



PROJECT MUSE®

Rape in the Courts of Gusiiland, Kenya, 1940s–1960s

Brett L. Shadle

African Studies Review, Volume 51, Number 2, September 2008, pp. 27-50 (Article)

Published by Cambridge University Press
DOI: 10.1353/arw.0.0063



➔ For additional information about this article

<http://muse.jhu.edu/journals/arw/summary/v051/51.2.shadle.html>

Copyright © African Studies Association 2008. Shadle, Brett L. "Rape in the Courts of Gusiiland, Kenya, 1940s–1960s," African Studies Review, Volume 51, Number 2, September 2008, pp. 27–50. <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8922603&fulltextType=RA&fileId=S0002020600002511>

Rape in the Courts of Gusiiland, Kenya, 1940s–1960s

Brett L. Shadle

Abstract: This article examines the history of rape prosecutions in the African courts of Gusiiland, Kenya, from the 1940s through the first years of independence. Drawing on transcripts from African courts, it demonstrates that Gusi court elders were quite sympathetic to women who lodged rape claims. Elders handed down stiff punishments to rapists, were willing to entertain a wide definition of “indecent assault,” and did not require the extensive evidence of rape so commonly demanded by judges in Western courts (and in British courts in Kenya). Perhaps most surprisingly, men who admitted to having had sex but claimed it had been consensual were forced to prove their claims. This article advances both the historical study of rape in Africa and suggests that we reassess—or at least reserve judgment—on the nature of sexual violence in the non-West.

Introduction

After much debate, in June 2006 the Kenya parliament approved the Sexual Offenses Bill, the first such overhaul of the law since 1930. The bill introduced into the penal code new crimes (such as gang rape) and minimum sentences for sex crimes. On the broadest level there was no vocal opposition, although a comment by one male MP (to the effect that Kenyan women always say “no” even when they mean “yes”) led to a walkout by female parliamentarians. Some early supporters of the bill argued that the final version had been too watered-down (the criminalization of female circumcision and of rape in marriage, for example, were dropped). Nonetheless, the bill’s sponsor, nominated MP Njoki Ndung’u, celebrated its passage as a major victory.

African Studies Review, Volume 51, Number 2 (September 2008), pp. 27–50

Brett Shadle is an assistant professor of history at Virginia Tech. His book, “*Girl Cases*”: *Marriage and Colonialism in Gusiiland, Kenya, 1890–1970*, was published by Heinemann in 2006. His articles on millennialism, customary law, and African courts have appeared in *Africa*, the *Journal of African History*, and the edited volume *Intermediaries, Interpreters, and Clerks* (University of Wisconsin Press, 2006).

With the passage of the bill, the problem of sexual violence entered center stage in Kenyan public discourse. Opinion coalesced around the conclusion that rape is in fact a serious and growing problem and has to be dealt with severely. Njoki Ndung'u herself was declared "Person of the Year" by the U.N. in Kenya. Issues such as child and wife abuse, and the treatment of victims by police and the courts, are now openly discussed. Police, medical personnel, and judicial officials are being trained in how to deal with cases of sexual violence. In contrast, only fifteen years before, the mass rape of seventy-one girls at St. Kizito Secondary School in Meru by their male classmates was dismissed by many as a case of "boys being boys" (Steeves 1997).

While the changes in attitudes and in law between the St. Kizito events and the passing of the Sexual Offences Act are striking, I argue that this does not necessarily signal the evolution of a "traditional" patriarchy into a more "modern" or liberal one. Using the example of the courts of Gusiland, I argue that the history of rape in Kenya is much more complex, and the trajectory much less clear, than might otherwise be apparent.¹ I demonstrate that from as early as the 1940s, and certainly from the 1950s through the 1960s, African courts and magistrates treated rape as a serious offense. Court elders, and later magistrates, punished rapists harshly, in absolute terms and relative to crimes such as elopement. The courts' conception of the crime was also strikingly "modern": elders and magistrates treated rape as an offense against a woman as opposed to one against her male guardian. Perhaps most fascinating are cases in which an accused man claimed to have had consensual sex with his accuser. Unlike their contemporaries in Western and in Kenya's British-run courts, Gusii elders did not expect a woman to prove that she had *not* consented to sex: instead, they demanded that the accused prove that she *had* consented. The record of these decisions complicates the notion of a progression away from a deeply rooted, deeply conservative patriarchal culture. In the absence of comprehensive historical studies of rape in Kenya (and indeed in most of Africa), this article suggests a different context in which to place contemporary debates surrounding sexual violence, and also offers another dimension to the historiography of gender and the law in colonial Africa.²

Historiography and the Historical Record

It could be said that the publication of Susan Brownmiller's 1975 *Against Our Will* opened the way for scholars to investigate the history of rape. (Ironically, Brownmiller essentialized the meaning of rape—as "a conscious process of intimidation by which *all* men keep *all* women in a state of fear" (15)—and thus rendered it ahistorical.) Scholars have since produced studies of rape in North America, Australia, Great Britain, and Europe (see, e.g., Bavin-Mizz 1995; Clark 1987; Dubinsky 1993), although historians of Africa have yet to contribute significantly to this literature. "Black perils"—

periodic waves of white paranoia over alleged increases in the rape of white women by African men—have attracted the attention of numerous scholars (Etherington 1988; Hansen 1989; Kennedy 1987; McCulloch 2000; Pape 1990; Van Onselen 1982; see also Scully 1995), but historians have remained curiously silent on the subject of intra-African rape, mentioning it at most only in passing. Even in historical monographs dealing specifically with African women (in which we might expect greater discussion of sexual violence), the topic is addressed only briefly (see Allman & Tashjian 2000:172; Sheldon 2002:54, 128, 198, 200–2). Kanogo (2005:55–62) relates some of the precolonial punishments for rape in Kenya, ideas of “curative rape,” as well as how the Supreme Court dealt with those few rape cases that came before it. Only Benson and Chadya (2005) have focused specifically on the subject with a review of issues surrounding rape cases in white magistrate courts in Bulawayo (Southern Rhodesia) in the 1940s and 1950s. Their sources, however—English-language transcripts from white-run courts—are not particularly revealing on the subject of African ideas about rape. A study of intra-African rape cases in African courts can thus provide a corrective to this lacuna in the historiography, and suggest methods for further studies.

This study can also, I hope, provide a needed historical context for contemporary debates over sexual violence in Africa. Sociological and legal studies of rape have proliferated; more research on sex crimes has been conducted recently in South Africa than anywhere else in the non-Western world (Jejeebhoy & Bott 2005:19). Increasingly active feminist communities in Africa, an apparent rise in the prevalence of rape (or of reporting about it), the connection between sexual violence and the spread of HIV/AIDS, and new attention to rape during wartime have drawn many more scholars and activists into analyses of the cultural and social conditions that lead to rape, the gender and legal norms that disadvantage women, and how policies can be altered to end gender violence and assist its victims (see, e.g., Nzomo 1994; Amnesty International 2002; Britton 2006; Coalition on Violence Against Women-Kenya 2002; FIDA Kenya 2006). Yet these activists and writers operate largely without benefit of a historical context. Are incidences of rape actually increasing? How did African communities in previous decades and centuries understand and deal with rape?

The received wisdom posits that precolonial and colonial African societies—all patriarchal—defined rape as an offense not against a woman, but against her male guardian. Thus when a man raped an unmarried girl, the victimized person was her father rather than the girl herself; the rapist of a married woman committed an offense against her husband. Early colonial officials in Gusiiland reported that a man who raped an unmarried woman would be required to compensate her father with a number of goats or cattle, although rape of a married woman might result in a physical confrontation between the families or clans involved.³ According to a colonial officer in Kenya writing in 1951, Kamba customary law made no distinc-

tion between rape and consensual but illicit sex with a married woman: “Whether the woman consents or whether she is compelled by force, the [compensation payable by the man is] the same” (Penwill 1986:75; see also Kanogo 2005:55). Regarding the Nandi, another colonial official noted in 1954 that whereas sex with an uninitiated girl carried no penalty, “irregular sexual relations... with an initiate or married woman... were regarded as a serious crime against the father or guardian or husband, as the case may be, though not against the woman” (Snell 1986:31). Among the Gikuyu, according to Robertson, rape and other assaults on women “were treated as property violations requiring compensation to the husband or father of the woman” (1997:33).

Such conclusions are not limited to Kenya. For example, in twentieth-century Asante, a woman’s engaging in sex outside of marriage was taken as an offense against her husband, whether she had consented to the sex or not (Allman 1996:32; Allman & Tashjian 2000:172). In Tswana areas, adultery, elopement, and rape were all considered infringements upon the rights of a woman’s male guardian (Schapera 1938:263). Bohannen writes that the Tiv of Nigeria “did not... distinguish between rape and seduction—both are called ‘spoiling women’” (1957:146). Similarly, Jeater argues that in early colonial Southern Rhodesia rape was construed as a contravention of social relations. “The African tradition was less concerned with the issue of consent,” she writes, “than with the offence to the lineage which unsanctioned sexual contact entailed” (1993:184). Epprecht concurs: “Lack of resistance or even active consent by the girl or woman did not in any way mitigate the rapist’s crime—which, after all, was not an offence against the individual female but against her family, especially her father” (2004:36). Rape might not even constitute much of a crime at all. One Chewa chief in early colonial Nyasaland stated that the rape of an unmarried woman was not treated harshly—the culprit might be fined as little as one fowl (Chanock 1985:197).

I suggest, however, that we should reconsider our understanding of how African societies handled rape. First, we now know that colonial-era compendiums of customary law often bore little resemblance to how African communities actually resolved disputes (Chanock 1985; Moore 1986). Second, in the literature we have rarely heard how *victims* of rape understood the crime. If senior men considered rape an offense against the lineage, does that preclude the possibility that the woman considered herself the offended party? Finally, we must ensure that until further research is carried out, we do not make unfounded assumptions about sexual crimes in Africa. Mohanty (1988:63) has argued that Western feminist studies of “a cross-culturally singular, monolithic notion of patriarchy or male dominance leads to the construction of a similarly reductive and homogeneous notion of... ‘third world difference’—that stable, ahistorical something that apparently oppresses most if not all the women in these countries” (see also Halliwell 2000; Ajayi-Soyinka 2005): hence the preconception that rape

not only exists throughout the third world (a point in fact challenged by Halliwell [2000] and Sanday [1981]), but also that the “third world difference” entails a sociolegal context exceptionally oppressive for rape victims. By presenting research on rape in a historically specific context this article attempts to act as a corrective to such thinking and to encourage a broader understanding of the subject.⁴

The History of Rape in Gusiiland

Of the few areas in Africa that have been subject to research on rape, Gusiiland has become one of the most infamous due to a 1959 *American Anthropologist* article by Robert LeVine. Based on the number of indecent assault cases filed in the African courts, LeVine made an “extremely conservative estimate” of 47.2 rapes per one hundred thousand Gusii per annum (compared to 13.85 per 100,000 in the urban U.S.). Further, LeVine argued that rape was more common among the Gusii than among neighboring Luo and Kipsigis. Gusii accounted for over half of the rape charges heard by the European magistrate (who had jurisdiction over cases from all three ethnic groups) despite accounting for only 36 percent of their combined population. All in all, LeVine concludes, “the contemporary rate of reported rape among the Gusii is extraordinarily high” (1959:966).

LeVine’s conclusions have been quoted extensively, perhaps most notably in Sanday’s (1981) cross-cultural study of rape. In an effort to disprove the thesis of rape as a universal aspect of human societies, Sanday drew on evidence from 156 “tribal societies” to create a model of “rape-prone” versus “rape-free” societies. Based on LeVine’s article, the Gusii became a prominent example of the former. Sanday’s study, in turn, has become a mainstay in the literature on rape.

While Gusiiland is obviously not “rape free,” neither is it clear that Gusii men have been more prone to commit rape than Luo, Kipsigis, or American men. LeVine’s conclusions need to be reconsidered on three grounds. First, the African court filings to which LeVine refers included cases of both rape and abduction. Although both crimes were filed as indecent assault, they were qualitatively different. Abduction was intended to force a marriage; abductors raped their victims in order to impregnate them and thus rape was only one part of the crime. Abducted women themselves understood their ordeal as an instance of forced marriage, with rape as one tactic employed toward that end. Levels of abduction rose during periods of crisis in Gusii marriage, such as in the 1890s and from the late 1930s through 1960s. In the latter period, abductions constituted perhaps half or more of all indecent assault cases filed in the courts. By the mid-1960s, less than a decade after LeVine conducted his research, the level of abduction in Gusiiland had dropped significantly (see Shadle 2006b:218–19). The inclusion of abduction cases, I argue, inflates the Gusii rape statistics and undermines their value in cross-cultural comparisons of rape.

Second, in comparing Gusii rates with those of Luo and Kipsigis, LeVine draws on a small number of cases (23) filed in the magistrate's court in 1955–56. Moreover, the administrative and hospital facilities necessary for filing a rape case before a magistrate were much more readily available in Gusiland than in Luo or Kipsigis areas. The higher number of Gusii cases might simply have been a reflection of Gusiland's geographical proximity to colonial infrastructure. Finally, we now know that in the case of the U.S. only a minority of rape victims have historically filed charges with the police. Thus the rate of rape in the 1950s urban U.S. was undoubtedly higher than contemporary statistics suggested. Consideration of all these factors makes it difficult to sustain the thesis of the Gusii as the stereotypical "rape prone" society. Again, this is not to say that Gusii culture does not contain a measure of contradiction and confusion over the nature of consent and violence in sexual matters, and in fact some practices appear to encourage sexual violence. The point is merely that, at the present state of research into rape cross-culturally, the Gusii should not be stigmatized as a "rape-prone" society.

The Legal Setting

My research draws on transcripts from African courts in Gusiland. Known locally as *ritongo*, these courts were established by the British in 1937, growing out of councils of elders first gazetted in colonial Kenya in 1913. While many Gusii continued to take minor disputes before the *abanyamaiga* (neighborhood elders) and *etureti* (semi-official dispute resolution bodies), the *ritongo* were flooded with thousands of cases each year until they were replaced by African magistrates in the mid-1960s. The state granted the courts authority to hear a wide variety of intra-African disputes, including those over land, bridewealth, divorce (except in Christian marriages), theft, minor assault, and "runaway" wives and daughters, as well as a select number of crimes under the Penal Code. In criminal cases, they could impose fines of up to 500 shillings and/or six months imprisonment (with or without hard labor) or detention. The *ritongo* were staffed by local men who were appointed by the British, only sometimes in consultation with Gusii. While the British always wished to include men known for their expertise in customary law, with each new appointment they sought out better-educated, literate, more "modern" men to fill the benches (see Shadle 2006a).

Ritongo first began to produce transcripts in the late 1930s, although few from these early years survive. Transcripts (ranging from one to four pages) were handwritten by a Gusii registrar or elder in Swahili (although the disputes were conducted in Ekegusii). They include the evidence of the disputants and witnesses, elders' occasional questions, a summary of evidence, the judgment, and the sentence. From Ritongo Gesima I recovered transcripts of 315 cases of "indecent assault" (of which at least 74 were rape, not abduction) and from Ritongo Kuja 154 cases (at least 35 of which were

rape). Unfortunately no records have survived from Ritongo Manga, the third court that served Gusiiland.⁵

In terms of legality, rape cases should not have been heard in African courts at all. In 1926, as the result of a “black peril,” the Kenya Legislative Council elevated rape to a capital crime (regardless of the race of the victim or offender). Until this decision was reversed in 1955, only the Supreme Court had jurisdiction over cases of rape. Even after 1955 rape and abduction both remained matters for white magistrates and judges only (Secs. 132 and 135 of the Penal Code). Nonetheless, administrators (who effectively controlled the workings of the African courts [see Shadle 2006c]) permitted all but the most serious sex crimes to be heard by Africans. This practice was due, first, to the common white assumption that Africans did not consider rape a serious crime. During the 1926 peril, Governor Grigg noted that the death penalty “could not of course be imposed for rape upon a native woman because native opinion does not regard that offence as a matter of much gravity.”⁶ Judges, too, downplayed the significance of rape among Africans. According to a statement made by the deputy public prosecutor in 1956, “Mr. Justice Connell’s suggestion is that in many cases of rape the offence is not a serious one, particularly African-African cases.”⁷ Indeed, one official argued that compared to Europeans, Africans “place different values on this particular offence and... in many cases it is regarded as little more than a breach of etiquette.”⁸

European officers also relegated intra-African rape cases to African courts in order to avoid the burden of investigating the crimes fully before committing the case to trial. Such an inquiry required a significant expenditure of time, and even then the evidence might not support a conviction. White courts commonly required strong physical evidence of rape, including a medical exam, yet few African women had easy access to a European doctor.

Administrative officials thus colluded among themselves to keep intra-African rape cases in African courts. The South Kavirondo district commissioner, for example, admitted that with his approval the tribunals often exceeded their authority and tried rape cases; until the state allowed tribunals jurisdiction over rape, he wrote, “there is no satisfactory solution which is legal”; in the meantime, administrators would follow the satisfactory but illegal path. Even colonial native court officers (NCOs) occasionally acknowledged to administrators that rape and abduction could not legally be heard by the tribunals, but that such cases were being tried all the time. Reviewing an elopement case in which the guilty man had been sentenced to peremptory imprisonment, one NCO wrote to the district commissioner that “only in the most exceptional cases where there is no consent on the part of the girl” should imprisonment be handed down—even though such an “elopement,” without the woman’s consent, was more properly an abduction, and therefore a crime technically outside of the tribunals’ jurisdiction altogether.⁹ Indeed, on at least one occasion the NCO tutored a dis-

strict commissioner on how properly to classify abductions, saying “I think it is desirable that the word *abduction* should not be used in Native Tribunal cases” and advising that they be filed instead as elopements. This was in fact procedure until 1949, when the Chief Justice agreed to grant tribunals jurisdiction over Sec. 137, Indecent Assault, under which abductions and all sexual crimes were henceforth filed.¹⁰

The Social Setting

Gusiland covers some 2200 well-watered and extremely fertile square kilometers of highlands in southwest Kenya, ranging from 1300 to 2100 meters above sea level. The ancestors of today’s Gusii settled the highlands in the first half of the nineteenth century. While it cannot be said that “the Gusii” constituted a self-conscious group before the colonial period (1907–63), they did share linguistic and cultural commonalities that distinguished them from their neighbors—Luo to the north and west, Maasai to the south, Kipsigis to the east (see Shadle 2000:37–39, 2006b:5–7). To this day Gusii peasants regularly produce surplus foodstuffs and also grow coffee (introduced in the 1930s), as well as tea and pyrethrum (introduced in the 1940s and 1950s). The Gusii also have one of the highest rates of population growth in the country. In the 1950s it was estimated that Gusiland housed some quarter million people; by 1999 there were 1.4 million (Government of Kenya 1999), and an estimated two million in 2006 (CIA Worldfact Book 2006).

From at least the late nineteenth century through the mid-twentieth, young people (both male and female) between the years of circumcision and marriage freely engaged in sex.¹¹ Iona Mayer (who, with her husband, Philip Mayer, conducted anthropological research in Gusiland from 1946 to 1949) found that premarital sex, far from being condemned, “showed that [the girl] was ‘normal’” (1973:129). Premarital sex was to an extent institutionalized in the practice of *ogochabera*, “taking by stealth.” In the seclusion period after girls’ initiation, young men would break into the homes in which the initiates and their older friends slept and attempt to have intercourse with them. In the anonymity of darkness incest taboos might even be broken without repercussion. In the 1940s elder men casually dismissed *ogochabera*, joking that the whole business was simply that of boys’ “opening the way for the cattle [i.e., bridewealth]” (P. Mayer 1953:31). Young people also carried on affairs “in the bush” or in a grandmother’s home (I. Mayer 1973:132). Some sexual encounters took place at the *egesirate*, or cattle villages, where young men watched their families’ cattle some distance from their homes. Girls might pay them visits, at least during the period just prior to an agemate’s marriage. Indeed, one colonial official reported that the *egesirate* “leads to the breaking of maidenheads at a very early age.”¹²

In fact, it appears that in the later 1800s and into the twentieth century, virginity was not expected of new brides (Levine & Campbell 1972:363–64).

Thus one official in 1920 noted that the Gusii “do not openly tolerate free sexual relations between unmarried persons... but on the other hand [they] do not seem to resent in any way the deflowering of a virgin relative.” “As a matter of fact,” he continued, “the young men and women all have illicit relations with each other, but by stealth.”¹³ The Mayers were told that lack of virginity at marriage was of no consequence, given that most girls engaged in intercourse during *ogochabera*.¹⁴ A virgin commanded no higher bride-wealth than did a non-virgin, or even a pregnant girl or unwed mother (P. Mayer 1950:12; I. Mayer 1973:31).¹⁵ The important point, insofar as fathers were concerned, was that they not be made aware of the sexual escapades of their children, and that girls not attempt to arrange marriages on their own. Sex before marriage was up to the girl; arranging marriage was up to her father.¹⁶

Yet even as cultural norms granted young women the right to freely engage in premarital sex, another discourse had it that women—or at least proper women—did not succumb easily to men’s sexual advances, and that some measure of coercion was an inevitable aspect of sex. During *ogochabera* girls were generally willing to have intercourse, but they put up a measure of resistance nonetheless. As P. Mayer reported, “It was expected that the girl will offer a certain amount of resistance, either genuine or feigned. Women informants when describing seclusion always say that ‘the girls dare not sleep all at once: one must stay awake to keep guard in case boys should come’” (1953:31). Yet women of the compound intervened only if a girl vociferously resisted and called for help, which apparently was uncommon.

Women were also expected to resist a husband’s sexual advances on their first night together. Men believed that a new bride would rely on various physical and mystical tools to discourage her husband, such as placing charcoal or a particular (phallic-shaped) pod in her mouth or bending her big toe. According to rumor, in 1957 one woman wove her pubic hair into an impenetrable barrier (R. LeVine & B. LeVine 1966:48). Young men told LeVine that husbands hoped to overcome such resistance, if necessary with the assistance of *agemates* who would hold down the reluctant bride. Grooms hoped to have intercourse at least six times during that first night, and they expected (or were expected by others) to cause the young woman physical pain in the process (R. LeVine & B. LeVine 1966:48–49). To what extent such aggression truly occurred or was just the boasting of youth is not clear; it does, however, suggest a level of confusion over the nature of consent in sex.¹⁷

Rape Accusations in the Ritongo

According to the transcripts, cases of indecent assault might be placed into one of four categories. First were assaults perpetrated against young, sometimes pre-pubescent, girls. In 1961 a young girl named Bwari, age thirteen, charged Anaya of raping her while she was on her way to visit her sister and then holding her captive for a full day. “I am a girl of 13 years,” she told the

elders of Ritongo Gesima, “I am not yet capable of sleeping with a man” (RG 347/61)¹⁸ In 1963 one eleven-year-old girl was stopped on the road as she was walking to the mill, threatened with murder, and assaulted (RG 529/63). The second category consisted of rapes of physically mature but unmarried females. In some cases the victim and her attacker(s) had been acquainted previously, while in other instances they seem to have been complete strangers. As in the cases involving younger girls, an attacker usually captured his victim along a path, took her to his or a friend’s home, and held her hostage for periods ranging from a night to several days: “I charge Mose,” one young woman testified in 1957, “because he pulled me, he even carried me off to his place, and I slept there four days, and he was raping me every one of those days. He pulled me the time I was going to harvest millet... I didn’t know the accused up to that point. I even yelled many times but no one heard” (RG 522/57).

The third class of rape cases included assaults committed against married women, often after she had been drinking and/or in the woman’s own house. “I accuse this man,” said one woman, “because around the date 4 February, 1958, he raped me at night the time I was drinking [millet] beer and I was drunk. And I woke up that night and I found that I was with the accused on my bed, and I found that he had already broken [into] my house and he was there with me, in my house. And at that very moment I screamed and people came and got him there” (RG 222/58). In the fourth category were abductions for the purpose of obtaining a wife. During the 1890s and again between the late 1930s and the mid-1960s, marriage became unattainable for many young men as bridewealth rose out of proportion to cattle (in the first period) or outstripped their ability to obtain cattle (in the mid-twentieth century). A desperate young man, impoverished and unable to persuade a woman to elope, would take her by force, secret her away, and attempt to impregnate her in order to coerce the woman and her father into agreeing to marriage (see Shadle 2006b).¹⁹

As the examples demonstrate, complainants appearing before the ritongo focused on the facts of the assaults. Many brought witnesses who had seen their capture or escape or could corroborate the complainant’s story based on hearsay. A few women displayed their ripped clothing in court. Given the lack of hospitals outside Kisii town, it is not surprising that very few brought examination reports from a doctor, although this omission might also have reflected the fact that sexual intercourse did not have to be proved in order for a man to be convicted of indecent assault.

In fact, Gusii elders accepted a broad definition of “indecent assault.” In one case from 1959, the elders at Ritongo Kuja convicted a man of indecent assault for having pulled a woman from the path with the intent (which was thwarted) of assaulting her (RK 822/59). Another woman in 1959 took a man to court with the accusation that he had ejaculated on her from behind when she was bending over at the market. The elders pronounced him “a person of very bad character” and convicted him of indecent assault

(RK 824/59).²⁰ In this case the ritongo elders may have been influenced by British practice, in which actions besides genital penetration could be defined as “indecent.”²¹ Yet in 1949 when British administrators informed Gusii elders of their new jurisdiction over indecent assault, they made no attempt to define the crime.²² Therefore, the broad understanding of what constituted indecent assault may well have been formed by Gusii elders and litigants alone.²³

Defenses against Rape Charges in the Ritongo

According to the evidence of the transcripts, very few men pleaded guilty to indecent assault. Those who did often offered no explanation; others claimed they had been drunk, or insisted that they simply did not know their motivation. One said he had acted “because of lust” (RK 254/63). In general, pleading guilty seems to have been an ineffective and even counterproductive legal strategy which inspired the elders to levy an unusually heavy sentence. Many defendants admitted to having had sex with their accusers, but denied using force: “I did not forcibly have sexual intercourse with . . . Moraa,” said one man. “In the evening in question I had met Moraa, talked with her in [her witness’s] house. She agreed to have sexual intercourse with [me] when I would be escorting her to her house. I admit I had sexual intercourse with her consent and I have been doing so since January 1965” (six months prior to the trial) (RG 436/65). A few men made compelling (and ultimately successful) arguments that their accuser had not tried to escape. In 1958 one man argued, for example, that he and his accuser had discussed marriage and that far from being abducted, she had willingly climbed onto his bicycle. Further, when stopped by her uncle in the road the woman had said “Don’t bother me, continue on your journey.” This case was dismissed by the elders with the judgment that “a girl who is carried off [*kufurutwa*] is not able to be placed on a bicycle” (RK 337/58). In another case a woman who could show no evidence of injuries, had not called for help, and had willingly boarded a lorry with the accused man was not a successful complainant (RG 225/59).

Other men who claimed to have engaged in consensual sex were simply liars. Those who, for example, had clearly pounced on an unsuspecting woman, used physical violence, produced knives, or threatened murder knew full well that their victims had succumbed only out of fear. In some instances it does appear that men may have confused, or perhaps consciously or unconsciously conflated, a woman’s real resistance to sex with what men expected of “proper” women. In one abduction case in 1946, the accused man told the court that his accuser had come to his home willingly, although his friend and co-defendant explained events somewhat differently: after having chatted with the woman on a previous day and then meeting again at the river, “we grabbed her and took her to another place to hide her. Of course, she tried to cry a little, because [that is] custom even if a

woman wishes, it's necessary that one try a little to cover her mouth" (RK 261/46). Most commonly, the cultural expectation of a feigned resistance to sex was not considered a reasonable explanation for a situation in which, for example, the man had used threats of strangulation to overcome such pretend resistance.

Judgments in Ritongo Rape Cases

Proving his innocence was not always easy for an accused rapist. The transcripts show that those who denied any contact with the accuser, and had no clear evidence brought against them, were acquitted. But cases in which the accused man admitted a sexual relationship but claimed that it had been a consensual encounter were adjudicated very differently. Interestingly, in white courts (in Kenya and in the West generally) the women plaintiffs in such cases were required to prove that consent had *not* been given, a difficult proposition, to be sure. Colonial Kenya's administrators, police, and judicial officials normally required physical evidence—injuries or torn clothing—that could demonstrate sustained resistance. In some assaults, even interracial ones involving girls as young as ten, white authorities spent considerable time exploring the possibility that the female had consented to sex, had later experienced regret and/or remorse over a sullied reputation, and then had filed a false rape charge (see Shadle 1999b).

In Gusiiland, by contrast, ritongo court elders generally required an accused man to provide a positive defense—to prove that the sexual encounter had been consensual—rather than requiring the woman to prove the negative. At least in regard to unmarried females, the notion of morning-after regrets or a false rape charge made no sense to them. Sex before marriage was not uncommon, and virginity at marriage was perhaps more the exception than the rule. The woman's sexual reputation was thus more or less irrelevant. Indeed, not a single transcript records any discussion of a woman's sexual past. The courts generally believed that if a woman testified that she had said no, odds were good that she had in fact said no. It was thus incumbent on the man to prove consent.

In one case in 1962, for example, a woman had been held by a man for nearly three weeks. The elders expressed some skepticism about her story. Why, they asked, had she remained there so long? She replied that she had been under constant guard with no chance to escape and that no one had answered her cries. This argument satisfied the court, which ruled that "she did not agree [to go] with John. If she agreed, she would not charge him afterwards" (RG 662/62). In another case in 1959, elders discounted evidence of a previous relationship between the man and her accuser:

Question to the accused [from the Court]: What do you have to demonstrate to the Court that the complainant came to your place of her own will?

Answer: I have a letter which she wrote about our discussions of marriage and which directed me to meet with her.

Question to the complainant: Who can prove that you were taken by force?

Answer: No one, no one was there.

[The elders turned again to the accused man:]

Question: Why did the complainant come to charge you if she was your friend and she wanted to marry you?

Answer: I think that her intentions were changed by her father when he beat her so much.

[The elders were unconvinced:]

Judgment: ... Although the complainant has no evidence, the accused himself has agreed he [went with] her and lived at his place and slept with her. So although the Court is uncertain if the complainant was taken by force or not, it has appeared that if she went on her own she would not come to charge the accused here in court. (RK 859/59)

Ritongo elders could also downplay medical evidence, in which white courts placed absolute faith. In one case in 1958 a woman's charge of rape was corroborated by only one of the two witnesses she called, and a letter from her doctor that was admitted into evidence stated that "she was not raped by the accused." Nonetheless, the judgment went against the accused: "In our view we the court see that the accused is guilty because ... he has no witness who is able to support him. ... We follow the words of Sigara[,] the witness of the complainant" (RG 394/58).

Punishments in Ritongo Courts

That ritongo elders took rape seriously is clear from the sentences they handed down. For example, they consistently fined rapists more heavily than they fined men guilty of elopement. Between 1955 and 1963 at least thirty men were found guilty of rape in Ritongo Gesima and Ritongo Kuja. Twenty men were fined, with fines averaging shs. 230 in Gesima and shs. 150 in Kuja. In contrast, fines in elopement cases during the same years averaged shs. 72 in Gesima and shs. 121 in Kuja.²⁴

LeVine (1959) argues that the level of fines in indecent assault cases was quite low, demonstrating the relatively slight significance Gusi placed

on such crimes. In fact, a fine of even shs. 100 could place an enormous burden on a man. The average income for a wage laborer at the Kericho tea estates (where most Gusii men sought work) was shs. 12 per month in 1944, although later in the 1950s wages in the range of shs. 35 were not unheard of (see Shadle 2006b:101,108). That is, a rapist convicted by Ritongo Gesima in the later 1950s would have had to produce cash equal to a full six months' wages. Few men would have had that type of cash on hand. Failure to pay a ritongo fine resulted in several months of confinement in a detention camp or in jail. In 1959, failure to pay a fine of shs. 200 resulted in four months of imprisonment; in default of paying a shs. 500 fine a man would serve six months.

Many men found themselves sent to jail straightaway. Indecent assault was the only crime in which ritongo had the authority to impose peremptory imprisonment, for up to six months. From 1955 to 1963, Kuja elders sentenced nine men to prison (and fined three of them as well), while Gesima elders imprisoned nineteen men (of whom four were also fined). The average sentence in both courts was five and a half months. Elders punished five men to the maximum penalty in their power, shs. 500 and six months in prison. It is likely that these men were unable to pay their fines, and thus spent an additional six months in prison.

It might still be argued that the punishments meted out were not equal to the crimes committed. Indeed, even heavier sentences for rapists are regularly condemned in Kenya today as being too lenient. Yet in the colonial context this was perhaps the best result that opponents of sexual assault could have hoped for. Ritongo elders did what they could, within the powers granted to them by the state. Had women sought heavier punishment for their attackers, their only option would have been to take their complaints to white officials, and convictions in white courts were harder to gain. Victims had to decide which was preferable: to have a good chance at a conviction with relatively low punishment, or a poor chance of conviction but with the possibility of a heavy sentence.

Rape Cases in Magistrates' Courts

Beginning in the mid-1960s ritongo were phased out, replaced by magistrates trained according to British legal traditions. Some had previously served in the ritongo as clerks. While the judiciary later posted magistrates without regard to their places of birth, at least until 1970 magistrates in Gusiiland were locals. Sixty-one rape cases from the years 1964 to 1970 (when the archival records cease) show that courts in early postcolonial Gusiiland decided rape cases in much the same way that their colonial-era predecessors had. In 1968, for example, three men pleaded guilty to indecent assault. Two claimed that they were "friends" of the victim, but they failed to convince the magistrate: "Naturally no woman complains if she is

a friend of a male” (RG 209/68).²⁵

The magistrates’ courts continued to hand down serious punishments to rapists. Fines now averaged shs. 247 at Kuja and shs. 287 at Gesima. Forty percent of convicted rapists were sent to prison (for an average of five months), and a third of these men were fined as well. The crown prosecutor in a 1968 case requested that the court show no leniency to a man convicted of attempted indecent assault “so women can go to their works with no fear of being indecently assaulted” (RK 664/68). Despite this being his first offense, the accused was imprisoned for three months. In another case in 1968, the district magistrate at Kuja sentenced three men convicted of gang rape to six months’ imprisonment and fines of shs. 500.²⁶

Moreover, the courts now had the authority to impose corporal punishment. Between 1964 and 1970 judgments from the magistrate’s court at Gesima led to penalties of six strokes of the cane for two men, eight strokes and fines of shs. 300 for three men, and three months of imprisonment, a fine of 50 shillings, and eight strokes of the cane for a man who had raped a ten-year-old girl.²⁷

Conclusion: Rape as an Offense against a Woman

Contrary to what previous historical accounts might lead us to expect, transcripts from the ritongo courts suggest that Gusii elders understood that women—not their menfolk—were the offended parties in rape and abduction cases. In the case of unmarried women, rape was considered a crime even though the woman alone was the victim. A father claimed no rights over his daughter’s sex life, and he thus had no rights that could have been breached. Of particular interest is the evidence that cases of elopement and abduction were treated differently. In both cases, one could argue, the offense of the accused was the violation of the father’s right to arrange his daughter’s future as he saw fit. Yet Gusii made clear distinctions between elopement and abduction. Elopement was a crime because one man had violated the rights of another man—a father’s right to make a marriage for his daughter and receive bridewealth in exchange. In abduction cases, however, the point in dispute was whether or not the *woman* had consented; this is what determined guilt or innocence. In these cases the wishes of both the woman and her father had been ignored, yet only the former were mentioned in court (see Shadle 2006b:169–70).

Although married women had much less control over their sex lives than single women had, they alone—and not their husbands—were understood as the offended party in rape cases. At marriage, women surrendered the right to engage in sexual intercourse with whomever they chose. An unfaithful wife courted *amasangia*, a dangerous mystical uncleanness which invited misfortune into the homestead. A long, difficult pregnancy also indicated infidelity (see Shadle 2006b:14). Given men’s full sexual rights over

their wives, one might expect rape trials to have been framed in terms of a rapist's having violated the rights of the victim's husband. This was not the case. For the woman, the accused, the witnesses, and the court what mattered was whether or not she had consented. Unless he could provide eye-witness testimony, a husband's testimony was of no interest to the ritongo.

Courts also thought it essential to determine if victims had the capacity to consent, which would have been irrelevant if the male guardian had been considered the offended party. A girl's age was one important factor; ritongo elders did not believe that females younger than a certain age or life-stage had the capacity to consent to sexual intercourse. According to P. Mayer, "it was always considered heinous (as it still is) for an uncircumcised girl to have sexual intercourse or to become pregnant" (P. Mayer 1953:26). That is, a girl's apparent willingness to engage in sex was immaterial; sex with an uncircumcised girl was beyond the pale. On occasion, elders made direct reference to the portion of the British colonial Penal Code that established an explicit age of consent: "It shall be no defence to a charge for an indecent assault on a girl under the age of sixteen years to prove that she consented to the act of indecency."²⁸ In one case in 1964 the court handed down a sentence of six months' imprisonment and ordered the accused to pay shs. 100 for the victim's torn dress, saying "The court takes this case as a serious case. The girl is under 16 years of age" (RK 766/64). In other cases the court's decision that a girl had been unable to consent was based less on chronological age (in fact, few people knew their actual date of birth) and more on a general judgment (perhaps based on whether or not a girl had been circumcised) that a girl was "not yet ready for marriage" (RG 347/61; RG 529/63).²⁹

It is to be hoped that this study of rape in Gusii courts is one step toward a larger investigation into the history of sexual crimes in colonial and post-colonial Kenya. As such, it perhaps poses as many questions as it answers. Did the 1940s, 1950s, and 1960s mark a new era or a continuation in older trends in thinking about rape? Since court records from earlier decades do not exist (and even records from the 1940s are sparse), it is hard to determine how councils of elders and ritongo adjudicated cases previously. Did Gusii women consciously abandon the precolonial practice of "shaming parties" (whereby groups of women raided the home of an accused rapist, seized some of his property, and publicly humiliated him in favor of the ritongo)?³⁰ Did the values that underlay "shaming parties"—that rape was a woman's concern—shape ritongo elders' thinking? What impact did Christianity have? While missionaries had made relatively few inroads into Gusiiland before independence, ritongo elders were more likely than other members of the community to have been exposed to the new religion. Did this shape their attitudes toward sex, sexuality, and rape?³¹ Were the Gusii courts unique in Kenya, or did African courts elsewhere in the colony (and in Africa) approach rape cases in similar ways? Unfortunately, it appears that most court records from other parts of Kenya have been destroyed, and

this is a question we may never be able to answer satisfactorily.³²

This article also speaks to recent work on gender in colonial Africa. The colonial era introduced new challenges as well as new opportunities for women. Some women took to the cities to exploit the economic opportunities provided by white and black urban communities (White 1990; Barnes 1999), although they could also be subject to the indignities of forced venereal disease examination (Jackson 2002). The advent of cash crops provided some women with new avenues for generating income, but it also heightened intrafamilial disputes over women's labor (Allman & Tashjian 2000; Kitching 1980). Colonial courts—white and black—altered the terrain of marital disputes, with mixed results for women (Allman & Tashjian 2000; Byfield 2001; Chanock 1985; Hawkins 2002; Roberts 2005).

My research reveals another aspect of this history. Although men controlled the dispensation of justice, women were able successfully to exploit male-dominated courts. Although in many realms—most clearly in the economic one—African men made inroads against the autonomy of women, antagonism did not determine all gendered interactions. Ritongo elders accepted that Gusi women could, and did, reject sexual advances, and that women, not men, suffered the most because of rape. If issues such as land ownership and labor management were hotly disputed, some gender norms remained uncontested. Areas of consensus could be found. The history of gender in colonial (and early postcolonial) Africa is more nuanced, and was perhaps less bitterly fought out, than we may have thought.

Acknowledgments

Portions and previous versions of this paper were presented at the Stanford conference titled “Colonialism, Law and Human Rights in Africa, 1999”; “Youth in Eastern Africa: Past and Present Perspectives,” a conference co-sponsored by the British Institute of East Africa and IFRA/French Institute for Research in Africa, Nyeri, Kenya, June 2006; African Studies Association annual conferences, November 2004 and November 2006; Santa Clara University, November 2006; and the Virginia Tech Africa Group, February 2007. My thanks to all those who commented on these earlier versions, as well as to the *ASR* reviewers.

References

- Ajayi-Soyinka, Omofolabo. 2005. “Transcending the Boundaries of Power and Imperialism: Writing Gender, Constructing Knowledge.” In *Female Circumcision and the Politics of Knowledge: African Women in Imperialist Discourses*, edited by Obioma Nnaemeka. Westport, Conn: Praeger.
- Allman, Jean. 1996. “Adultery and the State in Asante: Reflections on Gender, Class and Power from 1800–1950.” In *The Cloth of Many Colored Silks*, edited by John Hunwick and Nancy Lawler. Evanston, Ill.: Northwestern University Press.

- Allman, Jean, and Victoria Tashjian. 2000. *"I Will Not Eat Stone": A Woman's History of Colonial Asante*. Portsmouth, N.H.: Heinemann.
- Amnesty International. 2002. *Kenya: Rape—The Invisible Crime* (AFR 32/001/2002).
- Barnes, Teresa A. 1999. *"We Women Worked So Hard": Gender, Urbanization, and Social Reproduction in Colonial Harare, Zimbabwe, 1930–1956*. Portsmouth, N.H.: Heinemann.
- Bavin-Mizz, J. 1995. *Ravished: Sexual Violence in Victorian Australia*. Sydney: University of New South Wales Press.
- Benson, Koni, and Joyce M. Chadya. 2005. "Ukubhinya: Gender and Sexual Violence in Bulawayo, Colonial Zimbabwe, 1946–1956." *Journal of Southern African Studies* 31: 587–610.
- Bohannan, Paul. 1957. *Justice and Judgment among the Tiv*. London: Oxford University Press.
- Britton, H. 2006. "Organising against Gender Violence in South Africa." *Journal of Southern African Studies* 32: 145–63.
- Brownmiller, Susan. 1975. *Against Our Will: Men, Women and Rape*. New York: Fawcett Columbine.
- Burgess-Jackson, Keith, ed. 1999. *A Most Detestable Crime: New Philosophical Essays on Rape*. New York: Oxford University Press.
- Byfield, Judith. 2001. "Women, Marriage, Divorce and the Emerging Colonial State in Abeokuta (Nigeria) 1892–1904." In *"Wicked" Women and the Reconfiguration of Gender in Africa*, edited by Dorothy L. Hodgson and Sheryl A. McCurdy. Portsmouth, N.H.: Heinemann.
- Chanock, Martin. 1985. *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia*. Cambridge: Cambridge University Press.
- CIA World Factbook. 2006. www.cia.gov.
- Clark, Anna. 1987. *Women's Silence, Men's Violence: Sexual Assault in England, 1770–1845*. London: Pandora.
- Coalition on Violence Against Women Kenya. 2002. *In Pursuit of Justice: A Research Report on Service Providers' Response to Cases of Violence Against Women in Nairobi Province*. Nairobi: COVAW.
- Dubinsky, Karen. 1993. *Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880–1929*. Chicago: University of Chicago Press.
- Edegerton, Robert B., and Francis P. Conant. 1964. "Kilipat: The 'Shaming Party' among the Pokot of East Africa." *Southwest Journal of Anthropology* 20: 404–18.
- Epprecht, Marc. 2004. *Hungochani: The History of a Dissident Sexuality in Southern Africa*. Montreal: McGill-Queen's University Press.
- Etherington, Norman. 1988. "Natal's Black Rape Scare of the 1870s." *Journal of Southern African Studies* 15: 36–53.
- FIDA-Kenya. 2006. *Women's Rights: A Mirage or Reality?* 2006 Annual Report. Nairobi: Federation of Women Lawyers Kenya.
- Government of Kenya. 1999. Central Bureau of Statistics, Population and Housing Statistics. www.cbs.go.ke.
- Halliwell, Penny. 2000. "'It's Only a Penis': Rape, Feminism, and Difference." *Signs* 25: 789–816.
- Hansen, Karen Tranberg. 1989. *Distant Companions: Servants and Employers in Zambia, 1900–1985*. Ithaca, N.Y.: Cornell University Press.
- Hawkins, Sean. 2002. "'The Woman in Question': Marriage and Identity in the Colonial Courts of Northern Ghana, 1907–1954." In *Women in African Colonial*

- Histories*, edited by Jean Allman, Susan Geiger, and Nakanyike Musisi. Bloomington: Indiana University Press.
- Jackson, Lynette A. 2002. "When in the White Man's Town': Zimbabwean Women Remember *Chibewura*." In *Women in African Colonial Histories*, edited by Jean Allman, Susan Geiger, and Nakanyike Musisi. Bloomington: Indiana University Press.
- Jackson, Tudor. 1988. *The Law of Kenya*. 3rd edition. Nairobi: Kenya Literature Bureau.
- Jeater, Diana. 1993. *Marriage, Perversion and Power: The Construction of Moral Discourse in Southern Rhodesia, 1894–1930*. Oxford: Oxford University Press.
- Jejeebhoy, Shireen J., and Sarah Bott. 2005. "Non-consensual Sexual Experiences of Young People in Developing Countries: An Overview." In *Sex without Consent: Young People in Developing Countries*, edited by Shireen J. Jejeebhoy, Iqbal Shah, and Shyam Thapa. London: Zed.
- Kennedy, Dane. 1987. *Islands of White: Settler Society and Culture in Kenya and Southern Rhodesia, 1890–1939*. Durham, N.C.: Duke University Press.
- Ole Kipuri, Naomi N. 1989. *Maasai Women in Transition: Class and Gender in the Transformation of a Pastoral Society*. Ph.D. diss., Temple University.
- Kitching, Gavin. *Class and Economic Change in Kenya: The Making of an African Petite-Bourgeoisie*. New Haven: Yale University Press.
- LeVine, Robert A. 1959. "Gusii Sex Offenses: A Study in Social Control." *American Anthropologist* 61: 963–90.
- LeVine, Robert A., and Donald T. Campbell. 1972. *Gusii of Kenya*. New Haven, Conn.: Human Relations Area File.
- LeVine, Robert A., and Barbara B. LeVine. 1966. *Nyansongo: A Gusii Community*. New York: Wiley.
- LeVine, Sarah. 1980. "Crime or Affliction? Rape in an African Community." *Culture, Medicine and Psychiatry* 4: 151–65.
- Mayer, Iona. 1973. "The Gusii of Western Kenya." In *Cultural Source Materials for Population Planning in East Africa*. Volume 3: *Beliefs and Practices*, edited by A. Molnos. Nairobi: East African Publishing House.
- _____. 1975. "The Patriarchal Image: Routine Dissociation in Gusii Families." *African Studies* 34: 259–81.
- Mayer, Phillip. 1953. "Gusii Initiation Ceremonies." *Journal of the Royal Anthropological Institute* 83: 9–36.
- McCulloch, Jock. 2000. *Black Peril, White Virtue: Sexual Crime in Southern Rhodesia, 1902–1935*. Bloomington: Indiana University Press.
- Mohanty, Chandra. 1988. "Under Western Eyes: Feminist Scholarship and Colonial Discourses." *Feminist Review* 30: 61–88.
- Moore, Sally F. 1986. *Social Facts and Fabrications: 'Customary' Law on Kilimanjaro, 1880–1980*. Cambridge: Cambridge University Press.
- Ngwena, Charles. 2005. "Synchronizing Traditional Legal Responses to Non-consensual Sexual Experiences with Contemporary Human Rights Jurisprudence." In *Sex without Consent: Young People in Developing Countries*, edited by Shireen J. Jejeebhoy, Iqbal Shah, and Shyam Thapa. London: Zed.
- Njue, Carolyne, Ian Askew, and Jane Chege. 2005. "Non-consensual Sexual Experiences of Young People in Kenya: Boys as Perpetrators and Victims." In *Sex without Consent: Young People in Developing Countries*, edited by Shireen J. Jejeebhoy, Iqbal Shah, and Shyam Thapa. London: Zed.

- Nzomo, Maria. 1994. "The Status of Women's Human Rights in Kenya and Strategies to Overcome Inequalities." *Issue* 22: 17–20.
- Pape, John. 1990. "Black and White: The 'Perils of Sex' in Colonial Zimbabwe." *Journal of Southern African Studies* 16: 699–720.
- Penwill, D. J. 1986 (1951). *Kamba Customary Law: Notes Taken in the Machakos District of Kenya Colony*. Nairobi: Kenya Literature Bureau.
- Phillips, Arthur. 1944. *Report on Native Tribunals*. Nairobi: Colony and Protectorate of Kenya.
- Roberts, Richard. 2005. *Litigants and Households: African Disputes and Colonial Courts in the French Sudan, 1895–1912*. Portsmouth, N.H.: Heinemann.
- Robertson, Claire. 1997. *Trouble Showed the Way: Women, Men, and Trade in the Nairobi Area, 1890–1990*. Bloomington: Indiana University Press.
- Sanday, Peggy R. 1981. "The Sociocultural Context of Rape: A Cross-cultural Study." *Journal of Social Issues* 37: 5–27.
- Schapera, Isaac. 1938. *A Handbook of Tswana Law and Custom*. Oxford: Oxford University Press.
- Scully, Pamela. 1995. "Rape, Race, and Colonial Culture: The Sexual Politics of Identity in the Nineteenth-Century Cape Colony, South Africa." *American Historical Review* 100: 335–59.
- Shadle, Brett L. 1999a. "'Changing Traditions to Meet Current Altering Traditions': Customary Law, African Courts, and the Rejection of Codification in Kenya, 1930–60." *Journal of African History* 40: 411–31.
- _____. 1999b. "Rape and Justice in Kenya, c. 1940–1970." Paper presented at the Stanford Conference on Colonialism, Law and Human Rights in Africa, Stanford University.
- _____. 2000. "Girl Cases": *Runaway Wives, Eloped Daughters and Abducted Women in Gusiiland Kenya, c. 1900–c. 1965*. Ph.D. diss., Northwestern University.
- _____. 2003. "Bridewealth and Female Consent: Marriage Disputes in African Courts, Gusiiland, Kenya." *Journal of African History* 44: 241–62.
- _____. 2006a. "From 'Traditional' to 'Modern': African Court Elders in Nyanza Province, Kenya, c. 1930–1960." In *Intermediaries, Interpreters, and Clerks*, edited by Benjamin Lawrance, Emily Osborn, and Richard Roberts. Madison: University of Wisconsin Press.
- _____. 2006b. "Girl Cases": *Marriage and Colonialism in Gusiiland, Kenya, 1890–1970*. Portsmouth, N.H.: Heinemann.
- _____. 2006c. "Law and the Nature of Colonial Rule: The Struggle to Control African Courts in Kenya." Department of History Faculty Research Seminar, Virginia Tech.
- Sheldon, Kathleen E. 2002. *Pounders of Grain: A History of Women, Work, and Politics in Mozambique*. Portsmouth, N.H.: Heinemann.
- Snell, G. S. 1986 (1954). *Nandi Customary Law*. Nairobi: Kenya Literature Bureau.
- Steeves, H. Leslie. 1997. *Gender Violence and the Press: The St. Kizito Story*. Athens: Ohio University Press.
- Van Onselen, Charles. 1982. *Studies in the Social and Economic History of Witwatersrand, 1886–1914*. Volume 2. New York: Longman.
- White, Luise. 1990. *The Comforts of Home: Prostitution in Colonial Nairobi*. Chicago: University of Chicago Press.

Notes

1. This could be compared to Epprecht's (2004) work on "dissident sexuality" in southern Africa. In contradiction to the notion of a historical and cultural shift in Africa from a conservative, "traditional" view of sexuality toward a more open, "modern" one, Epprecht shows how a precolonial and colonial African culture of relative permissibility in terms of same-sex relationships has been countered and denounced by Robert Mugabe and other leaders in the region, due in part to the influence of European missionaries.
2. I deal only with the rape of women by men, since only such cases could be found in the court files. However, recent research has shown that men, particularly younger men, are also not uncommonly victims of sexual violence (Njue et al. 2005), and both the Kenya Sexual Offenses Act and South Africa's 2003 Criminal Law (Sexual Offences) Amendment Bill explicitly include assaults on males (for South Africa, see Ngwena 2005).
3. District Commissioner (DC) South Kavirondo to Acting (Ag.) Provincial Commissioner (PC) Nyanza, July 15, 1920, Kenya National Archive (KNA): KSI 3/2. Another officer reported that "A man who rapes an unmarried girl goes unpunished. Her father—as experience has shown—makes no ado and it seems to be generally doubted that the maid was loth" (W. M. Logan, "Customs of the Kisii," May 24, 1916, KNA: DC/KSI/3/2).
4. Another approach to uncovering African understandings of rape, but one outside the scope of this paper, is to inquire into "shaming parties." Discussing the precolonial period, Gusii elders in the 1950s explained that if a man was convicted of rape, presumably by a council of male elders, "women were ordered to go naked to his home, cursing him as they were going; and to destroy his hut and seize two goats from there. The goats were given to the husband of the rape[d] woman who slaughtered them to purify his wife. If the man offered a bull to the women, his hut was not raided and the bull was killed and eaten by the women" (Executive Committee, South Nyanza Law Panel, Kisii Section, 12 Oct., 1950, KNA: DP 18/13.) Whether women also raided the homes of men who raped unmarried girls is not clear. But this does suggest that, in at least some circumstances, the rape of a woman was treated as an offense against a woman, and she was to be defended by members of her own sex. I have, however, found no evidence of such a raid taking place in the colonial era, nor have I seen any other reference to it in the literature on Gusiiland, although there are examples of shaming parties from elsewhere in Kenya. See Ole Kipuri (1989:104), Snell (1986:32–33), Edgerton and Conant (1964). The extent of shaming parties, when and how they ceased to function, and what long-term influence on colonial courts they may have had will be fruitful avenues to pursue.
5. From Ritongo Gesima there were 61 cases that were clearly abduction, while for the remaining 180 cases there was not enough information for me to classify them as rape or abduction. The Ritongo Kuja files included 47 abductions and 72 which I could not easily classify. The files of Ritongo Gesima were, in 1997, held at the Magistrate's Court at Keroka, and the Ritongo Kuja files at the former district headquarters at Ogembo. My thanks to District Magistrate Kisii and Resident Magistrate Keroka for their assistance.

6. Telegram, Governor of Kenya to Secretary of State for the Colonies, June 5, 1926, National Archive (UK): CO 533/612.
7. Acting Deputy Public Prosecutor to Registrar, Supreme Court, March 2, 1956, KNA: Jud 4/114. Arthur Phillips, author of an exhaustive 1943 study of Kenya's African Courts, and later Judicial Advisor, believed that Supreme Court rulings in rape cases only spawned confusion among Africans. In African (men's?) eyes, he wrote, when the Supreme Court heard a rape case "the result is apt to be either an unjustified acquittal [because of the so-called technicalities respected in English courts] or an excessively heavy sentence" (Phillips 1944:266).
8. Provincial African Courts Officer Nyanza to African Courts Officer, Nov. 14, 1957, KNA: MAA 2/119. Some administrators, however, took issue with this view. See Ag. DC Kyambu to Ag. PC Central, Sep. 9, 1919, KNA: Jud 1/1104.
9. Native Courts Officer (NCO) to DC North Kavirondo, May 25, 1948, KNA: PC/NZA 3/15/76; DC South Kavirondo to NCO, June 8, 1949, KNA: MAA 10/43; NCO to DC South Kavirondo, May 4, 1949, KNA: MAA 10/43.
10. See Minutes of Meeting of DCs, Central Province, May 28–29, 1948, KNA: Adm 3/2/3; NCO to DC South Nyanza, July 1, 1949, KNA: MAA 10/43; NCO to Chief Native Commissioner, July 25, 1949, and correspondence between AG and CJ, Aug.–Sep. 1949, all in KNA Jud 1/978; Native Tribunal Circular (South Nyanza) 104/49, Dec. 7, 1949, KNA: MAA 6/9.
11. LeVine (1959) argues to the contrary: that youth had very few opportunities for sex, especially during the colonial period, and that it was this lack of sexual outlet that led young men to rape.
12. DC SK to Ag. PC Nyanza, July 15, 1920, KNA: DC/KSI/3/2.
13. Asst. DC Kisii, untitled document, c. 1909, KNA: 572.KEN.83-947, p. 387. As another put it bluntly, "Amongst [the Gusii] maidenheads are of no account." DC SK to Ag. PC Nyanza, July 15, 1920, KNA: DC/KSI/3/2.
14. Mayer Field Material 17: Marriage, Sex, Gender (in the possession of Iona Mayer, Oxford, used with her kind permission).
15. Asst. DC Kisii, Untitled document, c. 1909, KNA: 572.KEN.83-947, p. 387; G.A.S. Northcote, "History of the District," South Kavirondo District Quarterly Report, Dec 31, 1909; Questionnaire on marriage, 1930, KNA: PC/NZA 19/27; DC South Kavirondo to PC Nyanza, July 15, 1920, KNA: KSI 32. However, premarital pregnancy might somewhat negatively affect a girl's marriage chances. If her lover refused to marry her she might end up as the second wife of a wealthy man, pleased by this proof of her fertility, or married to another young man willing to ignore the parentage of what would now be considered his child.
16. Parents could never discuss or acknowledge the sex lives of their children—according to *nsoni* rules that regulated relations between genders and adjacent generations—although grandparents might advise their grandchildren in matters of the heart. On *nsoni*, see Shadle (2006a:16–17). LeVine (1959:981), however, argues that both parents would attempt to limit their daughters' escapades with young men, especially as the girls came close to marriageable age. This, however, would seem to have everything to do with preventing elopement. For parents to insinuate anything about a child's sex life would have been (and still is) inconceivable.
17. This does not lead one to conclude that Gusii men are more likely to rape than men elsewhere: lines between force and consent are in most places a matter of

debate. (Indeed, philosophers and legal scholars in the West struggle to define the nature of consent. See, for example, Burgess-Jackson 1999.) I wish only to point out here that *some* Gusii men, as some men in other times and places, assumed that a measure of force was permissible to induce women to engage in sexual intercourse.

18. In the text, cases will be referred to as RK for Ritongo Kuja and RG for Ritongo Gesima. The numbers refer to the case number and year. As of 1997, transcripts from Ritongo Kuja were located at the former district headquarters at Ogembo, and those from Ritongo Gesima at the Magistrate's Court, Keroka.
19. LeVine posits a slightly different typology of rape cases, based on "the conscious intent of the rapist" (1959:982). The first is "rape resulting from seduction," which he further breaks down into three varieties: a man confuses real resistance with the culturally expected token resistance; a woman falsely claims to have been raped after a consensual sexual encounter is discovered; a woman leads on a man, accepting gifts and flattery, but refuses sex until "he may rape her in desperation the next time they meet." The second category is "premeditated sexual assault," in which a man waylays a woman and rapes her, perhaps keeping her for several days. The third is abduction-cum-marriage.
20. The man in fact admitted his crime:

Court: Did you ejaculate? (*Je, ulimwaga maji yake ya uzazi?*)
Accused: Yes, my sperm came out because it's my custom that every time I bump up against women, anywhere, my sperm spills out.

A man accused of a similar offense in 1969 (RK 493/69) was also convicted.
21. In a decision in Great Britain in 1875, a judge explained that "if a young man kisses a young woman against her will and with feeling of carnal passion and with a view to gratifying his passion or to excite hers, that would be an indecent assault" (*R. v. Baker*, quoted in Jackson 1988:125).
22. Native Tribunal Circular (South Nyanza) 104/49, Dec. 7, 1949, KNA: MAA 6/9.
23. Indeed, African magistrates retained a broad definition of indecent assault, as the following transcript suggests.

Complainant: ... First, [accused 2] came in the house. He sat on our bed... He asked me, 'Are you a harlot?' ... He straight away came and pushed me from my chair and I fell on the table. I asked him, 'Have you come to fight me?' He started abusing me that I was stupid. He got hold of my neck and pushed me out of my house... Also by the time I was out he [accused 1] abused me in English 'that I was stupid.' (RG 61/68)

The accused men were convicted.
24. According to surviving court registers, at Ritongo Manga fines for indecent assault (including both rape and abduction) averaged shs. 179 in these years, while those for elopement averaged shs. 88.
25. The woman had also been forced to leave behind her six-month-old baby, not yet weaned, something the magistrate was certain no woman would do voluntarily.
26. District Magistrate (DM) Kuja 35/68. Given that all three claimed hardship it is unlikely that they paid their fines, and likely that they ended up serving an additional six months each.
27. DM Gesima 397/68; DM Gesima 209/68; DM Gesima 321/68. S. LeVine (1980) argues that in the 1970s Gusii treated rape more as an "affliction" than a crime,

at least in regard to serial rapists. The willingness of Gusii to bring rape cases to court, and the seriousness with which Gusii elders and magistrates treated these cases, would seem to contradict her conclusions.

28. Native Tribunal Circular (South Nyanza) 104/49, 7 Dec. 1949, KNA: MAA 6/9.
29. Raping a schoolgirl was also thought particularly serious, although it is not clear whether this was due to her age, her status, or to different cultural expectations of school-goers (RG 51/61). Elders in another case (RK 222/46) fined a rapist and his two accomplices, but noted that if the case had come before them in 1942, when the attack took place, the men would have faced lengthy jail time “for raping a child who is not yet ready for a man” (*kwa kuzini na mtoto asiyetosha mume*).
30. See note 4
31. Christianity emerged as a factor in only one case (RG 514/61), in which the victim explained that she had been dragged off (*kufurutwa*) while on her way to church; the elders scolded the accused that it was not good for schoolboys to drag off a Christian girl.
32. Kanogo (2005:57) writes that “The 1930s are particularly replete with court cases on rape charges.” It appears, however, that she refers to cases in Kenya’s Supreme Court and in the East African Court of Appeal.