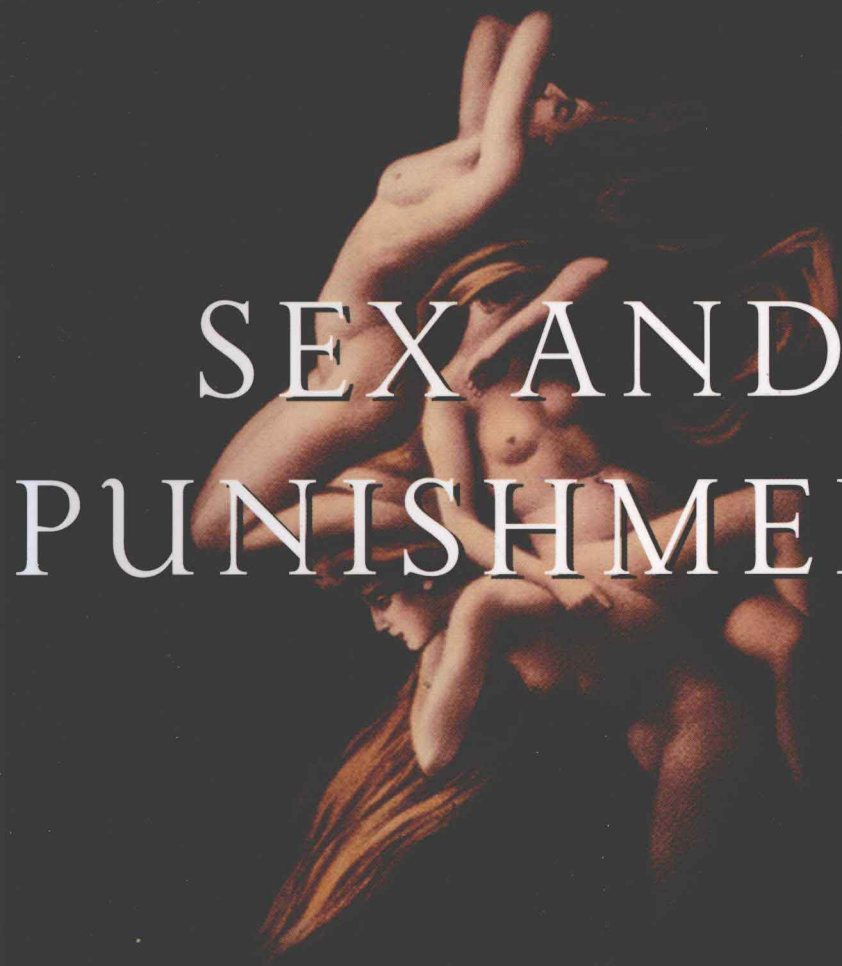
ERIC BERKOWITZ



SEX AND PUNISHMENT

FOUR THOUSAND YEARS OF JUDGING DESIRE

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INTRODUCTION

In 1956, in a village in Northern Rhodesia (now Zambia), a desperate woman sought help from a local tribunal made up of tribal elders in putting her marriage back on track. The relationship was in tatters. In recent months, both she and her husband had been diagnosed with a venereal disease. The husband insisted that it was she who had infected him, but she denied any infidelity and claimed he was at fault. He had threatened to stab her on one occasion and, worse, to use witchcraft against her. Yet none of that would have brought the couple to the tribunal had something more outrageous not happened, something so intolerable that the wife ran to court that very day: At dawn, she had awoken to find her husband with her breast in his mouth. She remembered his threat of witchcraft, and became terrified.

At the hearing, one of the elders demanded of the husband: "[W]hat were you thinking of when you were sucking your wife's breast? Are you a small child, like that one [pointing to a baby in the room]? . . . Why did you do it?"

The husband's reply only made his situation worse: "It was love," he said.

The elder was incredulous. "Love! You must be a strange person, practicing your love in that way while your wife was asleep." The elder and the husband went back and forth like this for a while, the husband protesting that he had merely been expressing tender affection for his wife while the elder became increasingly suspicious that the man was practicing sorcery. Finally, the elder said, "No, no . . . I am afraid that if you went with your

wife, you might try to kill her." The woman was placed in the protective custody of the police for the night, with more court proceedings to follow.

It was not the only time in mid-twentieth-century Northern Rhodesia that such disputes required court intervention. Another man had been accused of causing his wife to become infertile by sucking her breasts, and wives often ran to the courts to stop their husbands from performing cunnilingus on them or having intercourse with them while they slept. On other occasions, wives accused their husbands of stealing their menstrual cloths and using them as charms to bring success in gambling. The tribal judges took these accusations seriously. To them, taking a sleeping woman sexually was like making love to a corpse, while sucking a woman's breasts at any time of day blurred the roles of adult and child. Cloths soaked with a woman's menstrual blood were, in that society, not simple rags; they contained the awesome power of reproduction, which could be used for good or ill. To use such cloths for luck in gambling dens was to waste the procreative powers of the cosmos. In this context, the tribunal's decision to post a guard to keep a breast-sucking husband away from his wife was a sensible response to an explosive situation.

The British colonial officials who reviewed the tribal decisions, however, shared none of these beliefs. They usually threw such cases out, reasoning that marital sex was the concern only of the husband and wife, for which court intervention was inappropriate. A man who enjoyed his wife's body while she slept was simply taking the erotic pleasure that was his due, and unless he used violent force the law had no role to play. All that talk about power and witchcraft and luck was quaint, but irrelevant. Local courts in the territory complained that the Europeans should be taking these cases seriously, but their protests went unheeded.[1]

These incidents exist at the flashpoint between conflicting views on how the law should deal with sexual issues. To the inhabitants of Northern Rhodesia, it was not a question of prudishness, liberation, or even morality as such. Rather, sex was one of the underlying forces moving heaven and

earth. Improperly conducted sex summoned danger and caused everyone harm. By barring such sex, they were protecting the entire society from catastrophe.

Lest anyone snicker at the hapless couple, we should recognize that the differences between "modern" and "primitive" views on sex and law are not so clear—not clear enough, at any rate, to merit smugness. Sex and lawsuits have gone hand in hand everywhere, in every era, and few sexual transgressions have ever been too small to merit the meddling of one tribunal or another.

The wife in the Northern Rhodesia incident fell through a late-colonial justice gap. Her case did not fit the 1956 Western model of what a sex claim should look like. Yet had she and her husband lived in Europe a few centuries earlier, when courts regularly involved themselves in bedroom behavior, she would have found a more sympathetic hearing: European records are full of cases in which married couples were accused—and accused each other—of sexual sorcery. The judges who punished such transgressors often justified their decisions as necessary to save society from God's wrath. Indeed, dozens of sex acts in Renaissance Europe, both within and outside marriage, were believed to provoke divine vengeance. Sexual behavior was everyone's business because one person's sexual missteps, if bad enough, could cause war, famine, and hails of fire and brimstone.

Moreover, had the aforementioned African couple been students, married or not, at any number of present-day U.S. colleges, the wife's claim might well have been enthusiastically received. Many postsecondary institutions have adopted elaborate rules governing their students' sexual conduct, which they enforce with the zeal of the most devoted officers of the Inquisition. Gettysburg College's 2006 student handbook requires that all sex be "consensual," which it defines as "willingly and verbally agreeing (for example, by stating 'yes') to engage in specific sexual conduct." The handbook also prohibits the erotic touching of people's bodies while they slumber. Thus, a man wishing to "initiate sexual contact" with a sleeping

woman would need to wake her up, make sure her judgment is clear, and then ask (for example), "May I suck your breast now?" If he does not do so, he stands to be expelled from school and reported to the police.[2]

The Antioch College Sexual Offense Prevention Policy of 2006 follows a similar line, although it is more detailed. "Grinding on the dance floor is not consent for further sexual activity," warned the policy; neither are body movements or "non-verbal responses such as moans." Sex is forbidden with any person who is asleep, intoxicated, or suffers from "mental health conditions."[3]

American university sex codes have been ridiculed as overly prudish, and college disciplinary boards mocked as kangaroo courts, but they are not going away. In fact, they recently became more accommodating forums for sexual misbehavior claims. In 2011, the U.S. government informed publicly funded universities that accusers in sex cases must win if it can be shown by a "preponderance of the evidence"—that is, a mere 51 percent likelihood—that misconduct took place, despite the fact that the question of sexual wrongdoing often turns on the murky task of defining the power relationships between the people involved. (In U.S. criminal courts, the standard of proof is "beyond a reasonable doubt.") Duke University's rules add to the ambiguity by stating that sexual misconduct may exist where there are "real or perceived power differentials between individuals" that "may create an unintentional atmosphere of coercion." How anything resembling justice can be dispensed under these standards is difficult to imagine.

REGARDLESS OF THE setting, no one questions the law's primary role in resolving sexual conflicts. A person violating the shifting rules of sexual conduct in modern Western societies will not be accused of witchcraft, but that is often just a matter of terminology. Anyone, no matter how highly placed, who engages in sexual contact that is out of sync with prevailing attitudes risks being demonized and steamrolled in public by the

legal system. Consider the boorish men of influence who are caught taking what they see as the perquisites of their positions. The prominent French economist and politician Dominique Strauss-Kahn's allegedly violent sexual encounter with an African immigrant maid in a New York hotel suite quickly became an international incident in which the limits of class privilege were much discussed, especially in France. President Bill Clinton's dalliances with a White House intern, revealed in an unrelated sexual harassment case against him, resulted in his impeachment in 1998 by the U.S. House of Representatives (though he was acquitted by the Senate). Polish-French film director Roman Polanski, on the run since his well-publicized 1978 California conviction for having sex with a thirteen-year-old girl, again became a universal symbol of criminal sexual excess when he was arrested in 2009 by Swiss authorities at the request of U.S. authorities. (He was later released.) Even powerful corporations get tagged for inadvertent transgressions. The fleeting exposure of singer Janet Jackson's breast during the 2004 Super Bowl telecast resulted in more than $500,000 in government fines against the network that aired the game, CBS, and years of wrenching litigation over sexual "decency" on the American airwaves.

With sex law, context is everything and consistency should not be expected. Under slightly different circumstances, none of these events would have sparked a controversy. Many people still cannot accept that Strauss-Kahn was chased down and jailed for allegedly forcing sex on a maid; one of his defenders dismissed the entire affair as a mere *troussage de domestique* (roughly, "lifting a servant's skirt"), not worthy of too much attention. Taking the long view, this comment, while repulsive, has some logic. From the earliest times, female domestic servants have been viewed as snacks for the sexual appetites of their masters. Such women effectively had no rights to their bodies, much less to be taken seriously by police and the courts when they accused a powerful man of rape. Tellingly, the case against Strauss-Kahn was dropped after questions arose concerning his accuser's past history, but that did not resolve the question of whether

he sexually assaulted her as she described. If he did force himself on the woman, both this writer and, it is safe to assume, the readers of this book would consider him to be a monster. However, it is instructive to remember that this perspective is the historical exception.

The strobe-quick exposure of Jackson's breast would have incurred no penalty had it been aired only on cable television or in a theatrical film, instead of during a major television broadcast. Jackson's "wardrobe malfunction" also occurred while an ultra-conservative government was in power. (Shortly before the Super Bowl, the country's chief law enforcement officer, Attorney General John Ashcroft, ordered that drapes be placed to hide a bare-breasted aluminum statue called Spirit of Justice, which had been standing undisturbed in the Great Hall of the Justice Department for decades.[4]) Bill Clinton, meanwhile, was hardly the first president to commit adultery, but he was the only one to be sued for sexual harassment, and the only one to suffer a vote of impeachment for lying about his infidelity.

Polanski's legal timing was arguably the most unfortunate. When he had sex with the girl, statutory rape was a felony in California, and a serious one at that. Had he done the deed a century or so earlier, when California's age of consent for sexual activity was twelve, England's thirteen, and Delaware's seven, he would have had no legal trouble. Even after the age of consent was raised, judges rarely imposed jail time on convicted men and the girls were often branded more as temptresses than victims. (It is true, however, that Polanski was not only accused of statutory rape: The girl testified that the director had drugged and intimidated her [an allegation he denied], but it is the statutory rape charge that has dogged him these past three decades.)

The existence of differing cultural mores usually has no effect on one's risk of punishment for sex crimes. A California man recently received a 152-year prison sentence for having sex with two twelve-year-old boys. Would his legal defense have been strengthened had evidence been introduced that certain New Guinea tribes believe boys need homosexual

encounters in order to mature into manhood?[5] It is unlikely. In the stacks of court papers, legislation, and newspaper editorials on the subject of gay marriage, has anyone pointed to Sudanese Azande tribal traditions, which support the marriage of young boys to soldiers? Again, no. In the context of Western sex law, the customs of non-Judeo-Christian cultures are irrelevant. Far from appearing overly prudish, they appear to be not prudish enough. At the same time, Western observers express outrage whenever a Muslim wife faces being stoned to death for adultery, though the Old Testament itself (Deuteronomy 22:22) prescribes the death penalty for both adulterous women and their lovers. In early 2012, when this book went to press, gay marriage was allowed in eight American states and the District of Columbia, while the legality of mentioning homosexuality in Tennessee's public elementary and middle schools was being debated in that state's legislature.

SINCE THE EARLIEST periods of recorded history, lawmakers have tried to set boundaries on how people take their sexual pleasures, and they have doled out a range of controls and punishments to enforce them, from the slow impalement of unfaithful wives in Mesopotamia to the sterilization of masturbators in the United States. At any given point in time, some forms of sex and sexuality have been encouraged while others have been punished without mercy. Jump forward or backward a century or two, or cross a border, and the harmless fun of one society becomes the gravest crime of another. This book aims to tell that story.

I began my research on a much broader front, trying to trace the path of Western law generally by using colorful cases as examples. As I reviewed the first legal collections from the ancient Near East, I noticed that the earliest lawmakers were preoccupied with questions of sex. Everywhere I looked, there were specific rules on sexual relations with pigs and oxen, prostitutes, family members. Sex was evidently more micromanaged then than even now, with the surprising exception of same-sex relations—which

were ignored almost entirely by the law until the Hebrews labeled homosexuality a terrible crime on a par with murder. Additionally, sex was sometimes used as a punishment in itself, as when the wife of an Assyrian rapist was ordered to be raped in turn as punishment for her husband's crime, or when men who damaged Egyptian property markers were required to deliver their wives and children to the rough affections of donkeys.

It soon became clear that sex law was as passionate and mercurial as the sex drive itself, and could support a rather interesting book on its own. Extraordinary flesh-and-blood cases—much flesh, more blood—jumped out of the dustiest volumes, begging to be told. Building on the work of modern historians such as Eva Cantarella (*Bisexuality in the Ancient World*), Sarah B. Pomeroy (*Goddesses, Whores, Wives, and Slaves*), and James A. Brundage (*Law, Sex, and Christian Society in Medieval Europe*), as well as on translations of original sources, I have mapped out the story of Western civilization from the perspective of law and libido.

The chapters organized themselves organically, according to time period. The question was when to stop. As with any era of history, no ceremony declared the end of one epoch and the beginning of another. I decided, rather arbitrarily, to halt the inquiry in the last part of the nineteenth century, with the imprisonment of Oscar Wilde for "gross indecency" with one of his young lovers. If I traveled much further into the present, I feared, the noise of our most recent century would drown out the voices of our ancestors. Today's sex issues are touched on occasionally for perspective, but a detailed treatment of the roiling twentieth and twenty-first centuries will require another volume.

In any event, the experiences of the distant past cannot help but illuminate the issues of the present, especially where sex and law are concerned. For example, as the issue of gay marriage lurches through the courts and legislatures of the United States and elsewhere, with all participants in the debate claiming to have history on their side, it's helpful to know that loving and committed unions between men were sanctioned by Christian

and secular law alike many centuries ago, when no one recognized homosexuality as what Michel Foucault called a "hermaphroditism of the soul." Similarly, before we rush to impose fines on television networks for broadcasting "indecent" images to the masses, it is useful to understand how obscenity fell under government control in the first place. Sexually explicit materials were never regulated until they became available to mass audiences through the advent of printing. Those who wrote and enforced the law always had access to all the smut they could digest. Finally, as we throw the likes of Strauss-Kahn and Polanski atop the trash-heap of outdated boors, it helps to know how our legal and religious traditions made such sexual predators possible.

Of course, rape, adultery, incest, and all the other issues that unfold in the arena of sex law have been taking place since the beginning of human existence. All that changes are the methods people use to exercise control over one another's bodies, and the reasons they give for using them.

1

CHANNELING THE URGE: THE FIRST SEX LAWS

FOR A FOUR-THOUSAND-YEAR-OLD Mesopotamian homicide case, the record is impressively intact. Decades of archaeological excavations have yielded multiple copies describing the case in detail, spelled out on broken clay tablets embossed with cuneiform writing. The duplication makes sense, given that the victim was Lu-Inanna, a high priest of Enlil—one of this civilization's most important gods—and that the murder took place in Nippur, a holy city. By the time the trial came up, Nippur had been continuously inhabited for thousands of years.

The charge was murder, although sex was all over the case. The accused were two freedmen, a male slave, and Lu-Inanna's widow, Nin-Dada. Given the severity of the crime and the high status of the victim, the case was taken first to the king in nearby Isin. He took a good look, and then assigned it to the nine-member Assembly of Nippur.

By the time the case reached the assembly, no one doubted that Lu-Inanna had been killed by the three male suspects, nor was there any question that they had told Nin-Dada what they had done. The key remaining issue was why Nin-Dada had not immediately given up the killers to the authorities. Rather, the record says, she "opened not her mouth, covered it up." Had she participated in the murder? If so, her execution—most

likely by impalement—was a certainty. If she had not, then what crime had she committed by keeping her mouth shut?

First, a little law. It was forbidden in Mesopotamia not to report another person's misconduct, especially when sex was involved. (It was no different in nearby Assyria, where, for instance, prostitutes were not allowed to wear veils: If a man observed a prostitute wearing a veil and said nothing, he would be whipped, have a cord forcibly run through his ears like a horse's bridle, and then be led around town to be ridiculed.) Mesopotamian barmaids were required to eavesdrop on their criminal customers as they drank. If the barmaids heard something incriminating and failed to report it, they could be put to death. Adultery, at least when committed by women, was also punished harshly. A disloyal wife who had plotted against her husband was treated worst of all, by being stuck on a long pole and left to suffer a slow and very public death.

There was no proof that Nin-Dada had ever had sex with any of the killers, or that she had taken part in her husband's murder. Had she been well represented before the assembly, she might have squeaked through the trial with her life. Her supposed advocates could not have done a worse job, however. They presented a "weak female" defense, arguing that Nin-Dada was so helpless and easily intimidated that she had had no choice but to remain mute. As if that argument were not a sure enough loser, her defenders went even further, claiming that *even if* she had participated in the murder, she still would have been innocent because "as a woman . . . what could she do?"

Even after four millennia and translation from a long-dead language, the anger in the assembly's response rises from the tablets like heat:

> *A woman who values not her husband might know his enemy . . . He might kill her husband. He might then inform her that her husband has been killed. Is it she who [as good as] killed her*

husband. Her guilt exceeds even that of those who [actually] kill a man.

The Sumerian verb for "to know" meant the same as "to have sex," and Nin-Dada's silence after her husband's murder was enough for the assembly to conclude that she was hungry for such knowledge. Far from seeing her as a weakling, the assembly made clear that she should have braved any intimidation to see that the murder was avenged. Nin-Dada was sentenced to die.

So go the brief lives and unnatural deaths of a Mesopotamian husband and wife, he murdered for unknown reasons and she for disrespecting her husband's memory. They inhabited a world unknown to most of us, and barely understood by specialists at that.[1]

WITH THE CASE of Nin-Dada, this chapter's inquiry into ancient sex law begins at the time of the first known human writing. Although I shall touch on earlier periods, the absence of documentation makes the journey hazardous. In 1991, for example, hikers found a frozen five-thousand-year-old man in the Italian Alps. He had fifty-seven tattoos, still wore snowshoes, and carried a copper axe that appeared to have been of little use to him in his final moments. He was killed in some kind of violent confrontation. The corpse, now known as Ötzi the Iceman, also appeared at first not to have had a penis, which caused no end of questions (the penis was later found, looking much the worse for wear). Was he ritually mutilated, or castrated by a jealous husband? Or did his genitals, so cold and lifeless for several millennia, just shrivel away? Without additional information—that is, something we can read—it is impossible to tell whether he died at the hands of the law or whether sex had anything to do with his fate. While Ötzi is a relatively recent ancestor of ours, we do not know enough to arrive at any conclusions about the sexual mores according to which he and his tattoo-loving neighbors lived.

This chapter will draw on cases from as far west as Egypt, across Turkey and the Eurasian landmass, to what is now Iran. Its main focus will be Mesopotamia (modern Iraq), as well as the land that now comprises Israel and the Palestinian territories. This vast region has hosted urban civilizations as complex as those of Rome, Greece, and various caliphates down to the Ottoman Empire, and as elementary as tiny bands of nomadic hunters. Its peoples spoke a multitude of languages and dialects, most of them now lost. These Sumerians, Assyrians, Babylonians, Hittites, Hebrews, and Egyptians were slaves and freemen, priests and prisoners, whores and kings, gods and witches. They mixed, intermarried, and raped each other. Everyone had a role to play in their respective societies, and was subject to punishment for bad conduct—especially when it concerned sex. Sex for some was blessed, and for others, grounds for impalement.

All ancient civilizations were intent on controlling people's sex lives. The oldest extant written law, which hails from the early Sumerian kingdom of Ur-Nammu (circa 2100 BC), devoted quite a bit of attention to sexual matters. One of the earliest capital punishment laws on record anywhere concerned adultery. Ur-Nammu's Law No. 7 mandated that married women who seduced other men were to be killed; their lovers were to be let off scot-free. Death awaited virtually every other straying wife in the Near East, while the fates of their lovers were often left to the husbands to decide.

The first legal codes, such as that of Ur-Nammu, were founded on the customs of earlier precarious times. Even after small groups coalesced into identifiable societies, towns faced constant threat by bands of marauders looking to exploit any opportunity to invade and pillage. Adultery risked destabilizing the unity and bloodlines of a family, rendering an entire tribe or settlement that much more vulnerable. Ur-Nammu's death penalty for adulterous women was, in this light, no innovation; it was simply the first such punishment we know about that was written down.