

Liberty and the Normative Force of the Law in Montesquieu's *The Spirit of the Laws*

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Abstract

The aim of this essay is explore what demands living in liberty places on citizens in Montesquieu's *The Spirit of the Laws*. In contrast to the ideas of liberty from many of the thinkers that were to follow him, Montesquieu's notion of liberty requires that citizens subject themselves to the regulative relationships required by his normative conception of the law. For Montesquieu, living in liberty is not just a situation in which one avoids what the law forbids and is otherwise left 'free' without interference and coercion. For Montesquieu, liberty is a positively elaborated ideal with normative demands and a set of "necessary relations" that citizens must form. The result is that a life of liberty is defined in a significant way by the laws that bind a citizen because liberty is not the freedom to construct different ways of life, but the freedom to live securely within a particular way of life. I highlight this overlooked feature of *The Spirit of the Laws* by mobilizing Aron, Althusser and Durkheim's work on the law in Montesquieu to draw out the implications of Montesquieu's notion of law for liberty.

We must face up to the implications of this theoretical revolution. It presupposes that it is possible to apply a Newtonian category of law to matters of politics and history. (Althusser, L. *Politics and History*, 34)

Part of the joy and frustration in dealing with Montesquieu's *The Spirit of the Laws* lies in that it is work of tremendous innovation. It is exciting to deal with a host of new ideas being sorted out by a thinker who was committed to their originality and struggled with the vocabulary and structure to give them voice. Besides the excitement there is also the frustration that many have felt when Montesquieu's ideas lacked the clarity that would allow them to make complete sense

of them. Although an older commentary, Levin's *Political Doctrine of Montesquieu's* perhaps gives the most direct voice to the puzzlement and exasperation that boils up in many secondary sources, "An essential preliminary task in presenting the political doctrine of the *Esprit* is to disentangle it from the chaotic mass of good things gone astray in which it is embedded" (Levin 1936, 1). In another example, Rahe remarks that Montesquieu's definition of liberty is "puzzling" (2009, 33), while Richter calls it "notoriously ill-phrased" (1977, 95). Amidst this general agreement that parts of the text are somewhat opaque, it can be hard to draw a definitive line between what is unclear in *The Spirit of the Laws* (henceforth *Esprit*) and what is just insufficiently understood. Certainly, the line passes back and forth as interpretive arguments progress, pushing us to see that an assumption of ambiguity or vagueness in the text is really just an oversight by the readers, or that points that had been assumed to be clear are really more opaque than one might have believed.

My aim here is to move new elements in the relationship between law and liberty from the 'Puzzling' column to the 'Clear' column. I provide new perspective on the relationship between law and liberty through approaching Montesquieu's idea of liberty from an odd angle. Many of those who have explored Montesquieu's doctrine of liberty are approaching Montesquieu from a liberal point of view; one of the best examples of this is Pangle's *Montesquieu's Philosophy of Liberalism*. Pangle ascribes Montesquieu a forerunner's spot in the history of liberalism and certainly one cannot deny that Montesquieu had a tremendous influence on the history of liberal thought. However, we should also be attentive that *Esprit* predates the category of 'liberalism'; Larrère points out that the term 'liberal' did not appear until 1750, while *Esprit* was published in 1748 (Larrère 2009, 280). I do not raise this issue to undermine or invalidate the previous work on Montesquieu and liberty by liberals, in fact this essay builds off that work, but I raise this issue to point out that Montesquieu did not see himself as working within a liberal orthodoxy and we should not expect all of his work to conform to the basic tenets of liberalism. This essay

extends Montesquieu's work on liberty in ways that would be unexpected if we were to understand him as a liberal, so I raise the issue of Montesquieu's relationship to liberalism in order that we might leave open space for him to deviate from the positions that one might expect from a liberal.

Instead of approaching Montesquieu's notion of liberty from a liberal point of view, I approach it with an interpretation highly influenced by the French Marxists and sociologists Durkheim, Aron and Althusser. These authors investigate Montesquieu with a different focus than many other commentators on Montesquieu do. As thinkers working in the tradition of Marxist theory, the notions of individual freedom that Montesquieu put forward were not of primary interest to them, but as sociologists, they were quite interested in his work on the scientific laws that govern human life and society. These sociologists focus on his notion of the law, which allows him to reveal "the nature and arrangement of the elements composing [societies]" (Durkheim 1960, 13).

By approaching Montesquieu's notion of liberty through the French sociologists' work on law, we can come to see new facets and implications of Montesquieu's work on liberty that derive from his normative and relational view of the law. Durkheim, Althusser and Aron all stress the normative quality of law for Montesquieu and emphasize that the law is not just something that forbids particular actions but prescribes a particular nature or norm to them:

Most of the rules he sets forth are truths—stated in another language—which science had already proven by its own methods. He is concerned, not with instituting a new political order, but with defining political norms (Durkheim 1960, 17).

My contention is that the implications of Montesquieu's adoption of a normative conception of the law on his idea of liberty have not been fully explored, especially in terms of the

requirements it places on the individual. The aim of this essay is explore to what demands living in a free nation places on citizens in Montesquieu's *The Spirit of the Laws* when the full ramifications of a normative form of the law are taken into account. In contrast to many of later liberal thinkers, Montesquieu's notion of liberty requires that the citizen subject themselves to the regulative relationships required by his normative conception of the law. Living in liberty therefore is not just a situation in which one avoids what the law forbids and is otherwise left to construct a life without interference and coercion. For Montesquieu, liberty in each nation is a positively elaborated ideal with normative demands and a set of "necessary relations" that citizens must form. The result is that a life of liberty is defined in a significant way by the laws that bind a citizen because liberty is not the freedom to construct different ways of life, but the freedom to live securely within the norms that govern a particular way of life.

My concern with Montesquieu's notion of liberty is not just antiquarian, it also derives from an effort to grapple with the notion of liberty in our own time. Many thinkers have commented on the contemporary prevalence of normative institutions and laws, including Foucaultians, feminists, race theorists, critical theorists and others:

With this new economy of power, the carceral system, which is [discipline's] basic instrument, permitted the emergence of a new form of 'law': a mixture of legality and nature, prescription and constitution, the norm. [...] The judges of normality are present everywhere. We are the society of the teacher-judge, the doctor-judge, the educator-judge, the 'social worker'-judge; it is on them that the universal reign of the normative is based; and each individual, wherever he may find himself, subjects to it his body, his gestures, his behavior, his aptitudes, his achievements (Foucault 1995, 304).

It has been a topic of recent interest to consider how freedom can be conceptualized and practiced in a society that operates on extensive networks of normative forms of power. Authors

such as McWhorter (2009), May (1994) and Winnubst (2006) have attempted to work through a notion of freedom commensurate with the exercise of normative power. Montesquieu offers us the advantage of an account of liberty informed by different historical concerns than our own. His difference from the present is the benefit he offers us in terms of the possible tools to escape the confines of the conceptual universe that binds our thought and to begin thinking in new ways that might dislodge some of the problems that confront us. Although this essay will not have the space to deal with this contemporary literature on normalizing power and liberty, my hope is more historical work like this will enable new thinking on the subject.

This essay will proceed in four parts. First, I use Aron, Durkheim and Althusser to flesh out the ‘proto-sociological’ approach Montesquieu took to politics and the impact it had on his idea of the law. I explore why, if we are to accept the sociologists’ interpretation of the law in Montesquieu, we need to expand, but not necessarily refute or reject, much of the current thinking about his doctrine of liberty. Next, I flesh out the implications of a normative understanding of the law for Montesquieu’s notion of liberty. Finally, I conclude by reviewing current literature on Montesquieu’s ideas of liberty in light of the contributions of this essay.

Part I: The Law

This section deals primarily with Montesquieu’s account of the law in a way that is deeply influenced by the French sociological tradition. This is not to say that many of these same ideas on the normative role of the law cannot be found in other interpreters but that it is typically neither emphasized nor explored as deeply it is in the French thinkers, who make it a central concern. My aim here is to develop a notion of how the law operates in Montesquieu so that we are in a better position to evaluate the full extent of the meaning of liberty as “the right to do everything the laws permit.” (Montesquieu 2006, XI.3).

Law is often used in two quite different ways in theoretical discourse. In a negative or juridical usage, law typically exercises a forbidding function in the sense of outlawing a certain action. In this case, ‘law’ serves only to express a relationship of limitation in which, out of all possible actions, an individual is forbidden from carrying out the action forbidden by the law. For instance, a law might prohibit jaywalking or robbery but it would leave all of the other possible actions a person might undertake equally open for the individual to choose between. This is not the notion of the law Montesquieu had in mind and one can miss important aspects of his idea of liberty by approaching his understanding of law as a jurist might (Richter 1977, 67).

In a second usage, law denotes a positive or normative relationship between two or more things—this notion of law is generally associated with the sciences. Montesquieu writes, “Laws, taken in their broadest meaning, are the necessary relations deriving from the nature of things; and in this sense, all beings have their laws: the divinity has its laws, the material world has its laws, then intelligences superior to man have their laws, the beasts have their laws, man has his laws” (Montesquieu 1989, I.1). Law in this case does not describe so much what is forbidden as much as it describes exactly what something must do, how it must necessarily relate to the world around it. The planets follow the path of their regular orbit, just as water must boil when it is sufficiently heated, and human beings are of the nature to seek out each other’s company; all of these parts of nature follow the “necessary relations” that “derive from the nature of things.”

Montesquieu again emphasizes that the law describes the norms within which relationships between things unfold in their positivity in the following quote: “laws are both the relations that exist between it and the different beings, and the relations of these various beings to each other” (Montesquieu 1989, I.1). In comparison with a juridical usage of the law that bans one action but leaves all the others free, the normative usage of the law prescribes the way an object must act

and makes the other options impossible. Althusser highlights this normative usage of the law as revolutionary in the history of politics and history:

We must face up to the implications of this theoretical revolution. It presupposes that it is possible to apply a Newtonian category of law to matters of politics and history. It presupposes that it is possible to draw from human institutions themselves the wherewithal to think their diversity in a uniformity and their changes in a constancy: the law of diversification and the law of their development (Althusser 2007, 34).

In *Esprit*, the law works like a kind of regularizing joint or hinge that defines how one thing can articulate itself in reference to another. Laws describe the web of relationships that, taken as a whole, define the persistent and positively articulated character of possibility, the “necessary relations” that define our world.

Key here is to realize that Montesquieu sees the law prescribing for human beings a set of norms according to which they relate to the rest of being. Just as a scientist might describe the path a cannonball would follow if it came in contact with a certain force, Montesquieu wants to be able to describe the normative path that human society would follow given certain influences:

Many things govern men: climate, religion, laws, the maxims of the government, examples of past things, mores, and manners; a general spirit is formed as a result.

To the extent that, in each nation, one of these causes acts more forcefully, the others yield to it. Nature and climate almost alone dominate savages; manners govern the Chinese; laws tyrannize Japan; in former times mores set the tone in Lacedaemonia; in Rome it was set by the maxims of government and the ancient mores (2006, XIX.4).

Montesquieu is careful to note that the influences on human beings are many, so that a scientific study of the laws that shape human behavior has to be complex and take into account many different causes and their interactions with one another. Nonetheless, the project to reveal the nature of the relationships that govern human beings is possible, even if exceedingly difficult.

Montesquieu calls the host of all the regulative forces that govern a nation the general spirit. The general spirit is not one influence among many but the aggregate total of all of the many lawful forces acting on a group:

The general spirit, then, is not a partial cause comparable to the others, but a product of that totality of physical, social and moral causes. [...] The general spirit is not a ruling, all-powerful cause which would do away with all of the others. It is, rather, that quality which a given collectivity acquires over a period of time as a result of the variety of influences upon it (Aron 1968, 45).

The general spirit is like the resultant force vector that an object follows when it is acted upon by multiple forces; many forces may act upon an object to push it in different directions but, ultimately, the object can only follow one path, which is the result of the many different forces pushing upon it. It is the human scientist's job to work with this general spirit and come to understand the component parts that resulted in its final direction, to understand the "necessary relations" that together create the general spirit.

Aron, Durkheim and Althusser are all keen to emphasize that in Montesquieu human life and human societies follow normative laws because this notion of the law makes the human sciences possible. If human beings operate in relationships that follow certain normal or regular paths, then one can work to discover the norms and their causes that define any particular society. For instance, if one were to study a variety of human cultures in hot climates and notice that they are

prone to despotism as Montesquieu does, then one might hypothesize that the heat is related to the despotism:

The heat of the climate can be so excessive that the body there will be absolutely without strength [...] most chastisements there will be less difficult to bear than the action of the soul, and servitude will be less intolerable than the strength of spirit necessary to guide one's own conduct (Montesquieu 2006, XIV.2)

In this quote, Montesquieu traces the lassitude and lack of self-governance in hot climates to the action of the heat on the body. It is because that heat has a regular or normal range of effects on the body that he feels confident in voicing his results. However, if the law just worked negatively to forbid certain actions then one could not constitute a science because, outside of what was forbidden, what was actually done would be arbitrary and without rule:

If we assume, however, that there is no such causal relationship and that the effects can be produced without a cause or by any cause whatsoever, everything becomes arbitrary and fortuitous. But the arbitrary does not admit of interpretation. Hence, a choice must be made: either social phenomenon are incompatible with science or they are governed by the same laws as the rest of the universe (Durkheim 1960, 10).

Here Durkheim argues that it is imperative to notice that Montesquieu's notion of the law is normative and prescriptive, otherwise we lose what makes his study unique as a first attempt at forming a human science.

What has been discussed so far is law in the most general sense. We need to transition now from an exploration of an undistinguished and general notion of the law to an elaboration of Montesquieu's notion of positive law because it is positive law that is of most value in sorting

out liberty. As we will see, when Montesquieu speaks of the law in relation to liberty, he is referring to positive law (2006, XI. 3).

A section from Montesquieu in the opening book is helpful for beginning to understand positive law in its specificity from other types of law:

These rules are a consistently established relation. Between one moving body and another moving body, it is in accord with relations of mass and velocity that all motions are received, increased, diminished, or lost; every diversity is uniformity, every change is consistency.
Particular intelligent beings can have the laws that they have made, but they also have some that they have not made (2006, I.1).

Human beings have many laws that they are subject to that they have not made and have no ability to alter—every child who tries to fly by jumping off of the garage is reminded of just how little effect their will has on some laws—but human beings also make some of their own laws and have the ability to create, modify and destroy them; positive laws fall into the latter category. In the above quote, Montesquieu gives voice to a dissymmetry in law in terms of its origins—human beings create some laws, like positive law, while they inherit other kinds of laws—while also establishing a symmetry in that they both create the necessary and binding relationships between things that makes every diversity a “uniformity” and every change a “consistency.”

As a result of the normative character of created laws, these “made” laws have an interesting reflexive property. The reflexive property of human created laws are due to the way that they are established as a result of the way other laws govern human beings and they also come themselves to establish a governing relationship, acting back on the general spirit that formed

them. In other words, the laws that people make are expressions of the general spirit that then come to compose and alter that general spirit.

We must be careful, as positive law is not the only law that people create that in turn acts back on them to regulate their future behavior. We must distinguish positive laws from these other forces. Here, Montesquieu distinguishes positive law from manners and mores:

Mores and manners are usages that laws have not established, or that they have not been able, or have not wanted, to establish. The difference between laws and mores is that, while laws regulate the actions of the citizen, mores regulate the actions of the man. The difference between mores and manners is that the first are more concerned with internal, and the latter external, conduct (Montesquieu 2006, XIX.16).

Laws, mores and manners are all three human made laws that create binding norms for human relationships. Positive law forms a subset of these human created laws that is unique in that establishes the relations that regulate people in their guise as citizens; in other words, the positive laws regulate people insofar as they are subjects of a particular public or state apparatus. Positive law carries the weight of establishing the necessary relations between the individual, other citizens and the state. When positive law works well it establishes relations that build the unity of the citizenry and the state:

We have just seen that the laws of education should have a relation to the principle of each government. It is the same for the laws the legislator gives to society as a whole. This relation between the laws and the principle tightens all the springs of the government, and the principle in turn receives a new force from the laws. Thus, physical motion and action is always followed by a reaction (Montesquieu 2006, V.1).

Here Montesquieu is concerned to point out that legislation will alter the relationships between the citizenry and the state and care must be taken in crafting the law so that it strengthens that relationship and “tightens all the springs of government.” If the positive laws are in harmony with the principle of the government, then it will work to reinforce the government by strengthening or creating relations with the citizenry that reinforces its guiding principle. Likewise, we can invert his proposition to conclude that a law that is created according to a principle counter to that of the current government will require relationships to be established that will undermine the government, weaken it and deplete its forces.

It is precisely because the laws establish a host of necessary relations that legislators have to be wise in crafting them; a positive law impacts, to a greater or lesser degree, the relations that exist between things within the nation. When one creates a positive law, one puts in place a set of norms that will interact with all of the other forces acting on human society and the legislator must take care that the effect is positive. Put otherwise, the spirit of the laws interacts with and modifies the general spirit and so those that craft positive laws need to be careful to create laws that will have the proper effects on the general spirit:

Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another. Laws must relate to the nature and the principle of the government that is established or that one wants to establish, whether those laws form it as do political laws, or maintain it, as do civil laws.

They should be related to the *physical aspect* of the country; to the climate, be it freezing torrid, or temperate; to the properties of the terrain, its location and extent; to the way of life of the peoples, be they plowmen, hunters, or herdsmen; they should relate to the degree of liberty that the constitution can sustain, to the religion of the inhabitants, their inclinations, their wealth, their number, their commerce, their mores and their manners; finally, the laws are related to one another, to their origin, to the

purpose of the legislator, and to the order of things on which they are established. They must be considered from all these points of view.

This is what I undertake to do in this work. I shall examine all these relations; together they form what is called THE SPIRIT OF THE LAWS (Montesquieu 2006, I.3).

This quote from Montesquieu reveals that positive laws are a normative force on human beings but that positive law is not the only normative force. Positive law comes into being in a situation in which there are always already other normative influences. The climate, the terrain, wealth and other factors exhibit a regulative and shaping influence on human beings; “a wise legislator” would recognize these other normative factors and seek to create positive law that interacts with them in the desired way to produce a beneficial result (Montesquieu 2006, VI.13). A positive law created in one country may not have the same effect as the same law in another country with different forces at play; for instance, Montesquieu remarks that a Roman law forbidding “men to keep more than sixty sesterces in their houses” was a great success in Rome while in France a similar law “was catastrophic” (2006, XXIX.6).

Montesquieu’s analysis of the effects of positive law is not a simple one; he does not just confine his study of the relations established by a law to those to the explicitly named in a legislative text. Montesquieu recognizes that laws have effects beyond their intended consequences and beyond what the text may explicitly state: for example, positive laws set precedents for other laws and alter the course of future legislation; they interact with other positive laws to have a combinatory effect that is beyond what either of the them would have had alone; a positive law may have a symbolic effect that inflames or pacifies a nation; laws may encourage shifts in manners, mores and/or religion that will impact the stability of the government, etc. When Montesquieu considers positive law he does not restrict his analysis of its effects to those immediately created in the letter of the law, but he looks at it the law as establishing a set of

relationships, only some of which might be named in the body of the law. As a result, Montesquieu argues that he is not so much worried about whether a law belongs in particular category or another but with the spirit of the law, the total effect it has in terms of establishing regulative relationships within the nation:

I have made no attempt to separate political from civil laws, for, as I do not treat laws but the spirit of the laws, and as this spirit consists in the various relations that laws may have with various things, I have had to follow the natural order of laws less than that of these relations and of these things (2006, I.3).

Here we learn that Montesquieu is not interested in chasing after the ideal stated by the law as much as what it establishes in practice—a set of relations that is likely much larger than what the text is likely to reflect. Here the spirit of the law is similar to the general spirit, both are terms are meant to capture to the totality of the effective regulative laws established. Montesquieu wants to capture the “spirit of the laws” in terms of the entirety of effects a law has on society.

What we need to take away from our discussion of law to our next section on liberty is that positive laws do not just forbid certain actions; positive laws exert a normative power over citizens to compel them to establish particular relationships with the world around them. Although an unwise legislator may not recognize the way that their law will work to necessitate new relationships and modify existing ones, their laws will nonetheless have those effects. Positive law creates an obligation on the part of the law-abiding citizen that extends far beyond just avoiding what the law forbids; following the law means entering into relationships that require one to articulate oneself in a particular way in regards to any number of possible objects: other citizens, one’s wealth, marriage, property, etc. Positive law creates relationships that exert a regulative and normative impact on the citizen’s life that will alter its necessary character and, considered in aggregate, the character of the nation.

Part II: Liberty and the Law

In this section, we will revisit Montesquieu's ideas of liberty—which are based in part on his notion of the law—making sure to keep at the forefront of our analysis the normative qualities of the law. Liberty has two primary facets for Montesquieu, liberty in relation to the constitution and liberty in relation to the citizen; we will have to look at both facets in order to flesh out the full implications of his notion of law for liberty. Liberty in relation to the constitution details how the government must be arranged in order to permit liberty, while political liberty discusses how this liberty will appear in relation to the individual citizen.

Liberty in relation to the constitution is described in four lines:

It is true that in democracies the people seem to do what they want, but political liberty in no way consists in doing what one wants. In a state, that is, in a society where there are laws, liberty can consist only in having the power to do what one should want to do and in no way being constrained to do what one should not want to do.

One must put oneself in mind of what independence is and what liberty is. Liberty is the right to do everything that the laws permit; and if one citizen could do what they forbid, he would no longer have liberty because the others would likewise have this same power (Montesquieu 2006, XI.3).

The first line of each paragraph reminds us that liberty is not a freedom to do whatever one wants; in other words, liberty is not independence. Independence bears a complicated relationship to liberty. While independence might seem to be the freest form of existence, in practice it is not. Although when one is independent one is not limited from undertaking any particular actions by positive law, one's independence disrupts the rule of law and opens one up to exploitation and coercion by others who may also decide not to follow the law:

For Montesquieu, the purpose or nature of government in general is the creation of security, or freedom, for its citizens—freedom from domination and from threat of death or attack by other men. The purpose of government is to use the power of the state to suppress the natural war among individuals (Pangle 1973, 49).

In this sense, it is the law that creates a zone of liberty because the law is not so much a limit to freedom as what makes it possible through creating security. Without the law, one would not be free from the unjust and coercive interference of others and hence, one would have to live in a relationship of fear with the world. The law is not truly a limit on freedom but it is what makes untroubled liberty possible, “Life under the law is the only life which is secure and therefore free” (Pangle 1973, 110). At the same time, independence is not free because it implies a freedom from the law that would put one at risk of harm from others.

The second sentences in both paragraphs on constitutional liberty speak to the relationship of liberty to the law and are of central interest to us. We should keep in mind what was just said in regards to the law: Montesquieu does not understand law in the sense a jurist might, what “the laws permit” is not just the sum total of things that are not forbidden. What “the laws permit” in different political situations is positive and normatively defined; it comprises a list not just of what one should not do but the relationships that must be maintained. This becomes even clearer if we look to the first formulation of liberty in the quote, “the power to do what one should want to do.” ‘What one should want to do’ highlights the normative character of the law in relation to space for action protected by liberty. After all, Montesquieu does not say that liberty is not doing what the law says one should *not* do; liberty is undertaking the positive action that one should want to do.

What should one want to do? We must recognize that for Montesquieu the law is not only normative but it is also variable from society to society. For Montesquieu, the spirit of the laws and the relations that they demand are different when different governing relations are present. Different climates, terrains, ways of life, religions, numbers of inhabitants, commerce, mores and manners all are part of the variable general spirit that determine what type of political regime is developed. Depending on the mix of forces that makes up the general spirit, one can end up with a number of different political regimes: a republic, monarchy, despotism or a hybrid of them. The importance of this to liberty is that what “one should want to do” will be different depending on which type of regime one lives in. For instance, Montesquieu argues that in a monarchy one must live for “honor,” while in a despotism one must live in “fear,” while in democracy one must live in “virtue” (Montesquieu 1989, III.6; III.9; III.3). The citizenry of different types of regimes need to be differently constituted and maintain a different spirit for the regimes to be successful. A monarchy is unlikely to be successful, for instance, if the people in it behave as if they were in a democracy. So, although liberty consists in “having the power to do what one should want to do,” what this means in practice will differ as the character of the laws differ in their normative impact:

Given the type of state, the system of laws must follow. Montesquieu follows the causal sequence still further. Not content to show that the laws depend upon the form of the society, he seeks out the causes upon which the form of society itself depends and, among these causes, the one that plays the major role, that is, the volume of the society (Durkheim 1960, 37).

Unlike the American *Bill of Rights*, liberty for Montesquieu does not consist in any cross-cultural or transnational set of rights or protected list of activities; what one should do, and hence what is protected, will differ depending on the regime. Liberty is life within the set of required relations

that is determined according to the nature and principle of the regime that the individual lives under.

In relation to the constitution, liberty will be made manifest in a nation if the structure of a government compels its officials and the people ruled by it to act within the norms required by the law; in other words, liberty will reign if the constitution can compel people to do what they ought to do. To do this, the constitution must establish a governmental structure that encourages adherence to the particular normative qualities that make that society what it is. For instance, Montesquieu writes that a democracy must be motivated by a “love of equality” (2006, V.3). The love of equality is the desire to neither be lesser nor greater than others in the republic, whether in terms of wealth, power, or otherwise. For the reason of equality, Montesquieu argues that a democracy is most naturally formed and maintained when the lands are divided as equally as possible and the people have a desire for frugality and so do not desire to become wealthier than one another (2006, V.6). It is the role of the constitution of a democracy to make sure that the basis for society remains hospitable for democracy because “inequality will enter at the point not protected by the laws, and the republic will be lost” (2006, V.5). Without the material, social and economic basis for a democratic society remaining intact, the society would be subject to upheaval and social transformation—all of which threatens security and stability and opens the individual to lawless actions by others. Through our emphasis on the normative quality of the law, we can see that making sure that people do what “they should want to do” involves maintaining an extensive set of social norms. A free nation must have the ability to maintain its normative standards by compelling its citizens to act according to the relationships defined by the law, otherwise the society will falter, the rule of law will fail and people will be subject to the coercion and violence of others.

Before we move on to liberty in relation to the citizen, we need to complicate this notion of liberty in relation to the constitution yet further. For, although the constitution must preserve the normative basis of society, in other words, keeping people doing what they ought to do, there are many forms of government that cannot achieve this task. There is a functional contradiction in trying to get most of the forms of government to embody liberty. Most obviously, despotism is a political system constructed around the whims of an all-powerful leader who rules based on fear. Such a government cannot be held to a constitution as the despot cannot be reliably held to it; despotism "has no rule" of law but only the rule by a despot who "is strong only because he can take life away" (Montesquieu 2006, II.8). Such a society has no stable law, no stable order and little in the way of security for its citizens. So, although constitutional liberty is at one level compatible with all sorts of varied political regimes in that its aim is to maintain the rule of law, in practice there are not many types of regimes in which power is distributed in such a way that all of the members of the government can reliably be held responsible to the law.

The failure of liberty in certain types of regimes is interesting for what it says about the inability of those regimes to maintain their own normative basis. In nations whose form is inherently hostile to liberty—despotism especially but also democracy and aristocracy—the norms that compose the state are constantly being undermined and transformed (Montesquieu 2006, XI.3). Such unstable regimes constantly cause their own downfall because they cannot maintain the rule of law, they cannot maintain adherence to the necessary relationships that define their particular form of government. In their inability to maintain the rule of law, where law reflects not just certain forbidden actions but also the spirit that makes the regime what it is, these nations destroy their own basis. In the case of democracy, the heavy handed and abusive pursuit of virtue can undo liberty: "Who would think it! Even virtue has need of limits" (Montesquieu 2006, XI.4). The over-aggressive pursuit of the virtue of each citizen can put the moral police in a powerful position that they can use to undermine the power of their fellow citizens and set

themselves above them. One can imagine how impossible it would be to maintain an equal and democratic balance of power if those with whom one was disagreeing with had the power to, say, burn one at the stake for heresy. Likewise, a lack of moral authority in a democracy can cause the degeneration of the virtue necessary to a democracy and “When that virtue ceases, ambition enters those hearts that can admit it, and avarice enters them all” (Montesquieu 2006, III.3). A democracy is predisposed to become an aristocracy or despotism either by giving someone the too great power to monitor and enforce virtue or it is prone to the birth of ambition through a lax enforcement of virtue. Either way, democracy is prone to undermine the very norms that sustain it—just as the other immoderate regimes are as well. As a result, a democracy is not a nation that can exist in liberty as it tends to promote its citizens doing what they should *not* want to do, “Democracy and aristocracy are not free states by their nature” (Montesquieu 2006, XI.4).

Montesquieu’s analysis of the English constitution makes sense in this light as it is a constitution that has “political liberty for its direct purpose” by insuring that everyone follows the law (2006, XI.5). The English split their government into three branches, the executive, legislative, and the judicial, in order that each of the three parts might exercise a check on each other’s power to act outside of the law. The English constitution is an exemplary execution of liberty: it provides a series of powers that force each other to act according to the law.

The English constitution works to uphold liberty not just by preventing certain individuals from doing what is forbidden, it also directs them to act in consonance with the general spirit of the nation:

The form of these three powers should be rest or inaction. But as they are constrained to move by the necessary motion of things, they will be forced to move in concert (Montesquieu 2006, XI, 6).

In this quote, Montesquieu describes the way that government works in the terms of physics: government must be made to follow the “necessary motion of things”, to have a certain kind of motion that follows a prescribed path. In the case of the English constitution, it requires all three powers to act in “concert,” to act in harmony with the general spirit. Any power that sought to act to increase its share of the power would be opposed by the other two powers thus insuring that all of the parts of government act within their sphere and according to its prescribed function. Liberty in the constitution exists when the government is constructed in such a way that people do what they ought to do, which is not just to avoid breaking the law, but adhering to the normative spirit of the laws.

The second aspect of liberty, political liberty, “consists in security or, at least, in the opinion one has of one’s security” (Montesquieu 1989, II.2). If liberty is taken care of at the level of the constitution by insuring that the government must follow the law through a system of checks and balances, then the citizen’s security should not be threatened by the abuse of power by government officials. However, security may still be threatened by private citizens who seek to manipulate the power of the government with false accusations: “this security is never more attacked than by public or private accusations. Therefore, the citizen’s liberty depends principally on the goodness of the criminal laws” (XII.2). Proper enforcement is important for the obvious reason that if one is falsely accused while one is doing what one should, then one’s ability to do what one should, i.e. one’s liberty, is roundly under attack.

Montesquieu’s concern for security goes beyond moderating government power and preventing false accusations; his concern for security extends to the much broader field of the general maintenance of social norms. Montesquieu tasks it to the police to maintain order and security: “I restrict crimes against tranquility to the things that are a simple breach of police; the ones that,

while disturbing tranquility, attack security at the same time” (XII.4). To understand this last quote and its implications for liberty, we must understand that the police in France during the 17th and 18th centuries are not the same police of today. Foucault, in his recently published lecture course *Security, Territory, Population*, spends a significant portion considering the role of the police in the 17th and 18th century, especially in France. He most generally defines the role of police as “the set of means by which the state’s forces can be increased while preserving the state in good order” (2007, 313). Already this should indicate to us that the police are not primarily about upholding negative state power in the form of interdictions; the police aim to create a general situation in which the state’s forces are maximized and kept in good order, i.e. they maintain the general spirit. The tactics used by the police centered on regulation, the transformation of a situation to meet certain normative goals:

We are in a world of indefinite regulation, of permanent, continually renewed, and increasingly detailed regulation, but always regulation, always in that kind of form that, if not judicial, is nevertheless juridical: the form of the law, or at least of law as it functions in a mobile, permanent, and detailed way in the regulation (Foucault 2007, 340).

A “breach of the police” is a breach of the good order, the specific order of improvements that the police are constantly seeking to deploy and then improve upon. Montesquieu’s discourse on law in the section on liberty should be striking indication to his reader that liberty is not a place where one can do whatever one wants as long as it is not forbidden. Liberty is a situation in which one is secure in doing what one should and that security is provided by a whole series of forces that seek to maintain the spirit of the laws and the general spirit.

It is at this point the emphasis on the operation of laws in a normative fashion begins most obviously to produce new insight into Montesquieu’s idea of liberty. Liberty for Montesquieu is

not a liberal non-interference or independence, it is the ability to freely act out one's life as long as one constrains oneself to act according to the norms that the laws spell out. Liberty does not consist in an infinite number of possibilities to become whatever one would like to be; liberty consists in a certain number of ways of living a life in concert with the spirit of the laws. Living in liberty is doing what one "should want to do," which is defined following the "necessary relations" that stem from the laws. If people act outside of the law and establish relations with things, fellow citizens, or between the government and the governed that strike against the norms established by the law, then liberty is threatened in its relationship to the constitution and the individual citizen. If one is setting up illicit relationships then one is undermining the spirit on which the government rests by developing connections that follow another spirit.

As a result of Montesquieu's examination of the normative laws that sustain particular types of societies, he defines security as the maintenance of those norms through government moderation and the policing of those norms. Security could not be maintained through just preventing illegal actions—for instance, the fact that most people are not robbed does not imply that people are acting according to the principle and nature of the nation—security is only maintained when the unique spirit of the nation holds strong and constrains the relationships that people form to work within the spirit of the laws. Due to the specificity with which governments define norms via the law, living in liberty may be quite difficult, constraining, and involve constant work to embody successful conduct as defined by the law. For Montesquieu, liberty involves the whole of society, from the government, to commerce, to individuals in their manners and mores acting in consonance with the normative relations that make the collectivity what it is. As we noticed, certain political forms are not able to sustain their own spirit and so they fall to revolution and change of that nature and so those regimes cannot maintain the security that liberty consists in.

Liberty in Montesquieu may seem off to those of us that grew up in the liberal nations of the west. Liberty is certainly not defined by maximizing non-interference by the government or one's neighbors; liberty is the freedom to live in a secure, stable regime in which one can count on the law being followed and, hence, the spirit of the nation continuing on. This liberty is a liberty of peace, regularity and constancy. The type of liberty that Montesquieu favors does not work by making the maximal allowable room for difference and pluralism within the nation, for one to constitute oneself, one's life and one's family however one would like without interference from one's neighbor. Of course, certain differences of social class, occupation, etc. are necessary for a society to maintain its spirit—I am not arguing that Montesquieu puts in place a framework that encourages perfect homogeneity—but that the different social actors allowable within a nation are defined by its spirit which restricts the number and types of different social roles (Larrère 2009, 292-3). Where Montesquieu is most tolerant of difference and perhaps most seeks to protect it is in the plurality of norms that compose the different nations and necessitate different laws:

Different countries have different objectives. This is why political good is plural: there are as many political goods as their situations in place or time. This leads Montesquieu to reject the idea of a unique good, applicable to all places and times alike (Larrère 2009, 289).

This pluralism is difference preserved across nations, which means little in terms of the opportunities to an individual to construct different ways of life unless the individual has opportunities to emigrate to those nations. Montesquieu finds liberty reigns when the law and the norms it necessitates are followed. That in itself is freedom: the freedom to live one's life with the constancy, regularity and known expectations of enduring social norms.

Part III: Implications for Current Work on Liberty:

What this interpretation of liberty adds to the literature is a more detailed sense of the normative burden liberty places on the citizen in Montesquieu. Exploring Montesquieu's understanding of liberty in concert with the French sociologists' emphasis of the normative role of the law reveals the extensive restrictions that liberty places on one's possibilities to construct different forms of conduct by limiting one to live in compliance with the law. As I have understood law through the French sociological tradition, liberty is a normative framework that specifies a range of positively elaborated conduct and, as a result, acting within the law means much more than just avoiding what the law forbids. To some extent, this issue appears to be off of the radar of many of Montesquieu's commentators. Rahe, for instance, does not consider it all: he is certainly detailed on the restrictions and duties of the government in a free state but he does not detail how the people must constitute themselves as citizens to maintain liberty (Rahe, 2009). Pangle very briefly considers the issue in a paragraph of his book, *Montesquieu's Philosophy of Liberalism*, but when he does it seems to me that he relies more on a later liberal notions than on a close reading of *Esprit*:

Montesquieu identifies liberty with a life lived under the rule of law. A man is free only when he limits his doing as he wishes to activities not forbidden by law (Pangle 1973, 109-110).

This notion of liberty as the freedom to do whatever the law does not forbid might be found in Locke or Mill, but I do not think this is the idea we find in Montesquieu. Ultimately, I think Pangle might agree with me, as the little work he does on this subject is in significant tension with the more elaborate comments he makes later. At the end of the same chapter in which he is considering the importance of England in the *Esprit*, he ends by emphasizing that England is only able to maintain its liberty because its citizenry establishes the distinctive normative relationships that make liberty possible:

Montesquieu did not wish to simply mirror English society. He rather looked to what he believed to be the most portentous characteristics of England, the qualities and the spirit which he hoped and believed would shape the future of the world. The English constitution and its way of life is to be the guide, the polestar in political affairs (Pangle 1973, 160).

In contradiction to his earlier lines, here Pangle emphasizes that liberty is possible in England only because the citizenry have adopted a particular “way of life” that reflects a certain “spirit.” Although the rest of the world would not be able to adopt *tout court* the English spirit and way of life, they could still serve as a normative “polestar” from which others might begin to craft their own regulative ideals. Pangle’s insight here is spot-on in my estimation and it speaks to the argument I have made in this paper in terms of the relationship between the law and liberty; here he emphasizes that liberty requires adherence to certain norms guiding the way of life of the citizenry.

Although the issue of how the law constrains individuals to constitute themselves as free subjects has not generally been a focus in the interpretation of *Esprit*, we can see that Pangle is not alone in attributing a later liberal notion to Montesquieu:

Rather than assume the existence of a governmental prerogative to regulate human conduct in all areas not fenced off from interference by explicit legal protections, he preferred to adopt the view that citizens may only be compelled to do what the law obliges. Beyond that, they are by definition free (Carrithers 2001, 24).

Although Carrithers and Pangle generally have excellent readings of Montesquieu’s notion of liberty, I think a reflection on what obedience to the law requires does not let one interpret the burden of liberty on the citizen to be just avoiding what the law forbids. The law in Montesquieu does not just specify a few actions that one must not follow and leave all of the rest as equally

valid choices. The law prescribes the “necessary relations” that pertain between individuals and their world and so it places a much higher normative demand on the conduct of the individual. In regards to liberty, this means that doing what “one should want to do” and protecting the security of the citizen under the laws involves following a positively defined spirit.

In a larger context, the *Esprit* brings into relief the difficulty adjudicating between a collectivity that only is what it is because it adheres to certain norms and the freedoms promised by liberty that may well undermine those norms. Certainly, there are many people today in war torn and uncertain nations who would find it a great freedom to be able to wake up the next day and find out that the world is much the same as they left it when they went to bed. For them, Montesquieu’s focus on favoring the stability of the nation would have top priority. Freedom would make sense as security and lawfulness. However, many people may find the stability of their nations to be precisely what disturbs them in that the nation constrains them to a way of life they find demeaning, oppressive, and hostile. For these latter people, liberty may indicate the ability to challenge, change or disregard social norms in the creation of one’s own way of life—this is not a notion of liberty Montesquieu embraces. Montesquieu’s place in this debate is clear: he offers us a notion of liberty as security. In the *Esprit*, liberty is not to be found in the ability of individuals to act without interference and to conduct themselves with only the minimal constraint of avoiding what is illegal. Liberty is to be found in the security that comes with a protected, stable and enduring way of life in which the law remains constant and life is in many ways predictable.

Although Montesquieu’s notion of liberty may go against the grain of much of the common wisdom of liberal political practice today, I think it is a notion that we are much closer to than it might first appear. We are societies that give great credence to the social sciences. We seek answers for our issues in sexuality, family life, workplace dynamics, etc. from the social

sciences. These social sciences direct us to the environmental and genetic causes of our behavior so that we can understand, if not change, who we are. If human life and conduct reflect their lawful and regular responses to the forces around them, then it may well be that a more libertarian notion of freedom premised on the minimization of interference from others does not earn us much. After all, if we are constrained to act according to the laws that bind us, then giving a wide berth for the individual to conduct themselves outside of those norms is just to fight human nature. Our belief in the power of the social sciences to determine the causes of our behavior brings us closer than we might think to Montesquieu who apparently did not find much use in a definition of liberty premised on a freedom to create many different ways of life. If human life follows rules, then what else should freedom be besides the ability to follow those rules in security?

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