Introduction

What is a history of public modesty?

In some Barbarian cultures, it is deemed disgraceful to be seen naked

Herodotus, Histories I, chapter X

Modesty (or decency) is a term that has disappeared from the French Penal Code.* It seems as outmoded as corsets, virginity before marriage, catching women in the act of adultery, and unwanted pregnancies. The word evokes a bygone world in which Victorians used to fit their pianos with trousers to hide their nudity; a world in which people worried about seeing women ride bicycles, or one in which Prosecutor Pinard wrote his famous diatribe against Madame Bovary. Rather than being nostalgic, our contemporaries express a sort of irony mixed with indignation, relieved that the term is obsolete.

In criminal law from those times, the term “indecency” referred to two types of infractions. The first kind encompassed assaults committed against individuals. The old Penal Code punished violent indecent assault [L’attentat à la pudeur avec violence], which covered forced sexual acts that could not be categorized as rape, such as sodomy and fellatio. The code also punished nonviolent indecent assault [L’attentat à la pudeur sans violence], which targeted sexual relations with minors who were too young to give consent. In both cases, the perpetrators undermined their victims’ right (not) to consent to sexual relations. Though the law used the word “indecency” to evoke the nature of the violation to which

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* Translator’s note: There is no exact translation for the French term “pudeur.” While modesty possibly comes closest in many cases, legal definitions in English tend to use the term (in)decency. Thus, in this text, in keeping with usage in English, the French offense of outrage public à la pudeur is translated as contempt of public decency or indecent exposure.
Introduction

the victims were subject, it was not a question of a psychological wound, as one would understand such violations today. Indecency referred to a moral order, which the perpetrators of these infractions forced their victims to transgress, despite themselves, thus risking impoverishing their sense of morality and corrupting their instinct.

Article 330 of the old Penal Code—made famous by Georges Courteline’s eponymous play\(^1\)—also punished *contempt of public decency* as a misdemeanor directed not against a particular individual but against society as a collective. The law sought to protect society from the sight of certain sexual scenes. According to nineteenth-century legal scholars [*juristes*], the repression of this misdemeanor was aimed at avoiding an over-sexualizing of social life as well as fighting libertinage and debauchery, which risked undermining a moral order founded on the institution of marriage and the sacrifices that it entailed.

Thus, thanks to public modesty, yesterday’s society could veil things of a sexual nature in order for them not to perturb the social order. However, for the world of sex to stay covered, like those Victorian pianos, it was not sufficient to avoid unbridled exhibitionism. Public modesty implied a most serious policing of one’s very behavior and gestures.

In order not to be convicted for indecent exposure, one needed to be vigilant and zealous, with no room for error. The smallest negligence could prove to be fatal. One needed to watch out for windows, the wind, flies of trousers, cracks or breaches in walls and improperly closed doors. These interfaces that allowed private sexuality to come into contact with public space could, in the blink of an eye, transform nudity and benign pleasures into a misdemeanor. Thus, public modesty became paradigmatic of a society that rendered sexuality into a threat, a shameful and dangerous activity from which one needed to be protected.

Not only did this crime permit the confinement of nonviolent sexuality to secrecy and darkness but it also symbolized a pitfall of the past. Feminists have long denounced a practice that was current up until the 1960s: too often in punishing rape, judges re-categorized it as contempt of public decency.\(^2\) The metaphysical violence of rape was thus reduced to a simple public scandal, drastically lessening the supreme crime against women to a minor and almost ridiculous infraction.
Introduction

Thanks to this infraction, the courts not only veiled bodies and pleasures but also the most serious crimes of a sexual nature. By its intent to cover up, to silence sex, this misdemeanor ought to have done the same with its criminal manifestations. For, by condemning the evil of which Sex was capable, by describing the acts and gestures and speaking of the ravages it produced on its victims, did it not also underscore the very power and scandal and trickery of this demon that the society of the past sought so much to weaken and block?

The moral revolution

The reform of 1992 erased all trace of the word “decency” from the Penal Code, permanently sealing off the present day from the world of the past with this semantic change. In the early 1970s, a “revolutionary” movement, which is still underway, was launched. It brought about the legalization of contraception, abortion, the equal rights of illegitimate and legitimate offspring, the abolition of adultery as a crime, as well as divorce by mutual consent. This movement has engendered a veritable explosion in the number of convictions for sexual violence and has also created an institutional framework close to marriage for same-sex couples. In short, with its semantic makeover, the 1992 reform set in motion this on-going process, in which it stood as a milestone, and toppled Napoleonic marriage from its monopoly over sexual and family life.*

Henceforth, it is the term “Sex” that organizes the ensemble of crimes and misdemeanors against morality. Freed from its Victorian shackles, Sex, whose destructive as well as affirmative power we don’t cease to recognize, now takes the place of marriage as the source of rights and destiny. And its thunderous victory pushed the term “modesty,” which used to hide it, out of the present and into this form of forgetting we call history.

However, the old world did not bring down indecent exposure with it. Article 330 of the old code morphed into the new Article 222–32, and this change in numbering (which saved it from

* Translator’s note: the passing of the 1999 civil union law (Pacte Civil de Solidarité, also known as PaCS) and the 2013 Loi Taubira, which permits any two citizens to marry, regardless of their sex, have further put pressure on traditional notions of marriage.
Introduction

Courteline’s ironies) was accompanied by a modernization of vocabulary. We no longer use the term “indecent exposure,” but sexual exhibitionism. The sentences meted out for this new misdemeanor were reduced and the list of banned acts was further shortened. So, women are no longer banned from wearing monokinis, nor are people convicted for failing to cover up keyholes before engaging in indecent acts. Rather, this misdemeanor comprises a more specific behavior that consists of imposing sexual exhibitionism on others in a space accessible to the public eye. But the precise meaning of the notion of public decency did not disappear with the new infraction. Even though we no longer use this expression, the exhibitionist is still seen not just as a threat to the individual but to the collective, conceived as an undifferentiated sexual and moral entity, that is to say, exactly that which the Napoleonic codifications of public modesty were supposed to protect.

Although the penalty for the new infraction is so miniscule in comparison with the heavy sentences for other sexual aggressions, it is so precise in its definition and conviction is so rare that, by its insignificance, the new infraction only evokes its past splendor. Technically, if the infraction continues to protect public modesty, it seems to exist only as a vestige, like a river emptied of its waters or a bomb that has been carefully defused.

The spatialization of sexuality

If one envisages public modesty as a product purely of the past whose only interest lies precisely in being out of fashion—if one analyzes it as the negation of the world that we have ended up creating after long and bitter battles—one loses sight of the most important aspect of this story. By desiring to bury that past, one is neither interested in the forms that it took, nor in the tactics that it deployed, nor the manner in which the past inscribed itself into a system in order to draw its significance from it.

In the moral domain, social scientists are so eager to glorify the present, so hounded to denounce the past and to transform it into a narrative about the fight between Good and Evil, of Justice against Injustice, of Progress versus Reaction, that they do not take the time to reflect on the positive aspects of those past institutions. In so doing, they deprive themselves of the possibility of comprehending the present they are looking to glorify, the institutional procedures
that came to structure it, and the way in which this present is still very much a declension of that despised past.

Of all the institutions that organized morality, none has been more neglected and less understood than the one charged with protecting public modesty. It is called upon only to denounce the tool used by judges to censure artists, persecute homosexuals who openly flaunted their sexuality on the street, humiliate rape victims and make life difficult for “libertines” and wayward individuals [des distraits]. Such an approach has allowed us to be attentive neither to the juridical rationality of such an institution nor to the specific practices that it employed to do the work that it is accused of doing.

Nevertheless, what the history of this infraction teaches us when we consider it less from an ideological point of view and allow our curiosity to lead us is that it did not “repress” sexuality, did not bury or condemn it to silence. Rather, sexuality was distributed in space. Instead of trying to make it disappear, sexuality was made answerable to two opposing regimes of visibility, the first private and the other public, defined according to the nature of the space. In private, one could enjoy sexual liberties allowed for by the Code, while, in public space, it was imperative to hide oneself.

In this sense, one can see how Article 330 of the Penal Code, which organized this double regime of public and private in which sexuality could be expressed, in fact constructed a wall. The wall of modesty was a way to separate the two spaces by a physical frontier. Article 330 did not aim to judge sexual behaviors in the absolute. It was content to define them according to the space in which they were enacted. And if the article censured the public expression of sexuality, such behavior was left completely alone when it was enacted in private.

The wall of modesty incarnated the promise made by the Napoleonic State not to intervene in the peaceful sexual life of individuals. Thus, it sought to break with the older invasive and violent practices of the previous centuries. The wall of modesty was the solution found by the Napoleonic State to separate forevermore penal law from religion, to no longer use legal punishment as a tool for purification and salvation. With Article 330, the new State had invented a mechanism with which to curb itself without having to recognize the sexual liberty of citizens, who were, in principle, required to organize their intimate life around marriage. Sexual
Introduction

liberty was a precious and shameful thing to which one could only have access away from the public gaze, in the twilight zone that the State had organized for the benefit of citizens, in this region called private, to which it had decided to turn a blind eye.

Invading private space

But, just a few years after its construction, the wall of modesty began to engender profound regret. The courts started to doubt its legitimacy, and to question the State’s promise not to intervene in private sexual behavior. If this infraction has an intense history of jurisprudence, it is because, since it was constructed, the wall of modesty has not ceased to be challenged, to be displaced and breached, so as to extend the boundaries of public space to private space, until they were erased altogether. It was as if, as soon as it was constituted, this wall had authorized something intolerable, a harbor for vice, a school of corruption; as if it had been a structure unworthy of a civilized society, one that would have allowed people to hide, rather than be governed.

The displacement of the wall’s boundaries constituted a veritable challenge to a certain way of governing sexuality: the expression of a more and more insistent desire to see what was invisible to the eyes of the State, not to rely upon this arbitrary barrier that had given such power to the configuration and stature of space.

Slowly but surely public space began to infiltrate private space until in 1877, at the zenith of this process, the totality of visible space became potentially public. This spatial technique of controlling sexual behavior, which had originally left those at home in peace, began now to function like a tool to moralize private space. Article 330 was used to punish sexual behavior with the claim that it had been seen by others; not because those who let themselves be seen had committed some wrong against those who had seen them but because they had produced a public uproar in a private space.

From then on, it was sufficient to have more than two individuals in an enclosed, and even locked, space to make it public. It was consent, and not the nature of the space, or its visibility from the exterior that became the principal criterion for the space to become public. If one of the witnesses was nonconsenting to a scene that took place in an enclosed space, invisible to the exterior, then the space in question was transformed into a space that was as public
as a street or byway. The private–public distinction no longer had the clarity of a line that separates two countries on a map. It was unstable to the point where lovers could be punished for forgetting, in the heat of the moment, to lock the door, even if they had closed the shutters and the door of their bedroom. But it was not only these consensual behaviors that the courts punished based on Article 330. They also censured those alleged acts of violence for which they did not desire to impose the full weight of punishment provided for by the code.

Thus, Article 330 served two opposing goals: to soften the punishment provided for crimes and to transform behavior that the Code did not foresee into misdemeanors. Thus, this infraction seemed most to be able to express sexual evil, which was manifested through this curious grammar of space and scandal.

**Liberalizing public space**

But if private space was subject to increasing control during the last quarter of the nineteenth century, it was also in that period during which public space began to be liberalized in reaction. This phenomenon seems completely rational. Given that the wall of modesty had been virtually demolished, it seemed natural to homogenize the rules of the two worlds. Thus, starting from the end of the nineteenth century, French society sought to soften the rigidity of the Napoleonic Code governing public space and declared war on judges, who ended up giving in gradually. Not only artists, producers, and directors but also nudists, “débauchés,” and even the most respected legal scholars employed different means to achieve their goals.

First there was the theory of the “chaste nude,” which claimed that nudity was not always synonymous with obscenity or sexuality. The so-called war of the “nudes” began at the turn of the twentieth century, culminating only in the 1930s with the relative triumph of the liberal groups.

The other move, more radical than the first, sought to play with the notion of consent, which had been used until then toward an inverse goal: extending the public to private spaces. If the public consented to a particular performance, why could the theater in which the event took place not be considered private space?

During the period before the moral revolution, the liberalization
of public spaces was not so much due to the courts but to the indulgence of public prosecutors and the open-mindedness of certain administrations. Thus, after the late 1960s, under the watch of benevolent administrations, one sees a veritable explosion of performances with sexual content, as well as the organization of open-air practices, like nudism on certain beaches.

It was in this period that a movement began to radically transform the ways in which sexuality was governed. Judges, who found it more and more ridiculous to sentence women for having simply worn a monokini on the beach, began progressively to be stricter in applying sentences for sexual crimes provided for in the criminal code. Slowly, but surely, Article 330 was used with decreasing frequency, either because it was deemed to be too repressive, or because it was not stringent enough. This movement became more radical in the 1970s, culminating in the moral revolution, which fundamentally changed the institutions that organized family and sexual life in their entirety.

**Sexual exhibition**

The process by which private life was “dematrimonialized” and made subject to the empire of another, more powerful, master called Sex, marks a veritable turning point in the history of public modesty. Sexual life was no longer organized by either marriage or space. Hereafter, it was Sex, and its psychologizing and juridical techniques, that was going to take charge with a penal legislative arsenal that was the most repressive in the history of French Law since the *Ancien Régime*. Indecent exposure was no longer going to be charged with softening crimes or creating new infractions. Nothing would seem serious enough to punish those who transgressed sexual interdictions, while no intimidating, corrupting, harassing or violent behavior would be ignored by the penal order.

The new crime of sexual exhibition, which replaced the old Article 330, has very specific functions, which aim to censure certain forms of public sexual exhibition thought to be aggressive or deviant. It is forbidden to impose sexual exhibition on others in a space accessible to the public gaze. Those who seek to satisfy their desires in spite of that gaze are no longer punished. Rather, the legislator seeks to track down those for whom the public gaze is an object of pleasure.
Indeed, the law admits that one can revel in the public gaze under certain specific circumstances. Erotic spectacles, swingers clubs and gay saunas have all become legal. The law leaves such “débauchés” alone while pursuing “perverts”, and particularly exhibitionists: those strange creatures, who had been previously considered by the courts to be innocuous and who aroused the greatest curiosity among psychiatrists in the late nineteenth century.

Public space is no longer synonymous with the absence of sexuality. If the distinction between public and private spaces continues to exist, it is to limit a particular and specific form of eroticism that allows for observation and self-display.

This visual liberalization of public space goes along with a penal regime that increasingly affirms its grip on the individual’s sexuality. Never before has the penal system pronounced as many sentences for sexual crimes and misdemeanors, and never has public space been so eroticized. This evolution no doubt signals the very failure of the mechanisms that spatialize sexuality, according to which sexual desires are to be contained/controlled by a system of external walls and borders. In the world of Sex, these walls have been replaced by an internal surveillance of the desires of each individual, in a system that tends to confound legal transgression with mental malady. Spatial borders have become psychological/mental frontiers.

Moreover, imposed sexual exhibition, the only remaining technique of spatializing sexuality, is itself an imprint of this way of exploring psychological depths. The guilty exhibitionist is punished in the eyes of the law, less for having affected the public by transgressing the frontiers of the visible than for having shown dangerous desires. These desires are not those of criminals, like rapists, who enjoy sexual pleasure outside the law. Nor are they those of decent people who find their pleasures within the law. The penal order places the exhibitionist in this strange liminal space that separates two psychological universes, for s/he is said to gain pleasure from the law itself.

A history of the gaze

The history of public modesty conceived as one of the spatialization of sexuality is also a history of its “visibilization.” It posits the examination of the ensemble of practices that transformed sexuality
into a spectacle, that is to say, into an event whose specificity is to expose oneself.

Article 330 of the 1810 Code instituted a type of “original fiction” according to which all public space was under surveillance by the gaze of the State’s eye. This gaze was supposed to see all obscene acts that took place in such spaces, whether by day or night. It was not necessary for an individual to embody such a gaze. This eye saw even into deserted streets, unlit byways and even into places where no human being might venture. And in private spaces, into which this all-powerful eye could not penetrate, the State turned a blind eye to sexual scenes, even if a crowd witnessed them.

The function of this fictive vision, which was brought into being in public spaces, was to anticipate all possible gazes and to protect the individual from sexual spectacles that s/he was not supposed to see.

But, in order to widen the field of vision for this all-seeing eye, the judiciary began quite early to depend on human eyes. So, it was decided that under certain conditions, the individual’s gaze could incarnate the symbolic gaze of the State. This extension was brought about in two different directions. First, the State employed human eyes to render public spaces not only into spaces in which everything was supposed to be seen but also as kinds of watchtowers thanks to which the public eye could penetrate into private space. So, the fact that human eyes are parts of bodies that can be displaced from one space to another allowed for private spaces to be rendered public: it was sufficient for these eyes to penetrate that space. Thus, thanks to the mobility of the human gaze, private places not visible from the exterior became spaces deemed object of the watchful eye of the State. For, as I will explain in detail, the true subject of the gaze was the State, and not the individual who saw. No doubt, for this reason, the act of seeing was never simply the obverse of the act of revealing oneself [se montrer], for only the former could become the exercise of a kind of public charge. Unlike the act of revealing oneself, apprehending a sexual scene is an act that one can exercise in the name of the State.

Thus, the history of public modesty is the history of complex and polymorphous techniques by which the State’s gaze rendered the population’s sexuality into spectacle. It is therefore not only the history of the way in which the State appropriated its own power to see but also of the forms by which the State harnessed human
eyes to quench its “scopic desire” and how it came to realize that its fictive gaze became the object of desire of those it was supposed to monitor. The most recent reforms did not transform this institutional production of the gaze according to and in the frame within which we see and are always seen. In this sense, the history of public modesty is a kind of genealogy of our visual perceptions, a way in which to comprehend the notion that to see is less an act by which the world discovers itself within consciousness than an event that engages us as political subjects.

**Producing spaces**

But the history of public modesty/decenty is also the history of those practices that the judiciary undertook in order to produce spaces, that is to say, techniques by which they succeeded, thanks to sexuality, in transforming physical places into institutional spaces.

Between the 1810 Penal Code and the reform of 1992, by appealing to fiction or to forms of analogical reasoning, judges transformed the nature of places in which sexual scenes used to be enacted. In order to endow themselves with the capacity to transgress the rules that obligated them to respect the frontier between the public and private worlds, they made believe that an act in a specific space in fact took place in another. So as to displace the wall’s frontiers, they pretended that the wall displaced itself on its own, for it was truly necessary to justify the quasi-magical operation in which they were engaged: the metamorphosis of space. Was it not a task befitting the Titans to rule that a room under lock and key, invisible to the exterior, was a public space comparable to a voting booth or a church during mass, using only the logic that, of the three people present, one had not given consent to witnessing a sexual act?

Indecent exposure made it permissible to unify distinct places—a street and an apartment, for example—into one single space and to pretend that an opening existed even in a wall with no physical cracks, to presume that closed theaters were in fact open. It considered scenes that took place in locked bedrooms as if they had occurred on the street, and those that occurred on deserted streets as if they had occurred in a theater full of people, but spectacles performed in front of hundreds of people to be private.

Far from having obeyed an arbitrary subject, this ingenious, constant and cumulative jurisprudence was promoted by a careful and
never-failing logic. The courts took recourse to comparisons, analogies, fictions, that were stabilized, widespread and commonplace, and were not devoid of foundation.

These practices eventually not only constructed sexuality as an ensemble of comportments but also as a matrix of production of institutional spaces, which were substituted for real places—as it so often occurs in legal texts. And it is in this institutional space constructed by the courts over the last two centuries that our sexuality is always situated. Despite the 1992 reform the distinction between the spaces has remained intact. Thus, we live in a sexual space that judges have incrementally constructed since the beginning of the nineteenth century without ever having raised, during the last reform of the Penal Code, the issue of either its artificiality or its relationship with the society that we sought to leave behind.

In this sense, the history of public modesty can be seen as an archeology of contemporary sexual scenography. This history allows us to comprehend how the law has constructed the sexual spaces that we still inhabit, in ignorance of what we owe it—as much in understanding the limits the law imposes on us as being aware of the pleasures that it affords us.

Notes