



Sex and Punishment

For prosecutors as well as for priests, the ways we have sex have long been a subject of serious concern. So serious, in fact, that whenever community standards are breached, the response is often repression, if not severe punishment. Eric Berkowitz is an attorney in San Francisco who has studied this phenomenon. His new book is called *Sex and Punishment: Four Thousand Years of Judging Desire* (Counterpoint, 2012). In May, Berkowitz spoke with *California Lawyer* editor Martin Lasden.



Eric Berkowitz

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Q: After all the research you've done on the history of sex and punishment, you've concluded that there are no eternal sex laws; that what is perceived as virtuous in one culture can just as easily be perceived as sinful in another. Did that surprise you?

know, however, that under the Zoroastrian faith couples derived a sense of goodness from their incestuous relationships.

Compared to the surrounding pagans, were the ancient Jews so much more

position. The Jews very much believed that a woman had to be faithful, and that the man had to be faithful as well, but he was also allowed to keep several wives and produce more children, which was viewed as essential. It's a paradox.

"This whole notion of a woman having a right to be safe from the predation of the men around her is very, very new."

Yes it did. Take incest. Just the word is disturbing to us. And for both Jews and Christians it's viewed as a terrible crime. But among the ancient Egyptians, Persians, and Hawaiians, incest was condoned at almost all levels.

You say in your book that Persians actually required incest. So were they, as we might expect, confronted with an epidemic of birth defects?

We know that ancient Persia was an immense place with extreme cultural variations. I don't know and I don't think we can know whether children were produced through concubines, through second or third wives, or whether they were exclusive. We do

restrained in their sexual behavior?

Yes. Under Jewish law, sex is a blessed thing when it's engaged in solely to make more Jews. But when you veer off from the business of procreation, it becomes a sin. And that had huge consequences.

Of course, that didn't preclude polygamy. After all, the Bible tells us that King Solomon had 700 wives and 300 concubines. So help me out here: How can a society that would take the practice of polygamy that far maintain a view of itself as a restrained culture?

Solomon and the myth of him having hundreds of wives ... well, that's almost an indication of power and

Also, Jews held on to their slaves. And wherever there's slavery, there's bound to be sexual liberties taken, right?

Yes. Sexual submission is part of the job description of a slave.

Do you think it's almost like a law of physics that the more restrained and puritanical a society tries to be, the more hypocritical it becomes?

The more laws you enact, the more opportunity you create for lawbreaking, and we certainly see that when we get into the Christian and early modern era, when the amount of sexual restrictions multiplied many, many times. Now, we could talk about the two-faced aspect of this. For example, in the Middle Ages the [Catholic] Church went into the prostitution business, and the justifications for that are comical. But basically, the priests didn't like prostitution—except when they could make

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money from it.

So when the Protestants came along and started to draw attention to this gap between theory and practice, did the Catholics have to sell off their brothels?

Yes. The Catholic Church retreated to what's called the Council of Trent—which, over the course of almost 20 years, tried to deal with the challenges posed by the Reformation—and rather than admit, adjust, and loosen up, what they did was double down.

It seems to me that wrapped up in the history of sex and punishment is the history of how women's rights evolved. Here in California, for example, it wasn't until 1980 that it became legally possible for a man to be found guilty of raping his wife.

It's just astonishing. This whole notion of a woman having a right to be safe from the predation of the men around her—whether it be her husband, father, or brothers—is very, very new, and we have to realize that these rights are both hard won and easily lost.

We're now twelve years into the 21st century. We have a president who says same-sex couples should be allowed to get married, incest is taboo, sex with minors is arguably more taboo than ever, men can be found guilty of raping their wives, and pornography is more accessible than ever. So where is all this going? Are we perhaps more pagan-like than we were a century ago, with vestiges of Puritanism thrown in? Or is it more complicated than that?

I'm not sure if we're more pagan-like. But we are setting priorities in a different way. And when it comes to the future of sex law, one of the things that I think we really need to keep an eye on is the removal of sex, as we know it, from the reproductive process. The rights of people who were conceived through artificial insemination and surrogate motherhood, and our ability to change the reproductive process, is going to challenge the traditional rights of parents and children in ways that I can't imagine. 🌐