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Régis Schlagdenhauffen

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## ***Condemning obscenity in the name of public modesty (France, 1831-1981)***

Obscenity characterizes certain social behaviors openly hurting modesty (i.e. *pudeur* in French, *Scham* in German). Psychologists consider modesty as a human feeling that appears in infancy, around 5. They also observe that this feeling can disappear for elderly people. Anthropologists consider that modesty exists in all cultures, even if it does not always refer to the same parts of the body, social and sexual practices or topics of discussion. Historians have shown how modesty rules have evolved across time. Some sociologists, such as Norbert Elias, have analyzed the developments of modesty through the lens of the concept of civilization considered as a process.

Offenses to modesty might be prosecuted in France as in many countries through so called “obscenity laws”. They might condemn rape, sexual harassment, as other behaviors. One law specifically condemns ***offences to public modesty (OPM)***. This law was enforced between 1810 and 1994 and has been replaced by a new piece of legislation condemning “sexual exhibition”. Both laws have in common that they do not punish a forbidden physical contact – what might be called an assault (as in the case of a rape e.g.). Moreover, no human victim is necessary. In other words: offenders get prosecuted because she, he, they offended the society through his, her or their behavior.

Until today, there has been no empirical study permitting to know how many people have been convicted for breaking social modesty laws. We also do not know which specific behavior leads to a conviction in court. Even such a specific concept as exhibitionism, may indeed encompass many different crimes regarding this law.

My work attempts to answer these questions in order to better understand which specific behavior brought hundred-thousands of men and women onto court for having broken public modesty laws. My hypothesis is that social modesty rules vary through time and space, but also that the criminal justice is an interesting medium to understand how social control on immodesty has evolved in France.

This paper is a section (chapter) of my professorial (*Habilitation*) thesis project drawing on the moral limits of obscenity in France. It is based on an examination of the statistics relating to the offence of public indecency (OPM) as provided by the *General Accounts of the Administration of Criminal Justice in France* (= *Compte Général de la Justice* in French. Later: CGJ). With several hundred pages and summary tables, these accounts have been published each year since 1825 by the Minister of Justice. They report on *apparent crime* (the number of crimes and offences known to the courts), *legal crime* (the number of crimes and offences punished by the courts) and, more generally, the activity of the French criminal courts. The CGJ are a valuable source of information on the number of prosecutions, acquittals and convictions for OPM since 1825, in other words, on the evolution of the legal treatment of "public indecency".

In this paper, I will firstly present the source and outline the history of the CGJ from its genesis to the present day, the possibilities of use it offers as well as its limitations and biases (I).

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<sup>1</sup> I would like to thank Sébastien Le Pipeç for his remarks, comments and suggestions for improving this paper.

Secondly, after presenting the 1825 edition, I will proceed to a global examination of the data relating to convictions for OPM over 150 years, coupled with an analysis allowing to reveal temporalities in terms of repression of the offence (II). Then, I will conduct a thorough analysis of OPM conviction in terms of gender focusing on women (III). In conclusion, I will emphasize the achievements and limitations of my analysis.

### I - The *General Justice Account*, a remarkable but limited source

The *General Justice Account* (CGJ) has been a rich and valuable source for sociologists for long. Émile Durkheim used it when he published *Le Suicide* in 1897. The statistics on which he builds his argument derived from it and constitute one of the bases of his demonstration.

However, the CGJ is far from being a fixed and immutable object. Like all statistical document, it has experienced profound changes over time, as it has responded to the need to improve knowledge of the judicial system, the profiling of litigants, and the development of public statistics.

It was enriched with new categories with the aim of becoming more precise, improving criminal statistics and better appraising the "efficiency" of the French judicial system. From 1905 onwards, statistics were compiled from individual records. From 1952 onwards, when mechanographic statistics were introduced, the records were compiled from anonymous duplicates of criminal record forms, the processing of which was entrusted to INSEE. From then on, various innovations appeared in the CGJ, including the mention of the sex, age group and profession of convicted persons (at the cost of the disappearance of the number of cases and acquittals). From 1956 onwards, convictions were recorded by *département*. Then, from 1971 onwards, the "standard" tables were abandoned in favor of computerized and coded representations which made them difficult to read. In 1979, the title *General Justice Account* was abandoned. Since 1984, and following the computerization of the criminal record, the computerized repertoire of the investigation has been used to establish judicial statistics. Nowadays, these statistics are published on the website of the Ministry of Justice and digital copies are freely accessible.

As a source, the CGJ is both a mirror of the geopolitical evolution of France and of the moral social preoccupations at any given period. But various biases are to be tackled and constitute some of the limitations of this source.<sup>2</sup> They are mainly of two kinds. First, concerning the collection and restitution of data. Second, relating to the evolution of the nomenclature of offences. To this, one must add the biases related to the loss of data, as for example following the destruction of the "Palais de Justice" in Paris, caused by a fire in May 1871, thus during the Commune<sup>3</sup>. Another type of bias resides in the fact that the CGJ is based on a nomenclature of offences likely to be affected by legislative modifications (addition or removal of paragraphs to certain articles, of the amount of penalties incurred, reclassification of crimes as misdemeanors, etc.).

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<sup>2</sup> A certain number of them were listed by Bruno Aubusson de Cavarlay *et al.* in the presentation of the sources of the " Davido Database. General series: Aubusson de Cavarlay Bruno, Marie-Sylvie Huré, Marie-Lys Pottier, "Les statistiques criminelles de 1831 à 1981", *Déviance et contrôle social* (Cesdip), n°51, 1989. <https://criminocorpus.org/fr/outils/bases-de-donnees/davido/presentation#sources-de-la-base-davido> (05.05.2020)

<sup>3</sup> The fire at the Palais du Justice in Paris caused the loss of the penal statistics for the Seine *département* for the year 1870 and the first half of 1871.

*Box 1: Methodological aspects of data collection and analysis*

The CGJ published between 1825 and 1943 are more particularly kept at the BNF (with the exception of the years 1914 to 1918 which were not published). They can be freely downloaded in pdf format from Gallica<sup>4</sup> website. It is not the case for the files published between 1944 and 1978. I consulted them at the library of social sciences of the University Paris Descartes (rue des Saints Pères). The pages relating to convictions for OPM were photographed and printed. The years after 1978 and 2003 are kept in the archives of the Ministry of Justice (Paris). From 2004 onwards, the data are available online, in the "Publications" section<sup>5</sup> of the Ministry of Justice website. Finally, the "Davido, séries générales" database offers general data on the activity of correctional courts between 1831 and 1981. The OPMs are therefore not included. My analysis is therefore unpublished.

Concerning the choices made in terms of data collection: given that I wanted to be able to study the evolution of the OPM over the long term, I could either harvest all the years from 1825 or proceed by sampling. I chose the latter method for the period 1825-1939 and opted for a decennial sampling method. Since the years 1914 to 1918 are inexistent and a certain number of years are not available (at least on the BNF site), I was left with the choice between years ending in 1 or 9. I chose the years ending with 1, because they correspond to the beginning of a decade until 1981). But in order to avoid possible biases linked to the chosen periodicity as much as possible, I also collected the statistical data of the years ending with 6 (and when they were not available, those closest to those years<sup>6</sup>). Finally, from 1939 onwards, I collected data for every year. This choice is justified on two counts: first, to limit the biases associated with the Second World War, and second, because criminal statistics were gradually refined after the Liberation. New socio-demographic variables (age, occupation, number of children, marital status, etc.) were introduced, making it possible to carry out more in-depth analyses from this period onwards. Finally, all of the data collected was entered into a database (Excel): OPM FR.

In the following section, I will analyze the evolution of the repression of public immodesty as an offence over more than 150 years. It will allow us to see its progressive rise in importance from the second half of the 18th century, its golden age, and then its decline from the 1970s, prior to its abrogation in 1994. Since then, only the offence of sexual exhibition in public view has endured.

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<sup>4</sup> <https://gallica.bnf.fr/ark:/12148/cb412790415/date> (05.05.2020)

<sup>5</sup> <http://www.justice.gouv.fr/statistiques-10054/> (05.05.2020)

<sup>6</sup> As the year 1916 has not been recorded, I have examined the statistics for the year 1919, as well as for the year 1925 instead of 1926 (as it was not available). The five-year observations will be called up as soon as necessary in order to verify the non-existence of specific biases linked to the modalities of aggregation of the collected data.

Notes. Les délits qui précèdent l'astérisque sont prévus par le Code pénal; ils ont été classés dans l'ordre de ce Code. Ceux qui suivent l'astérisque sont punis par des lois spéciales.

Table with 10 columns: NATURE DES DÉLITS, NOMBRE des affaires, NOMBRE des condamnés, etc. Includes categories like Fausse monnaie, Faux, Fausse déclaration, etc.

Table with 10 columns: NATURE DES DÉLITS, NOMBRE des affaires, NOMBRE des condamnés, etc. Includes categories like Destruction de plans et croquis, Destruction d'ouvrages appartenant à autrui, etc.

Figure 1: Facsimile of the General Account of Justice (1825, p. 60), offences tried by the criminal courts

Table with 10 columns: COURS, DÉPARTEMENTS, NOMBRE DES DÉLITS, PEINES PRONONCÉES, etc. Lists departments like AGEN, AIX, AMIENS, ANJERS, BESANÇON, BORDEAUX, etc.

Figure 2: Facsimile of the General Account of Justice (1825, p. 86), Public Indecency

## II - Analysis of the evolution of the offence of OPM over time (1831-1981)

In this section, which is devoted to an overall scrutiny of the data on convictions for OPMs, I will analyze their evolution over time.

### Morphology of the OPM (evolution 1831-1981)

The data collected every ten years between 1831 and 1981 show that, on average, slightly more than 230,000 criminal convictions were pronounced by the criminal courts in France each year. Of course, both the volume of cases handled and the number of condemnations issued varied greatly over time (165,000 in 1841 versus 430,000 in 1981<sup>7</sup>). Similarly, on average, 2,745 convictions were delivered each year, i.e. about 1.2% of the volume of convictions in criminal cases. Of those prosecuted for an OPM, 9 % were acquitted,<sup>8</sup> 6 % were sentenced to more than one year's imprisonment, 80 % to less than one year's imprisonment and 14 % to a fine. Suspended sentences, made possible by the Act of 26 March 1891, amounted to an average of 33%. Finally, the proportion of women convicted amounted to 15 %<sup>9</sup> and the contribution of the Seine court jurisdiction represented 16 %.<sup>10</sup> However, these average figures conceal numerous variations and disparities, which prompts to conduct a descriptive and chronological analysis. By doing so, and by means of graphical representations, it will be possible to answer the following questions: How do sentences for OPMs evolve over time? How does the sentence ratio change? To what extent do they differ from the overall sentences in correctional cases?

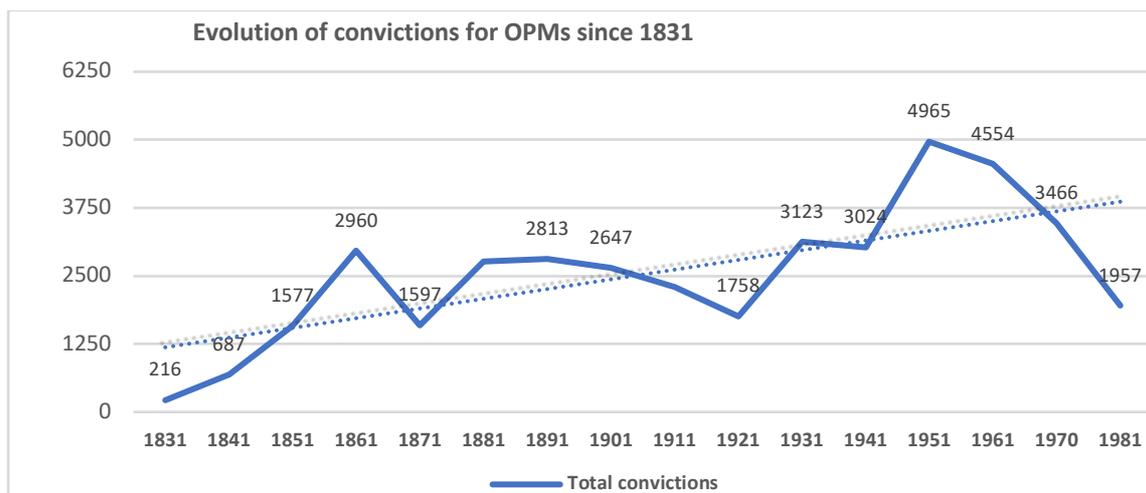


Figure 1: Number of convictions for OPMs since 1831

Between 1831 and 1981, the volume of convictions for OPMs evolved irregularly. The first period is marked with an exponential increase in convictions between 1831 and 1961. This was followed by a dip in 1871 (perhaps caused in part by the 1870 war, the Paris Commune and the burning of the Ile de la Cité court). In 1881, the cases reach that of 1861 (a little fewer than 3,000 convictions). A slow decline can then be observed until 1921. This was followed by a significant increase in the number of convictions, marked by a plateau until the Second World War. After the war, the number of convictions for OPMs increased again, drastically and rapidly, almost up to 5,000 convictions in 1961. Thereafter, a regular and marked decrease

<sup>7</sup> On the evolution of "crime" since 1825, see Nicolas Bourgoïn, *Les chiffres du crime. Statistiques criminelles et contrôle social (France, 1825-2006)*, Paris, L'Harmattan, 2008.

<sup>8</sup> Acknowledgement values are only available until 1951.

<sup>9</sup> Data on women are not specified in 1831, nor between 1936 and 1956.

<sup>10</sup> Data not available for 1941 and 1951.

began until the 1980s. These first rough indications, relating to the total number of offenders, can be refined initially by examining the sentences. This allows to conclude whether there is a consistency in punishing offences of OPM across time.

### The criminal sanction for OPM

A close examination of convictions for OPMs shows that the volume of convictions increased until the 1960s before starting to decline. The CGJ also provides information on the types of sentences handed down: prison, fine and the proportion of suspended prison sentences. In this sub-section, the quantum of the criminal sanction for OPMs will be examined from three angles: sentences of deprivation of liberty of more than one year, sentences of less than one year, and fines. Then, we will examine the proportion of suspended sentences. Finally, in an attempt to establish a first order of comparison, I shall examine whether the justice system is more lenient or more severe with regard to persons prosecuted for OPMs by comparing the quantum of sentences for OPMs with the 99% of other offences under the jurisdiction of the criminal justice system.

### *Quantum of criminal sanction for OPM (prison, fine)*

The total volume of convictions for OPMs is largely fed by sentences of six days to one year serving in prison. Regardless of the period, they constitute the bulk of the sentences handed down: on average 80%, with a notable decrease observed from 1961 onwards (69%), heralding the rise in judges' preference for fines or alternatives to imprisonment.

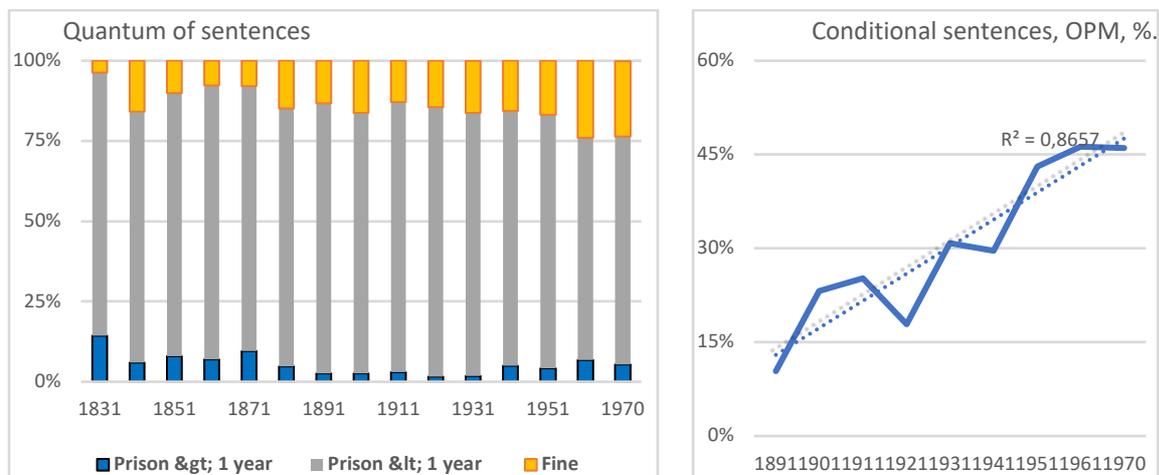


Figure 2: *Quantum of OPM Sentences by Length (<1 year ; > year) and Type / Figure 3: Conditional sentences*

Sentences of more than one year are generally rare in OPMs, averaging 6 % of sentences handed down. However, there are notable variations: exceptionally high in 1831 (14 %), they then remained at a level of between 6 and 10 % until 1871, before tumbling to 5 % until 1961 when they surged up to 7 %. This may be explained by the introduction in 1960 of a second paragraph in article 330 instituting "*an aggravated penalty for public indecency committed by homosexuals*" (the Countering Procuring Act of 25 November 1960<sup>11</sup>). Fines, which account for an average of 14% of the total, were rarely enforced in 1831 (4%), then remained at a level never exceeding 16% for several decades until 1941, before gradually arising as the favorite sentence, accounting for 25% of the total from the 1970s onwards. This evolution seems to testify to a movement in favor of alternatives to imprisonment that began in the 1970s. Such a

<sup>11</sup> [https://www.legifrance.gouv.fr/jo\\_pdf.do?id=JORFTEXT000000517663&pageCourante=10604](https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000000517663&pageCourante=10604) (05.05.2021)

movement is perceptible when the proportion of suspended sentences is scrutinized. They were made possible by the "Béranger Act" of March 26, 1891. The purpose of this dissuasive measure was to "prevent recidivism". The proportion of suspended sentences increases consistently: while it only concerned 10% of sentences handed down at the beginning, in 1891, it reached 46% in 1961. In this respect, the suspended sentence seems to have been more often favored for defendants prosecuted for OPMs, compared to the data available for all offences combined. A comparison with the average breakdown of convictions "all offences combined" will enable to identify whether the justice system was indeed more lenient towards defendants prosecuted for OPMs.

### *Less lenient criminal justice for those prosecuted for OPMs?*

*Table 1: Comparison of sentences for OPMs with all offences in 1891 and 1961 <sup>12</sup>*

	Prison > 1 year		Prison < 1 year		of which deferred		Fine	
	<i>OPM</i>	<i>Average</i>	<i>OPM</i>	<i>Average</i>	<i>OPM</i>	<i>Average</i>	<i>OPM</i>	<i>Average</i>
<b>1891</b>	3 %	3 %	84 %	58 %	10 %	6 %	13 %	40 %
<b>1961</b>	7 %	4 %	69 %	41 %	46 %	25 %	24 %	55 %

If a proper comparison is difficult at this stage, let us note that in 1891, persons prosecuted for a OPM were just as often sentenced to a prison term of more than one year as those prosecuted for any offence. On the other hand, they are more often sentenced to prison terms of less than one year than the average for all offences combined (+26 %) and consequently receive few fines (-27 % compared to the average). On the other hand, in 1891, they were slightly more likely to have their sentences suspended. Seventy years later, the trend observed is *approximately* similar, even though persons prosecuted for OPM tend to be sentenced more heavily than the average (+ 3 %). The same is true for fines, since even though persons convicted of a OPM seem to benefit more from this sentence, the difference in increase is of merely 2 % compared to that for all sentences combined.

We can therefore affirm that the justice system appears to be less lenient toward persons prosecuted for OPMs than toward those apprehended as a whole. Only the suspension of the sentence, an actual sword of Damocles, seems to benefit persons prosecuted for OPMs (+21 %). In conclusion, we cannot state at this stage that justice is less lenient toward persons prosecuted for OPMs than the findings made on the average results of prosecutions, since they benefit more from the suspended sentence.

### **The OPM in the economy of the correctional system**

In this section, I will expand on the comparative analysis by comparing OPM preventions and convictions to the overall correctional data provided by the CGJ. We will see that the OPM follows a very distinct pattern that is slightly more telling around the perception of public decency at the criminal justice level. The analysis will first focus on per capita conviction rates and then on an index study.

<sup>12</sup> For a volume of 219,112 sentences pronounced in 1891 and 222,593 in 1961. Source: Davido database - Table 4.3 "Activity of the correctional courts (from 1831 to 1981). Result of prosecutions". <https://criminocorpus.org/fr/outils/bases-de-donnees/davido/tableaux/13> (05.02.2021)

### *Per capita conviction rate for OPMs*

The demographic evolution of France has been slow and steady since 1831. While there were 33 million inhabitants in 1831, the figure rose to 39 in 1881, 40 in 1901, 42 in 1951, 50 in 1971, almost 60 in 2001 and 67 in 2020. This, related to the number of criminal convictions pronounced each year over the period studied, allows us to know the average number of convictions for OPMs (per 100,000 inhabitants), and to establish an index of convictions per inhabitant.<sup>13</sup> Thanks to this index, it is possible to know whether the OPM is punished as other offences.

Over the period 1831-1981, we can estimate the average rate of repression at 0.006%, or 6.1 per 100,000. Logically, this rate is much lower than that of all convictions handed down by the criminal justice system (whatever the type of offence) over the same period. It amounts to 0.566 %, or 5,666 per 100,000. However, it varies from one decade to the next.

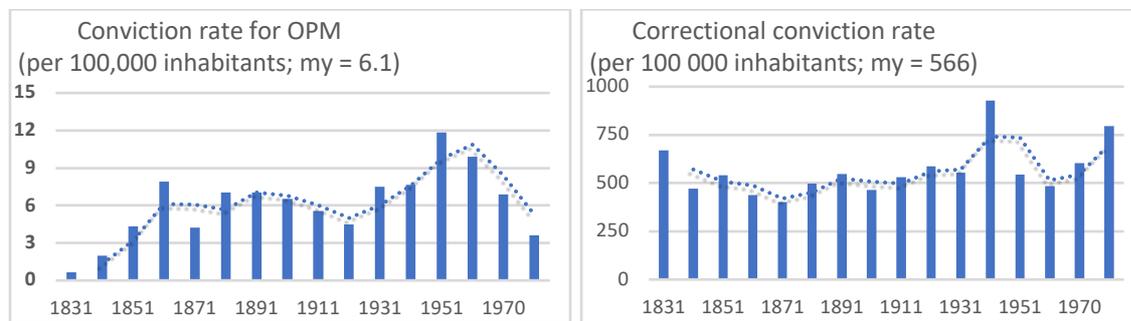


Figure 4: Conviction rate for OPMs (per 100,000) / Figure 5: Correctional conviction rate (per 100,000)

Between 1831 and 1981 the conviction rate for OPMs per 100,000 inhabitants does not vary in the same way as the conviction rate for "all types of offences." For example, there was a peak in 1951 for OPMs (12 convictions per 100,000), whereas the only peak observed in the "all crimes" category was in 1941. Moreover, convictions for OPMs per capita for France as a whole seem to vary much more widely than those for correctional offences as a whole.

<sup>13</sup> Index base 100 in 1881: French population (source Insee): 39,239,000; sentences handed down by the correctional courts (source Davido): 195,648; sentences for OPM (source CGJ): 2,768 (i.e. 1.4% of all sentences handed down by the correctional courts in 1881)

## Comparative Analysis of the Evolution of the OPM Rate Compared to Correctional Offences

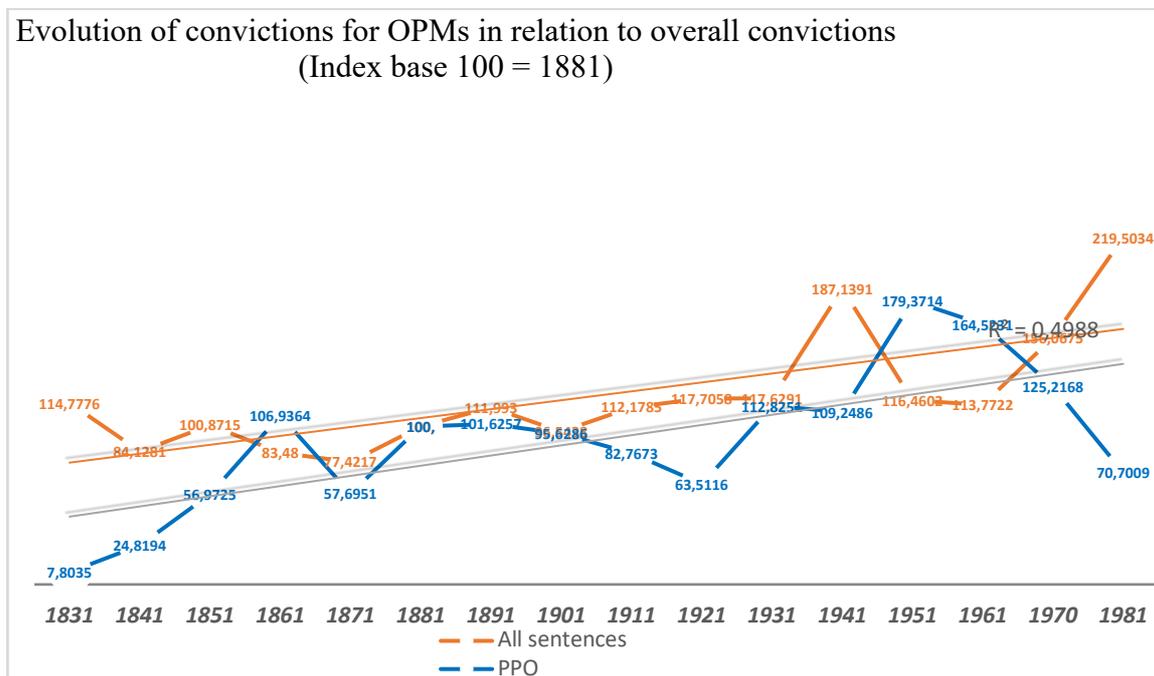


Figure 7: Changes in the OPM Conviction Index compared to the Correctional Sentence Index

The graph above shows that the curve for convictions for OPMs and for "all crimes" intersect in certain years and therefore do not follow a parallel trend. The nodes we observe indicate moments of under- or over-repression of the OPM.

After a phase in which the OPM gained in importance (1831-61), a *first turning point* can be observed around 1856. While the criminal justice system was more lenient in general, it was more severe with regard to people convicted of OPMs (in fact, until 1951, the proportion of OPM convictions did not exceed 1% of overall convictions, and reached almost 2% in 1861). Thus, in 1861, there were more than twice as many accused persons for OPMs as in 1851, and twice as many convicted persons as in 1851, even though there were 20% more convicted persons in 1861 than in 1851. In 1861, and for the first time, the OPM was therefore more severely punished.

One can then observe a *second node* around 1866. In 1871, the OPM was proportionally less repressed than all other offences. Afterwards, we observe that between 1881 and 1901, the intensity of the repression of the OPM remains more or less stable in relation to the overall volume of convictions handed down, which are prosecuted quite more intensively.

In 1901, a *third node* is visible that heralds the beginning of a new era. Between 1901 and 1931, the repression of the OPM abates in intensity to the point of disappearing almost in relation to all other crimes after the First World War (with a rate 36% lower than in 1881. A phenomenon that we observed previously). Then, in 1931 we observe a *fourth node*. While the OPM temporarily plateaus, the other offences judged by the correctional courts surge and reach a peak in 1941 (index: 187). It is likely that this peak during the Second World War is due to the fact that the courts were trying cases of smuggling, black market, theft and other activities prosecuted relentlessly in times of war and shortage. After the war, things once more upturned, apparently in the wake of the Liberation. While convictions for all offences combined fell sharply, those for OPM increased exponentially and reached an unprecedented intensity.

Finally, after having reached a virtual plateau during the 1960s and 1970s, there was a decline in the repression of the OPM, which materialized in a *fifth node*. From then on, the repression of the OPM continuously decreased while that of other offences soared.

By stretching the line somehow, and at the end of the analysis of this graph, we could say, at least from 1900 onward, that the OPM's increases or decreases mirror that of the 99% of other offences judged by the correctional courts. Such a reading could be summarized as follows:

- During the Belle Epoque, between the wars and after May 1968, the OPM was less punished than other offences.
- Conversely, after the 1870 war, the First World War and the Second World War, the OPM was repressed more than other offences (that is, many situations marked by anomy, to use a concept dear to Émile Durkheim).

At the end of these observations, the analysis will be conducted further by first examining the share taken by the OPM in the activity of the criminal courts.

### *Share of the OPM in the activity of the criminal courts*

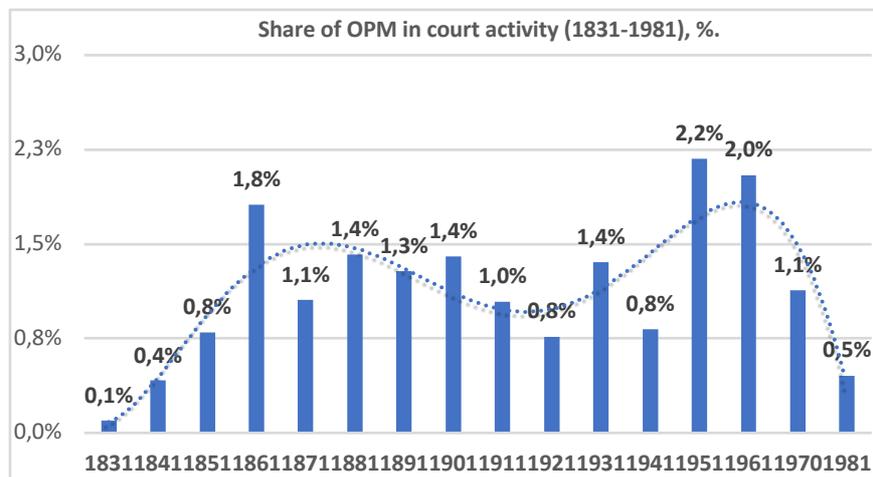


Figure 8: Share of OPM in the activity of the correctional courts (10-year review)

The study of the moving average of observations made every 10 years allows to confirm our previous conclusions: a steady rise of the OPM from 1831 onwards, a plateau at the end of the 19th century followed by a slight decline until after the First World War (despite a dip during the 1920s). Following the Liberation, the OPM grew exponentially until the 1960s and 1970s before the OPM set out to plummet until it was repealed.

### *Summary*

At the end of this analysis, we can therefore conclude that OPM cases occupy the courts proportionally less in three periods that have in common to be times of war. These are:

- the year 1871 (Franco-Prussian war),
- 1919 and 1921, immediately following the First World War (which killed 1.4 million people out of a population of 41 million, 3.5 million wounded, 600,000 disabled and 300,000 maimed),
- of the period covering the Second World War and the Liberation.

We therefore observe that in times of war or turbulence, the OPM is prosecuted less, because it is either considered to be an unimportant offence, or an offence that is more difficult to prove

than in times of peace, or an offence that is correlated with the gender of its perpetrator. This last hypothesis can be partially tested by taking into account the number of women prosecuted.

### III – Women breaking social modesty laws

"The police is tough on women and especially on young girls, who are considered totally out of place in the urban night life. At this level of arrests, the sexual dissymmetry is reversed to the detriment of women. However, as a police target, women are less likely to be brought to court. They are more likely to be kept in the paddy wagon or in the holding cell than sent to prison. (Michelle Perrot)<sup>14</sup>

At the end of the 19th Century, Camille Granier, using figures provided by the *General Account of Justice*, noted that women, convicted by a correctional court or by a criminal court, barely exceeded 12% of the total.<sup>15</sup> One hundred years later, France-Line Mary, author of a masterful study on the penal control of women, noted that "in our country and in recent times, women constituted only 14% of the persons implicated by the police and the gendarmerie in 1993, 13% of those charged in a case whose investigation ended in 1992, 11% of those convicted in the same year, 5% of those imprisoned in 1994, and 4% of the prison population.<sup>16</sup> In other words, over a hundred years, the rate of convicted women seems to have remained stable.

Apart from criminal anthropology that emerged at the end of the 19th century, judicial statistics have shown little interest in female delinquency and crime. Sociologists and criminologists were equally uninterested until the 1970s, that is, until the development of a feminist current in criminology.<sup>17</sup> Little recognized until the 2000s - because they highlighted the permanence of male norms and values in criminal matters - feminist studies on deviant women have now gained legitimacy and are giving rise to a growing body of research.<sup>18</sup> It allows to better understand the role played by penal institutions in labeling deviant women, the way they are treated by the justice system, and some of the specificities of what some people call female criminality.

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<sup>14</sup> « La police est sévère pour les femmes et surtout pour les jeunes filles, considérées comme totalement illégitimes dans l'espace nocturne urbain. À ce niveau des arrestations, la dissymétrie sexuelle se renverse au détriment des femmes. Mais, gibier de police, les femmes parviennent moins souvent au tribunal. Elles relèvent du panier à salade et du dépôt plus que de la prison. » Michelle Perrot, "Ouverture", in Christine Bard, Frédéric Chauvaud, Michelle Perrot, *et al*, *Femmes et justice pénale (XIXe-XXe siècles)*, Rennes, PUR, 2002.

<sup>15</sup> Camille Granier, *La Femme criminelle*, Paris, O. Doin, 1906, 468 p.

<sup>16</sup> France-Line Mary, "Femmes, délinquances et contrôle pénal, analyse sociodémographique des statistiques administratives françaises", *Études et données pénales*, n° 75, 1996, 281 p. [http://www.cesdip.fr/wp-content/uploads/EDP\\_75.pdf](http://www.cesdip.fr/wp-content/uploads/EDP_75.pdf)

<sup>17</sup> Colette Parent, « Au-delà du silence : les productions féministes sur la « criminalité » et la criminalisation des femmes », *Déviance et société*, vol. 16, n°3, 1992, pp. 297-328. [www.persee.fr/doc/ds\\_0378-7931\\_1992\\_num\\_16\\_3\\_1817](http://www.persee.fr/doc/ds_0378-7931_1992_num_16_3_1817)

<sup>18</sup> For a recent overview, see Gwenola Ricordeau, *Pour elles toutes. Femmes contre la prison*, Montreal, Lux, 2019; Arthur Vuattoux, *Genre et rapports de pouvoir dans l'institution judiciaire : Enquête sur le traitement institutionnel des déviances adolescentes par la justice pénale et civile dans la France contemporaine*, PhD thesis in sociology (dir. Bertrand Pulman), Université Sorbonne Paris Cité, 2016. <https://tel.archives-ouvertes.fr/tel-01397402v2/document>

In this section, I will attempt to better comprehend the women prosecuted for OPMs. First, we will outline the perspectives developed by sociology and criminal anthropology from the end of the 19th century on women offenders. Then, we shall look at the attitude of the justice system towards women on the stand. We will first note that justice, both criminal and correctional, is generally more lenient toward women, notably because of a tendency to reify female nature viewed as more fragile than that of men. We will then see that this apparent leniency is not expressed in all areas, because when women are accused of having trespassed the limits of sexual morality, which is necessarily bourgeois and masculine, they are severely punished. This observation will lead to show that the invention of the offence of public indecency in 1791, the forerunner of public indecency, was the preferred tool for repressing women who deviated from their expected role as good mothers or wives and who, in many cases, were forced to prostitute themselves in order to meet their basic needs. At the end of this overview, we will be able to interpret the statistics on women prosecuted for OPMs from the YGC. This section shall conclude that female delinquency, which is usually considered unsubstantial and numerically insignificant, is perceived as dangerous when it offends sexual morality.

### ***Deviant, delinquent and criminal women***

It is at the end of the 19th century that criminal anthropologists, advocating a naturalistic and positivist vision, began to take a specific interest in deviant women. Cesare Lombroso, known as one of the founders of criminal anthropology,<sup>19</sup> was among the first, along with Pauline Tarnowski,<sup>20</sup> to uphold the idea of a specifically female crime in *La Donna delinquente, la prostituta e la donna normale*.<sup>21</sup> According to him, since women are "naturally and organically monogamous and frigid,"<sup>22</sup> it is possible to identify criminal women by their excessive sexuality. He therefore contrasts the "madonna" with the "prostitute"<sup>23</sup> who, like all other delinquent and criminal women, is vicious and perverted upon birth as well as being sinful.

"For a woman offender, the sin is twofold: not only has she broken the laws of society, but she has stepped out of her traditional role as a passive woman, wife and mother."<sup>24</sup>

Such a point of view is also perceptible in the *Archives de l'anthropologie criminelle*, a French journal initiated by Alexandre Lacassagne, which differs from the positive theories of the Italian school because it emphasizes the influence of the social environment rather than genetics.<sup>25</sup> A reference journal on the subject, it was studied from a gender perspective by Martine Kaluszynski. She argues that, from the 1900s onward, three types of specifically female crimes

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<sup>19</sup> Cesare Lombroso, *L'homme criminel*, Paris, Alcan, 1887. <https://gallica.bnf.fr/ark:/12148/bpt6k9688138r>

<sup>20</sup> Pauline Tarnowski, *Étude anthropométrique sur les prostituées et les voleuses*, Paris, Lecrosnier et Babé, 1889. <https://gallica.bnf.fr/ark:/12148/bpt6k5788932f>

<sup>21</sup> Cesare Lombroso, *La Femme criminelle et la Prostituée*, Paris, Alcan, 1896. <https://gallica.bnf.fr/ark:/12148/bpt6k83334g>

<sup>22</sup> Hilde Olrik, "Le sang impur. Notes sur le concept de prostituée-née chez Lombroso", *Romantisme*, n°31, 1981, p. 167-178. <https://doi.org/10.3406/roman.1981.4479>

<sup>23</sup> Renée Collette-Carrière, Louise Langelier-Biron, "Du côté des filles et des femmes, leur délinquance, leur criminalité," *Criminologie*, vol. 16, no. 2, 1983, p. 27 45. <https://doi.org/10.7202/017179ar>

<sup>24</sup> Dvora Groman, Claude Faugeron, "La criminalité féminine libérée: de quoi?", *Déviance et société*, vol. 3, no. 4, 1979, pp. 363-376, p. 364. [https://www.persee.fr/doc/ds\\_0378-7931\\_1979\\_num\\_3\\_4\\_1754](https://www.persee.fr/doc/ds_0378-7931_1979_num_3_4_1754)

<sup>25</sup> France-Line Mary, "Femmes, délinquances et contrôle pénal, analyse sociodémographique des statistiques administratives françaises", *Études et données pénales*, n° 75, 1996, p. 22. [http://www.cesdip.fr/wp-content/uploads/EDP\\_75.pdf](http://www.cesdip.fr/wp-content/uploads/EDP_75.pdf)

emerge from the general discourse on crime.<sup>26</sup> First, among crimes against persons, blood crimes were less numerous than those perpetrated by men. However, even if women are less likely to be murderers, their ways are more devious: they prefer to resort to poisoning or vitriol. In The sulphuric acid thrown in the face of their spouse or lover blinds them, clogs their nostrils, welds their eyelids and marks their face with irreparable scars.<sup>27</sup> The "poisoners", very often deceived or abused, are above all considered in the eyes of public opinion and the justice system as hysterical who must be sectioned.<sup>28</sup> As far as crimes against property are concerned, women in the sources distinguish themselves for their strong inclination to steal (even if, as in all matters, they commit proportionally fewer crimes than men). Criminal anthropologists identify two types of theft associated with women: those committed in the private sphere, mainly by maids and servants, and those committed in the public sphere, especially in department stores. Two portraits of female thieves emerge: on the one hand, the "criminal servant,"<sup>29</sup> who was pervert, irrational, sterile in invention, promiscuous and vulgar; and on the other, the "department store thief", whose profile is difficult to define because they often belonged to the wealthy classes.<sup>30</sup> Finally, concerning crimes "against nature," criminologists are primarily interested in infanticide mothers guilty of "involuntary manslaughter of a newborn child by its mother." Alexandre Lacaze, author of a 1911 *study on women's crime in France*, considered them to be suffering from "a distortion of maternal feeling,"<sup>31</sup> because they wanted to jettison a burden or were driven by the desire to pursue an adventurous and free life. Then come the "abortionists", "adulteresses" and "prostitutes." For Alexandre Lacaze, the latter two types are to be understood together insofar as, in both cases, he considers them a form of moral suicide. However, in his eyes, the danger is not at the same level: the prostitute constitutes a social danger and a permanent source of crime, whereas the adulterous woman (who would be a kind of prostitute of the upper classes of society) is mainly a concern in that she harms the honor of the family. The fact remains that "the adulterous woman is much more often a homicide than the woman who remains faithful to her husband."<sup>32</sup> This typology thus confirms to the criminal anthropologists of the time that women's criminality is intrinsically linked to the nature of their sex.

The views of 19<sup>th</sup> century criminalists were challenged by feminist criminology from the late 1960s onward, which showed that the standards established to measure women's (and girls') criminality are biased and that their criminality is sexualized as if "*law enforcement officials have a special mission toward the female sex: to reproduce the norms and values of the dominant group, in this case men*".<sup>33</sup> Now that we know more about the profiles of women

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<sup>26</sup> Martine Kaluszynski, "La femme (criminelle) sous le regard du savant au XIXe siècle," in Coline Cardi and Geneviève Pruvost, *Penser la violence des Femmes*, Paris, La Découverte, 2012, pp. 286-299. <https://hal.archives-ouvertes.fr/hal-00733894>

<sup>27</sup> Karine Salomé Ceyzérieu, *Vitriol. Les agressions à l'acide du XIXe siècle à nos jours*, Paris, Champ Vallon, 2020, 288 p.

<sup>28</sup> Yannick Ripa, *La Ronde des folles. Femmes, folie et enfermement au XIXe siècle*, Paris, Aubier, 1986.

<sup>29</sup> Raymond de Ryckère, *La servante criminelle: étude de criminologie professionnelle*, Paris, Maloine, 1897. <https://gallica.bnf.fr/ark:/12148/bpt6k5821936h>

<sup>30</sup> Martine Kaluszynski, "La femme (criminelle) sous le regard du savant au XIXe siècle," in Coline Cardi and Geneviève Pruvost, *Penser la violence des Femmes*, Paris, La Découverte, 2012, pp. 286-299. <https://hal.archives-ouvertes.fr/hal-00733894>

<sup>31</sup> Alexandre Lacaze, "De la criminalité féminine en France (Etude statistique et médico-légale)," *Archives d'Anthropologie criminelle*, vol. 26, 1911, p. 451. <https://criminocorpus.org/fr/bibliotheque/page/20142/#page>

<sup>32</sup> Alexandre Lacaze, *op. cit.*, p. 453. <https://criminocorpus.org/fr/bibliotheque/page/20144/#page>

<sup>33</sup> Renée Collette-Carrière, Louise Langelier-Biron, "Du côté des filles et des femmes, leur délinquance, leur criminalité," *Criminologie*, vol. 16, no. 2, 1983, pp. 27-45, p. 28. <https://doi.org/10.7202/017179ar>

offenders and criminals as captured by criminal anthropology, let us turn our attention to how justice as an institution deals with them.

### ***Deviant women in the clutches of the justice system***

Until the aftermath of the Second World War, justice remained primarily a male institution. As Michelle Perrot reminds us, one should bear in mind these features<sup>34</sup>: for a long time, women's legal individuality was undermined; they remained deprived of the capacity to go to court, were legally incapacitated in civil matters as soon as they were married and were prohibited from practicing as magistrates until 1946. Lastly, the rules of family enclosure limited women's ability to file complaints, either for themselves or for their children. For,

"the husband-father, delegate of the State in the private sphere, is the regulator of the family order, accountable for the honor of the family and judge of the conduct of his wife and children, especially his daughters."<sup>35</sup>

In this context, women's voices - like those of children - were discredited because they undermine family secrecy and the prestige of men. As victims, they were neither believed nor listened to. Their voice was only heard when they are prosecuted. They were therefore considered criminally responsible - and fully capable of assuming responsibility for their criminal acts - whether in criminal or police matters.<sup>36</sup>

On the stand, women face judges who entertain a paternalistic vision. They seemed all the more shocked when the docile and submissive image they had of "the woman" was shattered in the courtroom. In the nineteenth century and for a good part of the twentieth, everything was done by the socialization authorities to ensure that women did not break the law: girls were piously educated in the knowledge of how to run a household in view of their eventual marriage; they passed from the guardianship of their father to that of their husband. Knowing this, it is the honor of men that is at stake when a woman deviates from the expectations of her gender.

Yet women are generally punished less severely than men. Perhaps this is because jurors (mostly middle-class) and judges share a similar view of women as fragile<sup>37</sup> beings? Perhaps also because they are attentive to their family responsibilities. Would condemning a mother not mean endangering her children? However, justice knows how to make exceptions to what seems to be a rule: "severity is required for those who deviate from fundamental duties."<sup>38</sup> "Bad mothers" and other "women leading a bad life" and all those who do not respect the assigned roles constitute the majority of those brought to justice. But of what material facts are they accused?

Unfortunately, to my knowledge, no large-scale, long-term study exists. Only the results of research carried out in archives allow us to partly tackle this question. Because they were less often prosecuted and convicted, one might assume that it would be easier to trace them. However, this is not the case, and what could be an advantage in terms of analysis, turns out to

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<sup>34</sup> Michelle Perrot, "Ouverture", in Christine Bard, Frédéric Chauvaud, Michelle Perrot, *et al*, *Femmes et justice pénale (XIXe-XXe siècles)*, Rennes, PUR, 2002.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Robert Allen, "La justice pénale et les femmes, 1792 - 1811," *Annales historiques de la Révolution française*, no. 350, pp. 87-107, 2007. <http://journals.openedition.org/ahrf/11256>

<sup>38</sup> Michelle Perrot, *op. cit.*, p. 19.

be an endurance test that requires patience for anyone trying to find judgments concerning women among the unheard of quantity of those kept in departmental archives. Only a few specific studies, corresponding to the years 1791 to 1914, then to the 1990s and finally to the 2010s, can contribute to enlighten us.

A study conducted by Sandrine Pons on the profile of people convicted between 1811 and 1914 in the département of Haute Garonne (by Toulouse) shows that the rate of female convictions remained stable as it did in nationally (about 16% of those convicted between 1811 and 1914).<sup>39</sup> But contrary to the notion criminologists have striven to build, thefts from department stores and poisonings remain rare. The majority of the thefts prosecuted were in the domestic sphere and were mainly committed by domestic servants. They account for 32% and their profile is clearly different from that of the men tried for the same reason, 45% of whom are craftsmen or shopkeepers. In fact, women are mainly prosecuted for homicide, abortion and other crimes (including castration). With regards to homicides perpetrated by women, the majority were infanticides (63% between 1811 and 1849 and 81% between 1850 and 1914) committed by women from the working classes. The same is true of abortions, even though midwives (26%) are distinguished from housewives (24%). Finally, poisoning, although presented by the tabloids as the "female crime" par excellence, was most often perpetrated by men.<sup>40</sup>

Looking at a more recent period, studies confirm the trends observed by Sandrine Pons, even though abortion has not been a crime in France since 1975. According to France-Line Mary,

"In 1993, women accounted for only 14 per cent of police and gendarmerie suspects, 13 per cent of those charged in a case whose investigation was completed in 1992, 11 per cent of those convicted in the same year, 5 per cent of those imprisoned in 1994, and 4 per cent of the inmates on 1 January 1995."<sup>41</sup>

In 2017, Faustine Büsche and Odile Timbart came to the same conclusion. Women represent "18% of those indicted, 15% of perpetrators subject to a criminal response, 10% of those prosecuted in court and less than 4% of the inmates." <sup>42</sup>

Despite the difference in vocabulary, we can note that the proportion of women prosecuted and convicted remains very low compared to men. Women offenders therefore stand out at all levels, especially in terms of the social attention they receive. A woman inmate is looked down upon.

A higher proportion of women than men are imprisoned for criminal offences (17% compared to 13%). On average, they also serve longer sentences than men. And unlike men, once they are behind bars, they are abandoned to their fate: neither their family nor their friends come to see them, as Gwenola Ricordeau has shown.<sup>43</sup>

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<sup>39</sup> Sandrine Pons, "Étude statistique comparée de la criminalité masculine et féminine en Haute-Garonne au XIXe siècle," *Les Cahiers de Framespa*, No. 25, 2017.

<sup>40</sup> *Ibid.*

<sup>41</sup> France-Line Mary, "Femmes, délinquances et contrôle pénal, analyse sociodémographique des statistiques administratives françaises", *Études et données pénales*, n° 75, 1996, 281 p. [http://www.cesdip.fr/wp-content/uploads/EDP\\_75.pdf](http://www.cesdip.fr/wp-content/uploads/EDP_75.pdf)

<sup>42</sup> Faustine Büsch, Odile Timbart, "Un traitement judiciaire différent entre femmes et hommes délinquants," *Insee référence : Femmes et hommes, l'égalité en question*, 2017, p. 65-80. <https://www.insee.fr/fr/statistiques/2586464?sommaire=2586548>

<sup>43</sup> Gwenola Ricordeau, *Pour elles toutes. Women against prison*, Montreal, Lux, 2019.

One third of those sentenced to imprisonment are sentenced for acts heavily sanctioned by the penal code (murder, assault and battery, etc.). They generally have in common that they have been victims of domestic violence or child abuse, often over a long period of time, or that they have encountered obstacles to effective contraception or access to voluntary termination of pregnancy.<sup>44</sup>

### ***How the French Revolution invented public indecency***

The French Revolution intended to put an end to the laws of the Ancien Régime, which were considered arbitrary and often confused offences with sins. A certain number of provisions repressing bestiality, sodomy or prostitution were put to the test. Because they belonged to the domain of private life and individual liberties, the law was no longer to interfere. However, even though they were withdrawn from the domain of the law, the provisions governing indecent exposure was slyly reintroduced in 1791. At the same time that the National Constituent Assembly, which had emerged from the Estates General, was drafting the French Constitution, it decreed that a municipal and correctional police force should be established. Article 8 of Title II of the law of July 19, 1791, instituting a municipal and correctional police force, stipulates that:

"Those who may be accused of having publicly violated morals, by outraging women's modesty, by indulging in dishonest actions, by exhibiting or selling obscene images, of having promoted debauchery or corrupted young people of either sex, may be seized on the spot and brought before the justice of the peace, who is authorized to have them detained until the next hearing of the correctional police."<sup>45</sup>

This article of the law, the final version of which will be adopted on 19 July, is discussed from the 4th of the month in the section on offences against morality (which will be called "good morals" in the end) of the draft decree.<sup>46</sup> It is interesting to note two things about this first version. First, the article begins with "those who will be warned of having ....". However, in the final version, the conditional is introduced ("those who may be accused of having"), thereby underlining the principle of presumption of innocence that is so dear to the law. Secondly, Article 8 in its preliminary version precedes by a short distance that relating to adultery (finally abandoned): "a complaint for adultery may be prosecuted only by the husband [...]. The wife convicted of this offence shall be punished [with one to two years] imprisonment."

The first draft of the future article 8 presented by Jean-Nicolas Démeunier is open to discussion. Pétion considers its formulation delicate because it could lead to arbitrariness. Then Robespierre seizes the matter because this law "concerns the principle of freedom." However, the exchanges will finally focus on two other points, obscene images on the one hand, and adultery on the other.

### ***Female prostitution and public indecency***

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<sup>44</sup> Julie Ancian, *Des grossesses catastrophiques. A sociology of reproductive logics in judicial and biographical narratives of neonaticide*, PhD thesis in sociology (ss. dir. Simone Bateman and Marc Bessin), EHESS, 2018.

<sup>45</sup> Law of July 19, 1791 on the organization of a municipal and correctional police. Title II: correctional police, classifications of offences and penalties to be imposed. <https://criminocorpus.org/fr/reperes/legislation/textes-juridiques-lois-decre/textes-juridiques-relatifs-la-recidive/19-juillet-1791-decret-relatif-a-lorganisation-dune-police-municipale-et-correctionnelle/>

<sup>46</sup> The sources on which I base my remarks are taken from "Archives parlementaires de la révolution française", *Archives Parlementaires de 1787 à 1860*, Première série (1787-1799), volumes XXVII and XXVIII, Paris, Librairie administrative, 1887. <https://www.persee.fr/collection/arcpa>

Prostitution was de *facto* decriminalized in 1791. Like public solicitation, it disappeared from criminal and correctional law, and did not reappear either in the Code of Offences and Penalties of 1795 or in the Penal Code of 1810.<sup>47</sup> However, this decision did not seem to be to the liking of the Central Police Bureau of Paris, the forerunner of the Police Prefecture. The question of the regulation of prostitution was in fact a recurrent demand made primarily by the citizens of Paris, as the city's *cahiers de doléance* testify - on the other hand, it emerges in only 1% of the complaints on the national scale). Unable to rely on the law and having to deal with the constant demand of citizens to regulate prostitution, the police focus all their attention on the prostitutes of the lower classes. It was mainly practiced by women who had been hit hard by the economic crisis that marked the Directoire.

During the *Directoire*, about 1,500 women were arrested each year by the Parisian police. This figure may seem low at first glance. However, in the days when it was repressed by various *Ancien Régime* provisions - most recently the criminal ordinance of July 26, 1713 on "debauched girls and women" - the number of women arrested for this reason never exceeded 700 or 800 per year, according to Clyde Plumauzille. In fact, there strong evidence that this was made possible by the invention of the "offence of public indecency in 1791," which was used with increasing frequency in cases of public prostitution. Through a careful examination of the reports of the Central Police Office, Clyde Plumauzille observes that the reference to "public indecency" became systematic from 1796 onward, allowing prostitution to be reclassified as an offence.

From that moment on, women were overrepresented among those convicted of crimes against morality. Although they represented 13% of all crimes and offences recorded in revolutionary Paris, 75% involved women. And in 90% of the cases, it was female prostitution. Prostitutes therefore constituted the vast majority of those prosecuted and convicted for public indecency. According to Anne Simon, it was a decision of the Court of Cassation on January, 20 1803 that gave public decency its public order dimension.

"In overturning a correctional judgment finding Lebas guilty of offending public decency for having uttered "verbal insults accompanied by serious violence toward the Cloteau woman", the judgment stated: "The offences in question cannot be understood as mere verbal insults, but only as acts or actions which, by offending the modesty of women, publicly offend public decency."<sup>48</sup>

However, other studies show that this dimension appears immediately after the law comes into force, especially in the provinces.

#### *Women of loose morals outraging public decency*

In a study of sentences handed down by sixteen provincial criminal courts between 1792 and 1811, Robert Allen shows that "promiscuous" women who were not prostitutes were punished

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<sup>47</sup> Clyde Plumauzille, "From the 'scandal of prostitution' to the 'offence against public morals'. Police control and the administration of public girls under the French Revolution," *Politix*, vol. 107, no. 3, 2014, pp. 9-31. <https://doi.org/10.3917/pox.107.0007>

<sup>48</sup> *Bulletin des jugements du tribunal de cassation rendus en matière criminelle*, Imprimerie de la République, t. VIII, an XII, p. 127. Quoted by Anne Simonin, "L'indignité où les bonnes mœurs républicaines", in Robert Belot, *Tous républicains! Origine et modernité des valeurs républicaines*, Paris, Armand Colin, 2011, pp. 213-232, p. 223, n. 1. <https://doi.org/10.3917/arco.belo.2011.01.0213>

with great severity, especially when they were single or widowed.<sup>49</sup> The phenomenon is particularly noticeable at the correctional level, more specifically when it comes to public indecency as defined in article 8 of title II of the law of July 19, 1791. The use made by judges of this article, with its vague and general provisions, certainly allows for the repression of prostitution, but also of a vast range of sexual "offences."<sup>50</sup> Thus, Allen pinpoints that in 1800, a certain Catherine Paillot, aged 22, appeared in Dijon for "conduct contrary to morality." She was suspected of having promised herself to soldiers and was condemned under the law of July 19, 1791 to serve 6 months in prison. The same applies to Marie Ducret, prosecuted the same year for "raiding in the vineyards with a soldier." She was sentenced to serve 6 months in prison. Finally, Catherine Chapolot, 19 years old, accused of "libertine and scandalous life" was sentenced by the court of Dijon to 6 months imprisonment.

From these three cases exposed by Allen, we can see that the justice system was harsh on women trading with soldiers. Such cases seem to have been common in the post-revolutionary period. Moreover, "it was often the company sergeant who came to denounce women who sneaked into the barracks."<sup>51</sup> They do not seem to be professional prostitutes and are prosecuted for having tried to "corrupt the young men of the national guard" according to Véronique Chouraqui-Ribouet who has compiled numerous legal archives in Languedoc.<sup>52</sup> In such cases, the soldiers appear to be the victims and their conduct is never questioned. On the other hand, the women with whom they traded were sentenced to six months in a prison. One of the judgments, issued in March 1792, a few months after the 1791 law came into force, gives us a clearer idea of how things were perceived by the courts. I reproduce it *in extenso*:

"The court, considering that both in the eyes of justice and in the eyes of morality and civic life, the illegitimate trade of young girls with soldiers in one of the rooms dependent on the barracks, in the sight of other soldiers placed in the same room, must be severely repressed, either because it sets an example that is as pernicious as it is outrageous, or because the guilty ardor of these shameless girls and their equally unbridled desires can only lead to poisonous consequences which lead to disgust with the military state, vile and enfeebling, and successively bring about a desertion which is always disgraceful, shameful and dishonorable. It is therefore for the good of the State, for the good police of society's interest and for the effect of good morals, the preservation of which is specially recommended and entrusted to us by Article 7 of Title 2 of the law of July 22 last, to stop the progress of the evil, which is as rapid as it is dangerous, and to bring to repentance by a correction proportionate to Levere's offence, not only for having indulged, without measure, in the night of February 22 to 23, to an openly corrupt, criminal and scandalous attachment with the said Auzenac, but also for having fallen prey to excessively tumultuous passions and by a sort of public prostitution with the said Auzenac in his bed without any curtain after having undressed in a room inhabited by other soldiers whom she made witness to her debauchery during the whole night [...]"<sup>53</sup>

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<sup>49</sup> On an overall level, while the acquittal rate was 53% for married women, it was only 39% for adult "girls" and widows Robert Allen, "La justice pénale et les femmes, 1792 - 1811", *Annales historiques de la Révolution française*, n°350, p. 87-107, 2007, p. 96. <http://journals.openedition.org/ahrf/11256>

<sup>50</sup> Robert Allen, "La justice pénale et les femmes, 1792 - 1811", *Annales historiques de la Révolution française*, no. 350, pp. 87-107, 2007, p. 102. <http://journals.openedition.org/ahrf/11256>

<sup>51</sup> Véronique Chouraqui-Ribouet, *Les compétences pénales du juge de paix sous la Révolution : entre police et justice (19-22 juillet 1791 - 3 brumaire an IV)*, PhD in Law History (dir. Jean-Marie Carbasse), Université de Montpellier, 2012, p. 98.

<sup>52</sup> *Ibid.*, p. 98.

<sup>53</sup> Ruling of March 5, 1792 against E. Levere (Archives départementales de l'Hérault, L 8249), quoted by V. Chouraqui-Ribouet, *op. cit.* p. 99.

It should be noted that cases involving public indecency, because they involve soldiers, are clearly separated from those involving private indecency, i.e. sexual assault. Those who have sexually assaulted women are only very moderately punished by the courts. Thus,

In Nîmes, in February 1792, Madame "Féline, wife of Reboul, was the victim of a stonecutter who entered her home, took her by the neck with one hand and by the breast with the other, and who was "about to injure her modesty when she cried out for help. The court condemned the man to a 3 pound fine [...]. In Montpellier, in January 1792, a young man tried to rape a young girl as she was leaving a ball. He was sentenced to two hours in prison."<sup>54</sup>

As Georges Vigarello has shown in his *History of Rape*, this crime – just like indecent assault – remained largely unpunished throughout the 19th century (and for much of the 20th). In 1900, while 2,967 cases of public indecency were brought before the courts, there were 383 cases of rape and assault on children and 65 on adults.<sup>55</sup> And very often, especially in criminal courts, and even more so in the provinces, the jury tends to acquit the person accused of rape or assault because it views the sentence too severe.<sup>56</sup>

### Women in the CGJ

The general justice accounts provide little information on the sex of persons convicted of OPMs. This information only appears in 1955, following the advent of mechanographic statistics.<sup>57</sup> For earlier years, the number of decisions rendered does not take gender into account, at least in criminal matters. However, it would be erroneous to assert that the question of gender was absent from the CGJ before 1955. It appeared as early as 1831 in the tables relating to criminal justice (accused and convicted), and then as of 1841 in correctional matters. It distinguishes between defendants by sex and by three age groups (under 16, 16 to 21, over 21), i.e. according to the established distinction between criminal responsibility (set at 16 since 1810) and civil responsibility (set at 21 in 1792). However, the CGJ is silent on the outcome of prosecutions. In 1911, an additional column was added to those relating to the results of prosecutions. It specifies the number of convicts who benefited from mitigating circumstances. In the case of OPM, it concerned 1,323 men and 195 women (Table XXIX, p. 59). This information is of little use, however, since the results of prosecutions are not previously sorted by sex. At this stage, therefore, we have only two pieces of information relating to sex: the number of defendants: 2,517 men and 360 women in 1911, and the number of persons who benefited from mitigating circumstances. The 1931 edition is the last among those examined to provide us with this type of information. They then disappeared completely from the tables until the 1950s. It is therefore primarily in the preliminary reports that information on the accused, defendants and convicts can be gleaned in order to shed some light on the legal criminality and delinquency of women.<sup>58</sup> In 1831, we learn that:

"Among the defendants present were 6,380 men and 1,226 women; this gives a ratio of 16 to 100 defendants. This ratio was 19 in 1830, and 20 in 1829: it varies according to the nature of the

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<sup>54</sup> Véronique Chouraqui-Ribouet, *Les compétences pénales du juge de paix sous la Révolution ...*, op. cit., 2012, p. 202.

<sup>55</sup> Georges Vigarello, *Histoire du viol*, Paris, Seuil, coll. Point, 1998, p. 194.

<sup>56</sup> *Ibid.*, p. 193.

<sup>57</sup> This also allows us to know, from 1955 onwards, the age group, the occupation carried out or declared, the marital status and the number of children of the persons convicted for OPM.

<sup>58</sup> As a reminder, the CGJ does not provide any information on actual crime and delinquency, but only on legal crime and delinquency, i.e. the number of crimes and offences that have been prosecuted and convicted. It is below the recorded (or apparent) crime and delinquency which is not systematically prosecuted.

crimes. Indeed, in crimes against property, there were 18 women out of 100 accused, and only 11 in crimes against persons." ("Report to the King," *General Account of the Administration of Criminal Justice in France during the Year 1831*, p. v)

"The proportionate number of males uneducated was 57 out of 100, and of females 80. These two numbers were 58 and 178 in 1830." (p. vj)

"Hitherto, the number of acquittals had been relatively greater for women than for men. This was not the case in 1831. Men and women, compared separately to the total number of accused of each sex, are in the same ratio of 46 to 100: this ratio was also in 1830 of 46 for women, but it was only 39 for men. Thus, it is the men who have exclusively benefited from the increase which we notice in 1831 in the total number of acquittals." (p. xj)

"Among the defendants there were 193,851 men and 60,887 women, which gives a proportion of 24 out of 100 (p. xij) ... Among the 30,608 sentenced to prison were 24,132 men and 6,476 women (p. xiv) ... The correctional court also had to deal with individuals with previous convictions. Their number amounted to 4,960 [...]. There were 1,047 women among them. Punishment for female defendants was even harsher than for defendants who were also repeat offenders: only 9 out of 100 were acquitted." (p. xvj)

From these few elements taken from the "Report to the King", we can conclude that in criminal matters, women constituted 16% of the accused. Their proportion varied according to whether the crime was against property (18%, mainly theft, mostly committed by servants) or against persons (11%, including rebellion, murder, assassination and abortion). We also learn that convicted women were by far less educated than men and that they were generally acquitted more often than men (with the exception of 1831). In cases of misdemeanor, women accounted for one third of defendants, but only 10% of them were sentenced to prison. Lastly, in terms of recidivism, the justice system seems to be firmer toward women than toward men.

Therefore, as early as 1831, the main elements that were the object of particular attention by criminal anthropologists with regard to deviant women are present in the report of the Ministry of Justice: they are less educated ... and therefore less endowed with reason, and they stand out for committing "specific" crimes and offences. Moreover, the justice system is more lenient toward them the first time around, but it is firmer when they re-offend.

### **Women prosecuted and women convicted for OPM**

Unfortunately, it is impossible to make a fair comparison over the long term since we only know the number of women charged with OPMs between 1841 and 1931, we have no information about them between 1941 and 1951, and we only know the number of women convicted of OPMs (but no longer the number charged) from 1961 on.

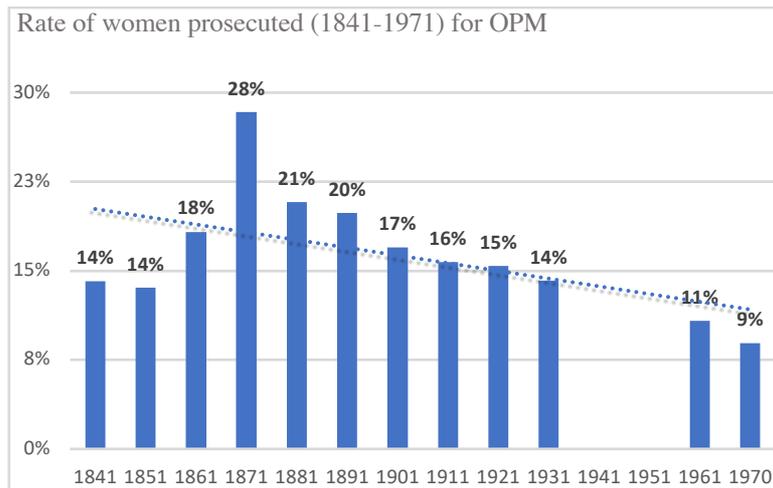


Figure 9: Rates of women prosecuted (1841-1931) and convicted (1961 onwards) for OPMs

The table above shows that the proportion of women prosecuted for OPMs increased continuously between 1841 and 1871, peaked in that year, and then declined steadily until 1931. We note that this decline seems to continue from the 1960s onwards, even though the unit of account is no longer the same, since it is now a matter of convicted women (and no longer of indicted persons). Only the year 1871 really seems to stand out in the table: 28 % of those charged with OPMs are women. However, 1871 was a special year, since it was marked by the end of the Franco-Prussian War (or 1870 War) and by the Paris Commune. However, another explanation may be mobilized to account for the brutal 10% increase observed between 1861 and 1871, the promulgation of the May 13, 1863 law, which corrected many crimes previously judged by the criminal courts. The function of this law was twofold: on the one hand, it made it possible to put an end to the fact that juries often acquitted individuals who would nevertheless have been convicted if a judge were to decide on the sentence; on the other hand, it was intended to allow the criminal courts to refocus on the crimes considered to be the most serious. In order to test the hypothesis of an effect of the 1863 law on the OPM, I conducted a five-year review of judicial statistics. Insofar as the rate of women prosecuted for OPM in 1866 (11%) is lower than in 1861 (18%), this hypothesis does not resist the test and another explanation should be found elsewhere. However, an examination of the conviction rate of women in 1919 (the year 1916 being non-existent) reveals a phenomenon similar to that observed in 1871: there is a sudden peak in convictions (26 %, i.e. 9 less than in 1921 and 10 more than in 1911).

The observation of such a similarity in the post-war phase leads to put forward the hypothesis that women in absence of their fathers, brothers or husbands may have benefited from a freedom gained thanks to the massive mobilization of men at the front. Another hypothesis is that at the end of the war, the justice system preferentially prosecuted women who had been with the enemy. The "Report to the President of the Republic on the Administration of Criminal Justice from 1914 to 1919" (CGJ 1919) might help us to see this more clearly. It informs of the following facts:

"The disorganization of the judicial police has had the natural effect of making the recording of offences less regular. Public action, like private action, has been exercised with less vigor. [And] crimes and misdemeanors condemned have been less frequent in a diminished population, but it is certain that this numerical decrease is in no way such as to herald a decrease in crime" (p. vi)

"One of the most characteristic results of wartime statistics is that while the prosecution of men for criminal and correctional offences necessarily decreased as a result of the hostilities, the prosecution of women increased considerably. The proportionate increase in the number of women offenders is explained by the enlistment of a large proportion of the male population; but the sudden increase, beginning in 1915, in the actual number of women prosecuted is so marked as to indicate a new situation that deserves attention." (p. vii)

"Women's crime, which before the war was about eight times less than men's (12 per cent), rose to 30 per cent by 1916, accounting for nearly one-third of total crime." (p. xiv)

According to the authors of the report, women have waded into modern criminal life because of the war. However, the explanation lies elsewhere. Indeed, as we can see in the graphs below, the rate of women prosecuted for OPMs was certainly higher after the war, but the numbers did not really vary from peacetime. Indeed, in 1919 the figures are the same as in 1921,: 271 women were prosecuted for OPMs.

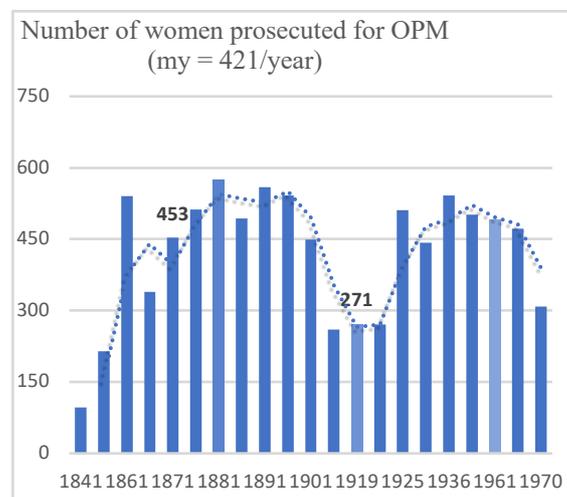
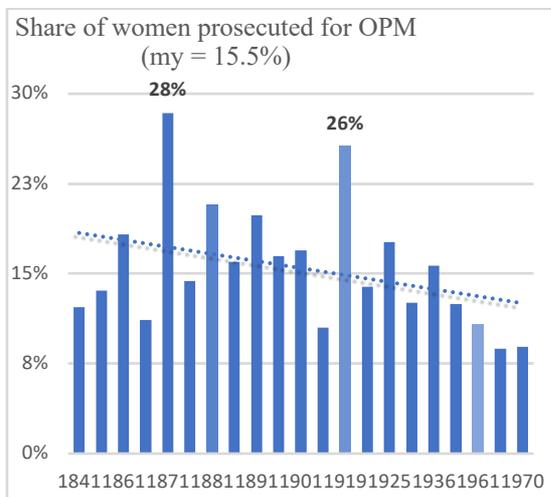


Figure 10: Share of women prosecuted for OPM Figure 11: Number of women prosecuted for OPM

The rate of women is therefore an indicator to be handled with caution, at least in wartime or immediately afterwards. Indeed, it is mainly the number of men prosecuted - numerically less numerous in wartime and immediately thereafter - that influences the rate of feminization of the OPM offences. When we look at things in terms of "gross numbers" every ten years, we can see that the graphic line of women prosecuted - who are known to be much less of a source of litigation units - actually evolves in parallel with that observed at the global level: steady increase in the number of cases and defendants until 1861 (with the exception of 1871), a slightly declining plateau between 1881 and 1921 followed by a steady increase leading to a second plateau in the 1950s and 1960s, before engaging in a real decline from the early 1970s.

In the end, this analysis shows that women prosecuted for OPM - although they account for less than 15% of OPM sentences on average - follow a similar pattern to that of men prosecuted for this reason. However, significant differences are observed: they are numerically few before 1861, between 1911 and 1921, while they fluctuate around 500 with a peak observed in 1881: 575 preventions for OPM.

## Conclusion

As this overview draws to a close, let us note that in France and since the French Revolution, women have represented between 10 and 15% of those convicted by the criminal justice system and 15.5% of those prosecuted for OPMs. The justice system, both criminal and correctional, is more lenient toward women. However, we observe two types of situations in which the justice system is less understanding towards them, which have in common that they show differences in terms of gender stereotypes. On the one hand, this concerns single, divorced women and repeat offenders; on the other hand, women prosecuted for "sexual" or indecent offences. The latter are placed at the extremes of the continuum of types of delinquent and criminal women established by criminal anthropology and then popularized by the press.

Women of ill repute, necessarily bad mothers and therefore bad wives, are equated with prostitutes. However, insofar as prostitution has no longer been an offence in France since the Revolution, we have observed that the police in the first place - partly under the pressure of public opinion - and then the judiciary in the second place, used an article of law, initially intended to protect the modesty of women, to condemn those whose morals were considered too loose. Finally, the 1791 statute, diverted from its essence and used for this purpose, was replaced by a new offence of public indecency, the provisions of which remain just as vague and general as the previous piece of legislation; insofar as there is no research to show whether, from 1810 onwards, public indecency also allowed for the repression of prostitution and a wide range of sexual "offences" perpetrated by women. Failing to demonstrate this, I will argue that some of the women prosecuted for public indecency, about whom the CGJ provides little information, may have been prostitutes, adulterers or promiscuous women.

In conclusion, one has difficulties at this stage to conclude that women are proportionally more convicted than men in matters of OPMs. Numerous biases and limitations prevent from doing so, even though the literature on women in the criminal justice system indicates that they are more severely punished when it comes to matters of morality. The lack of information on the number, rate and quantum of convictions prior to 1955 hinders any conclusions on the subject. Only a more detailed analysis, possible from 1955 onwards, and an analysis of the judgments handed down (analyzed from 1942 onwards for the jurisdiction of the Seine court) will enable us to gain a better understanding of the profile of women prosecuted and convicted for public indecency.

## Limits and Opening

At the end of this paper, we still do not know which acts or sexual practices were condemned as Outrage to public modesty. This question shall be examined in another part of my work. Nevertheless, it is possible to conclude that the OPM concern an average of 1.1% of the sentences handed down by the criminal courts each year in France, even though there are major variations from the average (2.2% in 1951 compared with 0.5% in 1981 or 0.4% in 1841). However, two trends are apparent.

- There was a tendency to condemn more in the late 19th century and after the Second World War.
- Conversely, there were fewer convictions for OPM during the Belle Epoque and after May 1968.

Finally, after the Second World War, more than in any other period, there is a greater number of condemnations, also more severe, for OPM. It can therefore be said that something was at play from the 1950s onwards. Insofar as the 1950s are also the years from which criminal statistics are refined and strengthened, we can go into greater detail in our analyses of this period. And even more so from 1963 onwards, when new variables appear, such as the marital status of convicted men and women and their number of children.