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Montesquieu and the parlement of Bordeaux.

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ABSTRACT/RESUMÉ.

This study provides an in-depth account of the practices of the Bordeaux parlement for the years 1714-26 as a background and prelude for an understanding of Montesquieu's political theory. The first chapter demonstrates that the discipline of jurisprudence in early eighteenth century France was in a state of transition and was to a large degree unreflective of new political realities. The discipline did not offer the intellectual resources needed to construct a compelling account of contemporary developments in the growth of the state and of its tools. In contrast, it is shown in chapters two and three that the magistrates of the Bordeaux parlement rejected standard principles of Roman law, constitutionalism and patriarchalism and fashioned their own particular form of political argument. This new form of argument, called 'associational discourse' by the author, has significant resonance in the work of Montesquieu. Chapter four shows how this theoretical disposition was developed more fully in Montesquieu's early writings. Chapter five in turn shows how this was articulated in its fullest form in his major work, L'Esprit des lois (1748). Chapters six and seven show how this new form of political thinking was to have an important effect on Montesquieu's comprehensive theory of criminal justice. In conclusion, it is suggested that this early-modern form of associationalist thinking points to an alternative to liberalist and communitarian positions, by the consideration that governments should be concerned for the moral strength of subordinate associations in their communities, while not being fully responsible for the exact content of the beliefs fostered within them.

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Cette étude vise d'abord les pratiques et les arguments du parlement de Bordeaux des années 1714 à 1726 pour traiter ensuite de la pensée politique de Montesquieu comme issue de ses expériences judiciaires. Le premier chapitre pose comme hypothèse que la discipline de jurisprudence au début du dix-huitième siècle en France était en voie de transition comme elle ne reflétait guère les grandes lignes de la nouvelle politique contemporaine. Dans les chapitres deux et trois, il est montré que les magistrats du parlement de Bordeaux ne se servaient plus des arguments traditionnels tirés des principes du droit romain, la pensée constitutionnelle ou la pensée patriarchiste. Au contraire, on voit dans les archives du parlement, l'émergence d'une forme nouvelle d'argumentation, ce que l'auteur appelle 'le discours d'association'. Dans le quatrième chapitre, on démontre comment cette approche a été développé par Montesquieu dans certains de ses premiers écrits. Dans le cinquième chapitre, il est montré comment L'Esprit des lois peut être lu comme une expression profonde et développement théorique du nouvel discours. Dans les chapitres six et sept, on démontre les liens entre cette nouvelle façon de penser la politique en général, et les réflexions de Montesquieu sur la justice criminelle. En conclusion, il est suggéré que le discours d'association nous offre une troisième voie pour penser la politique de la modernité. A l'encontre de l'école libérale, cette approche nous offre la possibilité de reconnaître que les gouvernements doivent être engagé à protéger et promouvoir l'intégrité morale des associations subordonnées, sans toutefois, et à l'encontre de l'école communautaire, avoir la responsabilité de légiférer le contenu des valeurs qui y sont nourris.

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In memory of my dear father,
Frederick Temple

Si l'ouvrage est bon, il appartient à tout le monde; s'il est écrit sur des matières importantes, il convient que tous les bons esprits aident les auteurs de leurs remarques et de leurs réflexions. Les vérités que je trouve sont à vous et celle que vous trouverez sont à moi; la vérité est comme la mer, que M. Loke (sic) appelle la grande commune de l'univers; ce n'est qu'avec la raison des autres qu'on devient soi-même raisonnable.

Montesquieu in a letter to the président Hesnault, February 1749.

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INTRODUCTION

MONTESQUIEU, ASSOCIATION AND DIVERSITY

This study has three main purposes. First, as an account of the political thought of Montesquieu, it seeks to understand the significance of his work in the context of the theory and practice of law in early eighteenth century Bordeaux. Departing from attempts to portray Montesquieu's thought as issuing directly from aristotelianism and early-modern academic jurisprudence, it will be shown that French legal scholarship at this time was in a state of crisis and decline, posing more challenges than solutions for the scholars of the discipline.[1] In contrast, it will be argued first, that the milieu of the Bordeaux parlement, where Montesquieu served as a magistrate for twelve years, generated a distinct understanding of politics and law informing its practice (that is, a new language of politics) and that second, this language can serve more fruitfully as a background from which to understand Montesquieu's political thought.[2] Montesquieu worked as a magistrate in the Bordeaux parlement from 1714 to 1726, that is from the age of twenty-five to thirty-seven, arguably the most important period in his intellectual development.

The second purpose of the study is to reflect on legal and regional associational diversity. This is explored as both a central feature of the institutions of the old regime and a valued structural element of Montesquieu's own political thinking. It will be argued that Montesquieu's focus on the process and forms of human association is his most important contribution to the established traditions of political thinking. It could be considered as his particular project in a more general turn in the history of political ideas away from strict exposition of the grounds of sovereignty and obligation and the need for obedience, towards an exploration of alternative strategies of governance drawing on a more developed understanding of the qualities of the population to be ruled. While for Foucault this new direction is to be understood through the logic of a teleology of control with the introduction of more dispersed and informal modes of discipline, Montesquieu's arguments show that this turn towards an understanding of the

social underpinnings of a regime cannot effectively be restricted and understood as merely a ruse of power.[3] In fact, by turning to a study of the population as a means to generate more effective strategies of governance, theorists of an initial reason-of-state persuasion would be confronted with new demands than merely the maintaining of order. If complete social control was recognised to be a largely unattainable objective through state policy alone, a notion of diffused forms of control would have to come to terms with independently generated aspirations, needs and moral systems. Montesquieu demonstrates that matters of social control could not be discussed without consideration of the form of moral community through which control and discipline was to be effected.

In this enterprise while he abandons a search for standards of moral and political judgement on the basis of individual human nature, he argues instead that the very process of human interaction, or association, offers alternate grounds. His greatest insight is to recognise that the process of association is not arbitrary but generates varying moral systems which can be judged in the end by the corresponding quality of community life and by their ability first to generate an effective practical guarantee for the performance of various social duties and second to promote a more orderly polity. For purposes of social and political judgement, it offers a more flexible approach recognising shared moral ends, but a need to adapt their fulfilment to the character of the population concerned and the general characteristics of the state.

The third purpose of the study is to examine in particular the relation between this general approach to the study of politics and Montesquieu's theory of criminal justice. This will involve not only an examination of the passages of L'Esprit des lois most relevant to this theme (the focus of chapter six and seven), as a prelude, it involves (in chapter three) a study of over eight hundred rulings of the criminal court of the Bordeaux parlement (la Tournelle) to which Montesquieu was assigned for most of his judicial career. It will be shown how Montesquieu's new insights in the field of criminal justice are directly related to his new understanding of the dynamics of human association.

However, before embarking on a study of Montesquieu's judicial career, it is necessary to offer a broader justification for the present study given the current state of Montesquieu scholarship as well as a more general account of relevant intellectual traditions and institutional realities within early-modern France to help situate Montesquieu's enterprise. While associational diversity is recognised as being an important theme in Montesquieu's work, scholars generally characterise his treatment of this theme as a continuation of one of two intellectual traditions, namely scepticism or natural law. Both of these traditions, in fact, render the reality of diversity problematic. By examining the intellectual approaches to diversity stemming from the Renaissance it is possible to see that in fact, alongside these nascent traditions there existed a third, and one with which Montesquieu's work can be more easily identified. Thus, a glance at the theoretical uses of the theme of diversity in sixteenth century France will shed light on the historical origin of Montesquieu's own position and of scholarly reactions to it. Once these positions are clarified, it will be possible to come to a better assessment of the schools of interpretation of Montesquieu's work on this issue.[4]

While the roots of cultural and legal diversity within Europe can be traced far back in time before the consolidation of the modern state system, the theoretical recognition of the theme of diversity as a matter of central importance for politics is traced to the Renaissance. Within the French intellectual tradition, three major schools of reflection on this theme can be found. One notes, firstly, an attempt to integrate the recognition of a variety of experiences, authorities and values into the traditional frameworks of scholastic thought. Certainly, within an Augustinian framework, diversity as a theme played a positive role in the system of belief in that a variety of forms of life served as evidence for the reality of an imperfect world which through both human pride and God's punishment was alienated from its original condition of unity. It is also true that while the positions of the Church fathers and certain classical thinkers such as Aristotle had been deemed authoritative, the tradition itself was not averse to the adjudication

of diverse positions in its argumentation. The Thomist disputation is evidence of the potential within the scholastic tradition, of a certain tolerance for diversity.[5] However, the challenge of newly discovered societies with the reality of radically different forms of life posed with stark evidence for the first time, led in one strand to a consequent radicalisation of the latent potentialities within scolasticism. As one example, the newly created Jesuit order (1540) espoused the doctrine of probabilism "that anything approved by well-known authors is probable and safe in conscience" thereby accommodating possible conflicts among theological authorities and the order also adopted a practice of adaptation to various cultures and religious cults.[6] Similarly, Bartolomé de las Casas was able to work within the Thomist framework to develop a heightened sensibility and appreciation for the customs and practices of the native Americans, while still arguing for their ultimate conversion.[7] Here, the recognition of diversity did in no way threaten the integrity of the original belief system, it only offered a new and challenging context in which to present and preach it. While the position did include a tribute to a variety of forms of life and opinion, these were dealt with in a way which would serve the independently established or revealed principles of universal truth. The intellectual disposition to recognise diversity yet use it only as a challenge to transmit pre-established principles has been carried over into a variety of contemporary schools of thought, including rights based theories of liberalism and modern natural law thinking. These in turn have shaped critical interpretations of Montesquieu's project.[8]

A second treatment of the theme of diversity at the time of the Renaissance was as an outright challenge, spawning what is sometimes referred to as a general sceptical crisis within the intellectual community. Scepticism as a doctrine is often traced to Carneades and Sextus Empiricus as a form of philosophical defeatism in reaction to the high epistemological ideals of Platonism. Here the variety of beliefs and practices were used to show the untenability of any claims to universal truth and justice.[9] However, its reemergence in the Renaissance, posed with greater urgency in the wake of the Reformation, extended the possibilities of the

position by coming to challenge not only rhetorical claims to truth, but also our subjective experience of the world.[10] The theme of diversity was invoked in several ways to serve the sceptical stance. As one example, for Montaigne, diversity is as much a feature of our world, given a variety of cultural practices and laws, as it is of our very selves, our use of reason and our judgements.[11] Coupled with a picture of the human being as essentially narrow-minded, presumptuous and blindly (and by implication wrongly) dogmatic this diversity, while serving a useful theoretical and rhetorical role, is presented as in essence problematic, for it seemingly undermines pretensions to the possibility of a discovery of universal truth. In fact, the notion of a universal, unchanging truth serves an important function in Montaigne's work and is the very notion which allows him to satirize the vanity of human enterprises and the weakness of human reason which is always wavering and unable to arrive at any form of consensus. However, the way out of the impasse as presented by Montaigne is to reject any attempt to clarify what regulative notion of truth he may have used, and to seek knowledge in and of the self. The diversity and self-referential character of our judgements which he had at first so fully satirised as evidence of weakness and waywardness, become the practical result of an ethic of aesthetic self-fashioning. While having the pretence to have reached a higher level of understanding of the 'other', we may say with Todorov, that in this radical scepticism a return to the self for principles of truth denies this claim to greater understanding in practice.[12] While the theme of diversity played a central role in the fashioning of the sceptical school of the French Renaissance, as well as in the various attempts to overcome scepticism, it seems ultimately to have been a rhetorical device and a means of attacking established canons of dogma. The challenge remained a formal one in that the content of the differences pointed to could be said hardly to matter. Modern sceptics build on these intuitions and have sought to read Montesquieu's treatment of diversity as in part a reaffirmation of this intellectual disposition.[13]

However, there is a third, and often neglected, treatment of the theme of

diversity. It is articulated in the work of Louis Le Roy (dit Regius), more specifically in his 1567 treatise De la Vicissicitude ou variété des choses en l'univers.[14] It is this outlook which best can be seen to share great affinities with the work of Montesquieu. Le Roy writes in the language of earlier medieval traditions with frequent recourse to analogical reasoning, with examples drawn from nature itself, while invoking a certain teleological vision. However, these formal devices are infused with a new consciousness of the radical diversity of things and the ubiquitousness of discord, flux and difference. He focuses firstly on the extensive bio-diversity in the structure and content of the natural world whose very conservation and moderation is directly dependent on an infinite succession of contrary movements and dissimilar phenomena. However, to guard against the vision of an apparent chaos, Le Roy recognises the need to be aware not only of the differences in the particulars, but also of the relations among them which in their various proportions and convenance sustain and perpetuate the whole.[15] What is a reality in the natural world also holds true for the cultural and political world of human beings, only that the apparent diversity is much greater, and the consequences of discord on the surface more bitter and deadly. He explores the variety and vicissitude of human life from the point of view of modes of subsistence, political fortunes, linguistic patterns, the history of the arts and sciences as well as constructing a conjectural history of the development of civilisation based on successive modes of existence, a clear precursor to the four-stage theory which was to become a central idiom in Enlightenment thought.[16] This vision also was used to undermine the traditional approach to the study of morals and politics. Using the analogy of the discipline of medicine, he recognises that politics cannot be fully centred on the study of the just, the honourable and the good, but that the unjust serves as a necessary regulative notion:

> ...le bien ne peut estre entendu n'y estimé sinon en le consinant avec le mal pour l'eviter, n'y le mal evité et domté sans l'aide du bien cogneu...il est certain nature n'avoir rien créé, à qui elle n'ait

donné son contraire pour le retenir...[17]

It is also the apparent injustice of power politics and conquest that creates the conditions for the flourishing of the arts and scientific disciplines. The revival of languages and learning in his own era is unabashedly attributed to the conquests of Tamerlane in whose time Petrarch began his classical studies. Thus, the encounter with diversity as variety, flux and opposition is not an occasion for withdrawal or scepticism. Le Roy ends his often wayward treatise with a vote of resounding confidence in the intellectual traditions of his day to improve on the learning of the ancients, despite his equally pessimistic political vision of an inevitable return to ignorance, decadence and barbarism.[18] Here there is a call to recognise the interaction of various elements and to discern the aspect of complementarity that underlies apparent contradictions and the timing and placing of injustices. Injustice is not naively denied; but it is recognised that it plays an important function beyond itself. The value of diversity, then, lies not fully in the particulars for their own sake, but in the study of the relations among them and it is this which forms the basis for a valid and valuable science of ethics and politics. A similar approach to the theme of diversity can be seen to have been carried on from Le Roy by such writers as Borel, Fontenelle and Leibniz.[19]

Despite his often imperial pretensions, over a field which cedes with difficulty, Montesquieu recognized the same positive value in diversity. There are two levels at which the spirit of Le Roy's work can be discerned in Montesquieu. Firstly, he seeks to uncover how the various particular features of a given regime relate to its laws and to each other. Thus, the law itself becomes an expression of an array of political, geographical, economic and social conditions and modes of association. It is the study of these relations rather than of the logic internal to the laws themselves that becomes the new focus for a science of politics and which is the basis for his classification of governments.[20]

At a second level, the comparative study of different types of regime, both modern and ancient, serves as a forum for reflection on various political goods and evils. A close study of the text of <u>l'Esprit des lois</u> will reveal that his judgments

here do not fully coincide with his tripartite classification of regimes. All strive for a form of justice and all are liable to decline and corruption. Each form of government will have its merits and its faults and the art of legislation becomes in many ways an exercise of balancing the two. Much of the interpretation of Montesquieu's work suffers from wanting to collapse these two levels of the work into one, often concluding that his work suffers from unsalvageable contradictions.[21] However, by reading his work through the writing of Le Roy it becomes easier to recognise the separate needs of charting the contours of diversity in political and social phenomena and of drawing the important lessons from them. The ultimate challenge in Montesquieu's work, if it was not to remain purely a theory of difference, was both to develop the appropriate theoretical framework that would further an understanding of the reality of modern political conditions characterised by an essential diversity of conditions, environmental factors and ways of living together, while incorporating an understanding of the better principles of political solidarity which could serve as a standard in assessing various forms of political life.

However, while Le Roy's work offers an alternative interpretation of the question of diversity which avoids a sceptical stance and recognises its pedagogical worth, it does not offer any clear method or systematic approach to the study of diversity, other than an awareness of a wide range of possible relations among various phenomena and their relative values. Furthermore, his treatise is addressed to fellow humanists of his day as a call in the revival of learning and creativity and professes no claim to contemporary political insight. Thus, while there existed an intellectual current in France which harboured a confident appreciation of diversity, an understanding of Montesquieu's work would not be complete without an account of the origins of his specific approach to explore further this intellectual disposition, as well as of the significance of his choices and arguments in this enterprise in the political context of his day. Here, it is important to examine the possible impact of new trends of historical scholarship on an understanding of Montesquieu's enterprise. The theme of diversity is not meant

to refer exclusively to practices which could be described as foreign or radically new and potentially challenging. Apart from obvious geographic and regional differences, diversity is also a basic feature of the very cultural and legal make-up of France throughout the early-modern period.[22] While corporative organisation and a coexistence of a variety of legal regimes had readily been accepted in an understanding of medieval institutions, it is only recently that historians of the ancien régime have come to recognise the continued presence of these features in a period of what is commonly called absolutist rule, epitomised by Louis XIV but with roots leading back to the settlement of the Hundred Years War. New emphasis is being placed on the public space found in a variety of local and corporate bodies, with varying degrees of self regulation, and on the real limits on the king's exercise of power.[23] With the recognition of a certain institutionalisation of diversity in political absolutism also comes a recognition of a greater degree of internal political rivalry and conflict than previously allowed. It is the insights of these new studies on the working of the institutions of absolutism that may allow for a new understanding of Montesquieu and his relation to the political regime of his day. They allow us to consider that some of the tensions and ambiguities often attributed to his political thought may be more a reflection of the political tensions of his time. They also require us to rethink Montesquieu's commonly attributed role as an active critic of absolutism, given that absolutism in practice was far removed from the visions of Bossuet. Finally, they lead us to recognise that absolutism in practice harboured a variety of languages, leaving open multiple possibilities for influence and appropriation. In exploring these questions, however, it is important to focus on the nature of the political experience as witnessed by Montesquieu himself. For this reason, special attention will be paid to building an understanding of the dynamic and tensions of absolutist rule from a provincial perspective, that is, through the records of the Bordeaux parlement. This will serve both to test these new theories of the limited nature and active constraints working in absolutist rule, as well as to serve as a backdrop for a new understanding of the significance of Montesquieu's thought

for his own political context.

Here, distinct from the established intellectual traditions, we find that the defence of local privilege in the early eighteenth century, despite its often petty and possibly corrupt motivations, harboured a conception of legal legitimacy no longer fused uniquely with institutional precedents or a preordained model of universal rationality. In the annals of the parlement of Bordeaux, one finds a new form of argument which justifies law in terms of its relation to the regional characteristics of the jurisdiction concerned, what I will call 'associational discourse'. It will be argued that the experience of being embedded in a local tradition which defended its privileges and interests in a language attentive to regional, social and economic particularities served a foundational role for Montesquieu's project. In addition to making him sensitive to the benefits of certain regional and social diversity, it gave him the resources from which to develop a new articulation of an emerging sense of national legal personality in the context of the growing inadequacy of the traditional language of Roman civil law to express this reality.[24] In a similar manner, Montesquieu drew from the de facto judicial autonomy as a feature of regional liberties in France (the legacy of an ancient policy of conquest) and used it to construct a centralised and functional theory of judicial independence. While engaged in a language traditionally used for the defence of acquired local liberties, Montesquieu's strategy also pointed beyond them to the emerging features of a fully integrated, national state. By a seeming irony, his argument came to mirror the competing yet integral features of absolutist rule in France: that is, the effective protection of certain regional and corporate privileges combined with a process of state-building driven by policies of national consolidation and centralisation through the development of national legal codes and standardised procedures of administration and justice.

At the basis of his arguments there is a conception of diversity implied which is not valued for its own sake and as a blind celebration of difference bordering on a relativism or informed by a scepticism, but one which recognises

the possibility of the important pedagogical and moral value of the acceptance of various forms of life, either internal or external to the state. Praise of diversity, and by implication, the diversity of modes of association, then, is not the result of an intellectual impasse, but of the recognition of its positive social and political function. It is also allied with the more subtle awareness that in the complexity of the world, the shapes of political goods and evils are never pure nor stable.[25]

Previous interpretations of Montesquieu's work have dealt with the question of his relation to his political context in various ways. Most implicitly deny the sincerity of the invocation of the theme of diversity in Montesquieu's work and instead read his major opus L'Esprit des lois (1748) as a vindication of a single institution or of a single class. Combined with this political classification is a temporal one which argues for either his clear originality and modernity or his anachronistic political objectives. The first line of argument is found most readily within the Anglo-American tradition and, as Keohane has remarked, mistakenly takes his claim to originality at face value (he prefaces L'Esprit des lois with the epigram Prolem sine matre creatam, literally a creation or child without a mother).[26] Rather short and narrow passages, for example his discussion of the English constitution or of federalism, are taken to be the core of his message and to be the key through which to interpret the rest of his work.[27] To identify Montesquieu as a clear proponent of liberalism, as this tradition of interpretation tends to do, has several difficulties including the different meaning such a tradition carries in different cultural contexts as well as the general agreement of its birth as a political movement in the nineteenth century, more than half a century after the publication of the work. A more convincing argument is offered by Hulliung who presents Montesquieu as a visionary presenting the political model of a modern commercial republic, modelled on the English example, with an argument for both formal and informal constraints on the exercise of political power in the modern era.[28] In contrast, a second stream of interpretation identifies Montesquieu's intellectual project with his class situation and places him within a general trend of aristocratic reaction after the death of Louis XIV. Given the

divisions within the ranks of the nobility there have been various ways in which this interest was defined, whether it be as a feudal vision associated with the nobility of the sword, or as a defence of the hegemonic fraction of the noble class which had come to monopolise several key judicial and administrative offices, or of the parlements themselves as one component of the aristocratic power base.[29] Although these various readings have been valuable and highly influential, they tend to suffer from an impulse to identify his classification of regimes with the alternatives and limited horizon of his potential political stances, messages or choices. In addition, they do not adequately address Montesquieu's central claim that he did not accept the notion of one universally acceptable political model, seeking instead the rules and modes of moderate rule which could be combined with a variety of constitutional and social characteristics.[30] Instead, these approaches uncritically place Montesquieu's work in the tradition of a long line of political treatises, to promote one form of regime over and above another.

However, Montesquieu's attachment to the value of political moderation must be seen to be more a product of his contextualism, than to his theories of institutional design. In addition, it is related to an understanding of the very ambiguities possible within political institutions themselves. His theory of political moderation is thus only a facet of what Montesquieu saw as his primary object: that is, to develop a science of politics which would dispel the notion that legislators were only driven by their whims and fantasies in the promulgation of law.[31] The study of legal diversity is at the centre of this project not, in the tradition of the theorists of natural law, to overcome or deny it, but to explore it and use it to arrive at a better understanding of political phenomena in general.

Some theorists have not left unrecognised this wider purpose of Montesquieu's work and the centrality of the value of diversity in the development of his science of law. For Kelley and Franklin, Montesquieu, in the line of Bodin, was a pioneer in the field of sociological jurisprudence.[32] This implied a recognition that law was only one force among others to be taken into consideration for an understanding of political life. It also recognised the primacy

of the regime as a conceptual means of political classification and differentiation as well as an explanatory feature of social cohesion amidst relative diversity. However, while these interpretations treat more seriously the central concerns in Montesquieu's work, they are incomplete having ignored both the historical sources of this approach and the added sensitivity of Montesquieu to a dynamic of institutional ambiguity. They also place too much emphasis on the first level of Montesquieu's work, that is to generate an explanation of diversity, by ignoring the second, that is to put this understanding in the service of a science of morality so that an appreciation of diversity does not become assimilated to a form of moral relativism.

The tension between these two general approaches to the interpretation of Montesquieu (that is, Montesquieu as the legislator of the free regime, as a universal and uniform solution, and Montesquieu as the observer of a wide range of political values and behaviour) can be reconciled in part by examining the very political conditions in which he was writing. A study of the workings of a local institution within the absolutist system in France will reveal the very same tensions between a drive for uniform and universal principles of political action and justification and the realist recognition of a diversity of practices and motivations. The tensions in his work could be understood as in part a reflection of the very tensions in the world where he had most of his legal training. However, on a deeper level, his work also demonstrates an on-going attempt to find a moral basis for politics, not in any pre-social or meta-political framework, but through a close examination of the dynamics of human association and the conventions to which it gives rise. In this light, diversity may still pose a challenge, but does not refute the attempt to recover grounds for political judgement for there is continued recognition that some forms of association are debilitating. His analysis of the despotic regime governed by the principle of fear can be read as an attempt to explore the psychology and effects of one of these more destructive forms of inter-personal association.

To elucidate this claim for a new interpretation of L'Esprit des lois, it is

necessary firstly to address the grounds for previous alternative understandings of Montesquieu's work. The first chapter illustrates the relative state of decline in juridical thinking in France of the early eighteenth century. This offers a challenge to the arguments of Goyard-Fabre, Keohane and others that Montesquieu was writing to continue a long established tradition of domestic jurisprudence. The first chapter also addresses the view that Montesquieu's experience in the Bordeaux Académie played a formative role in his intellectual development by providing him with the empirical scientific principles which he would apply with originality to the discipline of jurisprudence. Only when these routinely invoked beliefs on the sources of Montesquieu's thought are addressed is it possible to offer a more plausible alternative. For this purpose, chapters two and three are devoted to a study of the theory informing the practice of the Bordeaux parlement from 1715-24: first (chapter two), through an analysis of the remonstrances and policy pronouncements of the institution; and second (chapter three), by a study of over eight hundred rulings of the criminal chamber (la Tournelle) to which Montesquieu was assigned for most of his judicial career. Chapter four, in turn, offers an analysis of three of Montesquieu's early works (Eloge de la sincérité, Traité des devoirs and Considérations sur les causes de la grandeur des Romains et de leur décadence), reading them as attempts to provide a moral grounding for an associational theory. Chapter five shows how L'Esprit des lois can be read as a development of that theory. Finally, in chapters six and seven, I show how this approach can illuminate his discussion of criminal justice and his arguments for the moderation of punishments. The contributions of this study to Montesquieu scholarship are, first, in showing more clearly how his most important text is related to his judicial career and early writings, and second, in showing how L'Esprit des lois can be read as a reworking of the very tensions within the practice of absolutist monarchy generating a moral argument for political moderation, rather than as the indignant scratchings of one of absolutism's most righteous critics.

Endnotes

1. Critics who emphasise the Aristotelian strains in Montesquieu's work include Simone Goyard-Fabre in Montesquieu adversaire de Hobbes (Paris: Archives des lettres modernes, 1980) and idem., "L'Héritage aristotélicien dans la pensée de Montesquieu," n.p.,n.d.; Ernest Barker in The Politics of Aristotle (Oxford: Clarendon Press, 1948); and Alasdair MacIntyre in A Short History of Ethics (New York: Macmillan, 1966). Those who stress Montesquieu's debts to jurisprudence of his day and the Roman law tradition include Donald Kelly in "The Prehistory of Sociology: Montesquieu, Vico and the Legal Tradition," In History, Law and the Human Sciences (London: Variorum Reprints, 1984) and idem., The Human Measure (Cambridge, Massachusetts and London: Harvard University Press, 1990); Nannerl Keohane in Philosophy and the State in France (Princeton: Princeton University Press, 1980); Tzevtan Todorov in "Droit naturel et formes de gouvernement dans L'Esprit des lois," Esprit 75(1983), 35-48; and C.P. Courtney, "Montesquieu and the problem of 'la diversité'," In Enlightenment Essays in Memory of Robert Shackleton, eds. Giles Barber and C.P. Courtney, 61-81 (Oxford: The Voltaire Foundation, 1988).

2. For a general account of the concept of a language in the practice of political theory, see J.G.A. Pocock, "Virtues, rights and manners," In Virtue, commerce and history, 37-50, (Cambridge: Cambridge University Press, 1981) and idem., "The Concept of a language and the metier d'historien: Some considerations on practice," In The Languages of Political Theory in Early-modern Europe, ed. Anthony Pagden, (Cambridge: Cambridge University Press, 1987), 19-38.

3. On these developments, see Michel Foucault's "Governmentality," In The Foucault Effect, eds. Graham Bunhell et al. (Chicago: University of Chicago Press, 1991), 87-104.

4. The political discourse of the contemporary era sees a juxtaposition of two seemingly incompatible elements. On the one hand, there is a general climate of political scepticism which takes several forms. In its positive dimension, it translates into a willingness to recognize equal validity to all political and social demands with an incapacity to adequately judge among these demands in a context of limited resources. In its negative dimension, it can turn against the system altogether in the electoral process or the administrative and judicial functions of the state and generate political apathy and outright cynicism. On the other hand, in seeming contrast to the scepticism, there is a renewed effort to couch demands in an appeal to the language of social justice. We may see this appeal as nothing more than a part of what it is to be a public self of a late twentieth century Western liberal culture, in other words, there is no theoretical grounding for it but only a rather naive sense that public action will take this form. Alternatively, we could see the appeal as the use and extension of a liberal discourse of progress

which in fact is inhabited by a spirit of despair in that very project. The implicit valuing of social and political freedom in tracts denouncing the very intellectual tradition which spawned such values as covertly (and not so covertly) oppressive is only one manifestation of this. While presupposing the intellectual possibility of liberation as a promise of the Western tradition, these two forms of appeal to social justice question it in actual practice and fact by recognizing its limited efficacy and its inevitably oppressive dimensions: hence, their inordinate power as critical tools. However, the ultimate weakness of these positions as vehicles for political change is shown in that while they may generate sympathy for various groups in their claims for justice as against the political status quo, they are unable to provide solid justification for the particular form of political action required to redress that claim. Thus, while theoretical scepticism had often been allied with a political conservatism as defence of the status quo, so the modern appeal to social justice seems for many to play a role of political gad-fly which helps to express certain discontent with dominant political structures and ideas but offers little to direct political and social change.

Embedded in these forms of political thinking, as the flip-side to a critique of pervasive oppression, is a call for greater attention to a variety of forms of life, for a willingness to listen to a variety of voices and to give value to them. While stretching the bounds of pluralist sensitivities it is nonetheless not without certain irony that one observes the limits of such a conception in that it is a conception of diversity fully rooted in the private (as opposed to public) sphere; it is a conception which is static generally ignoring the process of historical evolution; and, it values diversity as a series of particulars, with little sense of how they relate to a wider vision and which treats interaction with other voices or traditions as in general a cause for concern. Thus, it reflects the basic structure of a pluralist position which conceptualizes the private sphere as the realm of incongruous particulars and the public sphere as the realm of adjudication, whether fair or unfair, among stable and competing interests of roughly equal value. (While traditional pluralism has been accused of neglecting the role of the state, it would be of no great challenge to factor state interests themselves into the equation.) No matter if the system is seen to have become dysfunctional. In the interests of distributive justice, such a picture requires that there be an overall structure or framework with its universal, independent and public justification.

This theoretical dynamic can be traced to the hidden side of many of the constitutional movements of the nineteenth century in that while respect for a diversity of opinion and pursuit (with certain restrictions) was widely touted as a central principle of political reform, diversity itself was also tamed in this process being identified as the <u>matter</u> of public life, rather than its form. Political conflict was to be controlled and harnessed within the bounds of institutions resting on universal justifications to be the object of overall consensus and seemingly immortalised in written constitutions to be modified with great difficulty; and the political process was conceived as a means of generating compromise through higher and hidden reasons. Thus, despite the wide possibilities in our

understandings of diversity, there are also important limits, limits which are perpetuated by our very institutional presuppositions and traditions.

5. See Alasdair MacIntyre's Whose Justice, Which Rationality? (Notre Dame: University of Notre Dame Press, 1988) which attempts to revive this method of debate as a means to correct the seeming impasse of contemporary liberalism.

6. The Oxford Dictionary of the Christian Church (London: Oxford University Press, 1957) defines probabilism as "The system of moral theology based on the principle that, if the licitness or illicitness of an action is in doubt, it is lawful to follow a solidly probable opinion favouring liberty, even though the opposing opinion, favouring the law, be more probable." Its classic statement is attributed to B. Medina, a Dominican, in his Commentary of Aquinas' Summa (1577).

7. Bartolomé de las Casas, In Defense of the Indians (DeKalb: Northern Illinois University Press, 1992). This text is a summary of his arguments given in the defense before the court of Charles V at Valladolid in 1551.

8. Those who identify Montesquieu's thinking within the tradition of modern natural law include Mark Waddicor, Montesquieu and the Philosophy of Natural Law (The Hague: Nijhoff, 1970) and C.P. Courtney, "Montesquieu and the Problem of 'la diversité'".

9. Both Academic and Pyrrhonian sceptics agreed on the unjustified dogmatism of current claims to truth (as well as on the practical necessity to abide by them in daily life), but disagreed as to the implications for a theory of knowledge. For Academic sceptics it was deemed that no knowledge was possible, while Pyrrhonian sceptics rejected this position as a new form of dogmatism and adopted a stance of systematic doubt for all questions. See Richard Popkin's The History of Scepticism from Erasmus to Spinoza (Berkeley: University of California Press, 1979). While Popkin asserts the compatibility of belief and scepticism, it is also important to recognize that a recognition of diverse arguments and traditions did not necessarily lead to a form of fideism. For the first, the diversity did not appear as a challenge to established rational grounds for belief but posed a challenge in the attempt to practice and universalise them. For the second, the diversity was seen as a factor leading to a modified position as to the grounds for belief.

10. Richard Tuck, Philosophy and Government 1572-1651 (Cambridge: Cambridge University Press, 1993), 285-86.

11. See in particular I i; I xxiii; I xxxi; II i; II xii; III xiii of his Essais.

12. Tzevtan Todorov, Les Morales de l'histoire (Paris: Grasset, 1991), 70.

13. See for example Judith Shklar, Montesquieu (Oxford: Oxford University Press, 1987); George Klosko, "Montesquieu's science of politics: absolute values and ethical relativism in L'Esprit des lois," Studies on Voltaire and the XVIIIth Century 189(1980), 153-77; and others such as Pierre Barrière, Un Grand Provincial: Charles Louis de Secondat de Montesquieu, baron de la Brède (Bordeaux: Delmas, 1946) who place Montesquieu's thought in the same tradition as Montaigne.

14. The full title is De la Vicissitude ou variété des choses en l'univers, et concurrence des armes et des lettres par les premières et plus illustres nations du monde, depuis le temps où a commencé la civilité, et memoire humaine jusques à present. Plus s'il est vraye se dire rien qui n'ayt esté dict au paravant: et qu'il convient par propres inventions augmenter la doctrine des anciens, sans s'arrester seulement aux versions, expositions, corrections, et abregez de leurs escrits. The edition consulted is that published in Paris by Pierre l'Huillier, 1577.

15. Ibid., 5-6.

16. Ibid., Livre III.; Ronald Meek. Social Science and the Ignoble Savage, (Cambridge: Cambridge University Press, 1976). While Le Roy does not expressly speak of four separate stages nor make explicit the link between the economic form of organisation and the political structures, the distinctness of the forms of life are made clear and the relation between terrain, life-style and political system is hinted at in other parts of the work.

17. Le Roy, De la Vicissitude, 5-6.

18. Ibid., Livre X and Livre XI.

19. Montesquieu did not have his own copy of De la Vicissicitude, however, he was acquainted with Le Roy's work and owned a copy of his translation of Aristotle's Politics. Montesquieu was well known to have consulted books from the private collections of his friends, as well as from more established collections in Paris.

20. This can also be read historically. One can discern in his work the attempt to prove the anachronism of a lost unity of ancient republican conformity and solidarity. He shows through this that it is no longer possible to found one's conception of the world on visions of immediate community. The fragmentation of the Empire made ancient community an anachronism, yet, as an anachronism, it also contributes to a historical sense of diversity and evolution and helps as a vantage point from which to understand other ways of life.

21. Montesquieu's apparent contradictions have been described in a variety of ways as a tension between nature and value [Charles Beyer, Nature et valeur dans

la philosophie de Montesquieu (Paris: SEVEC, 1979], as a form of 'impure' reason [Paul Verniere, Montesquieu et la raison impure (Paris: Société d'édition d'enseignement supérieur, 1980)] and as a conflict of roles as a sociologist and a moralist [Emile Durkheim, Montesquieu et Rousseau comme précurseurs de la sociologie (Paris: Marcel Rivière, 1953).

22. Fernand Braudel begins his work L'Identité de la France (Paris: France Loisirs, 1986) with a consideration of the essential diversity of the nation, "Que la France se nomme diversité".

23. See for example Roger Mettam, Power and faction in Louis XIV's France (Oxford and New York: Basil Blackwell, 1988), Peter Campbell, The Ancien Regime in France (Oxford: Basil Blackwell, 1988), David Parker, The Making of French Absolutism (London: Edward Arnold, 1983) and Sharon Kettering, Patrons, Brokers and clients in Seventeenth Century France (New York: Oxford University Press, 1986).

24. Although both these latter positions do not rule out the possibility for a defence of local privilege in their own idioms, Bartolism being a key example in the context of Renaissance civic humanism, these positions are also limited by their own languages. See Quentin Skinner, The Foundations of Modern Political Thought (Cambridge: Cambridge University Press, 1978).

25. In doing so, Montesquieu, then, must not be regarded as a theorist primarily engaged in the sceptical-anti-sceptical debates of the early-modern period, but as one who seeks to harness an alternative approach to the question of diversity to the field of jurisprudence. This understanding also will help to make better sense of what has often been regarded as Montesquieu's rather ambiguous relation to the modern school of natural law.

26. Nannerl Keohane, Philosophy and the State in France (Princeton: Princeton University Press, 1980).

27. See for example Norman Hampson's Will and Circumstance. Montesquieu, Rousseau and the French Revolution, (London: Pergamon Press, 1983), Thomas L. Pangle's Montesquieu's Philosophy of Liberalism (Chicago and London: The University of Chicago Press, 1973) and M.J.C. Vile's Constitutionalism and the Separation of Powers, (Oxford: Oxford University Press, 1967). Exceptions to the Anglo-American classification include the work of Simone Goyard-Fabre, La Philosophie du droit de Montesquieu (Paris: Klincksieck, 1973) which looks to the rule of law as the central theme of Montesquieu's political theory, as well as Lando Landi. See Anthony Pagden's "L'Inghilterra e il pensieor politico di Montesquieu by Lando Landi," Journal of Modern History 57(1985), 99-101.

28. Mark Hulliung, Montesquieu and the Old Regime, (Berkeley: University of California Press, 1976). See also his "Montesquieu's Interpreters: A Polemical Essay," In Studies in Eighteenth-Century Culture, vol. 10, ed. Harry C. Payne (Madison: University of Wisconsin Press, 1981), 327-45.

29. The first strong accusation of anachronism was voiced by Helvétius. Works which interpret the significance of Montesquieu's thought in terms of affiliation with aristocratic interests of the sword include Louis Althusser's Montesquieu: la politique et l'histoire, (Paris: Presses Universitaires de France, 1959), Franz Neumann's Democratic and the Authoritarian State, 96-148 (Glencoe,, Illinois: Free Press, 1957) and Pierre Barrière's Un Grand Provincial. In the latter work, while Barrière identifies Montesquieu's social sympathies with those of Fénelon, he also recognises that their political visions differed in that Fénelon was an advocate of limited despotism and Montesquieu one of feudal liberty. For Paul Janet, in the Introduction to his edition of L'Esprit des lois (Paris: Delagrave, 1892), 1-66, the identification of Montesquieu's political sympathies with those of the members of the circle of the duke of Burgundy, including Fénelon, is made without qualification. Franklin Ford's The Robe and Sword, (Cambridge, Mass.: Harvard University Press, 1953) argues that Montesquieu can be read more clearly as a representative thinker of aristocrats of the robe who had begun to define the interests of the aristocratic class as a whole.

See also various articles in a special edition of Dix-huitième siècle 21(1989) devoted to Montesquieu and his eighteenth century interpretations. The position that Montesquieu was a spokesperson for the parlements themselves was a popular interpretation of the latter eighteenth century and one which served to discredit his work after the calling of the Estates General.

30. A focus on alternative and exclusive political models, whether ancient or modern, is a legacy of revolutionary thinking and part of a wider tendency to read French Enlightenment thinking solely as a prelude to later battles. New studies of the revolution as an isolated, political event in its own right also frees the study of early-modern intellectual history. It also belies the reality that Montesquieu's arguments have been put in the service of multiple political causes. As Derathé notes: "L'Esprit des lois est une oeuvre si riche en ses divers aspects qu'elle a pu être invoquée par toutes les tendances de l'opinion publique française, aussi bien sous l'ancien régime que pendant la Révolution." ["Introduction," L'Esprit des lois, vol. 1 (Paris: Garnier Frères, 1973)]

31. "J'ai d'abord examiné les hommes et j'ai cru, dans cette infinie diversité de lois et de moeurs, ils n'étaient pas uniquement conduits par leurs fantaisies." Préface, L'Esprit des lois, vol. 1 (Paris: Garnier, 1973), 5.

32. See Donald Kelley, "The Prehistory of Sociology: Montesquieu, Vico and the Legal Tradition," In History, Law and the Human Sciences (London: Variorum Reprints, 1984) and Julian Franklin, Jean Bodin and the Sixteenth

Century Revolution in the Methodology of Law and History (New York: Columbia University Press, 1963).

CHAPTER ONE

CONSIDERATIONS ON THE STATE OF LEGAL SCIENCE IN EARLY-MODERN FRANCE.

It is often asserted that a major innovation in the work of Montesquieu, justifying his position in the annals of intellectual history as one of the founders of modern social science, is his use of a new method taken from the field of natural science and applied to the study of law.[1] This position assumes three things: that the law as an object of study is independent and can be understood outside of academic traditions and prevailing methods of jurisprudence; that jurisprudence is itself only a succession of conceptual frameworks for the passive interpretation of law; and that in Montesquieu's time there was a dominant conception of science and its methodology that could be appropriated and applied to other disciplines. This chapter is designed in part to question these assumptions.

It will be argued that the development of jurisprudence cannot be adequately understood solely as a series of methodologies applied to the study of various legislative acts and customs because legal understanding is also shaped by legislative acts and popular pressures, just as acts and customs are a product of a form of legal understanding. Through an examination of the state of jurisprudence in the early eighteenth century in France, the chapter will show that a complex relation existed between the academic study of law and legislative and political developments. On the level of practical training, a great breach between the schools and the courts is evident. However, on another level, one can see a political tension of the time reflected in the structure of the discipline. Attempts by the French state in the latter seventeenth century to mold the development of the discipline show its fundamental importance in bolstering established political structures, as the emphasis on Roman civil law had in the past; yet at the same time, the limited effectiveness of these official attempts at state-building is also evident by the continued counter-pressures exercised by the legacy of former

strategies and by independent attempts to forge new alternatives.[2] The relation between academic jurisprudence and political reality could thus be characterised as one of relative autonomy: that is, while harbouring potential for independent enquiry, academic jurisprudence was shaped by the pressures of the state seeking support from the discipline, the interests of the theorists and the requirements of the students. Furthermore, it is precisely this fact of relative autonomy and the breach between academic inquiry and political realities which it brought to light that brought both the need for a novel approach and a challenge to which Montesquieu would respond.

This chapter also provides a brief study of the state of the scientific discipline as practised in early eighteenth century Bordeaux and will show that despite an almost universal rejection of traditional Aristotelian principles in this field, there was no general consensus on what should replace it. In the course of experimentation, there were indiscriminate appeals to both Cartesian and Newtonian principles from one experiment to the next, as well as competing visions of each. In Montesquieu's own reporting of scientific discovery, this general eclecticism is further confused by his often rhetorical invocation of the benefits of science over and above any detailed consideration of the procedures used. Thus, through both a consideration of the state of legal science in France at the beginning of the eighteenth century and of the practice of experimental science, it will be concluded that it is necessary to reexamine and reformulate the nature of the relation between the work of Montesquieu and legal scholarship of his day.

I. Eighteenth century jurisprudence: a map of the discipline.

Some theorists deny any connection between Montesquieu's theory of politics and early-modern traditions of jurisprudence, emphasising his own claim to originality and his expressed disenchantment with the legal profession.[3] The essence of his originality is usually attributed to his sociological sensibilities and

his more rigorously experimental approach to the study of law.[4] This is supported by Montesquieu's own suggestion that his treatise L'Esprit des lois was not intended as a work of traditional jurisprudence.[5] However, by his training as a magistrate, his voracious reading in legal matters shown indirectly through his own library collection and more directly through direct references in his work, it is clear that Montesquieu was both well acquainted with and intrigued by the legal scholarship of his day. As a foundation for a better understanding of the relation of his project to features of the discipline, including how Montesquieu diverged from the standard approaches, it is necessary to sketch the overall structure of the discipline of jurisprudence in his time.

To paint this picture we must look at the range of literature available to a legal scholar in early eighteenth century France and its principles of organisation, the types of debates and trends of argument which were arising at the time, and finally, the state of various institutions through which this knowledge was transmitted. I will argue that a consideration of all these factors will reveal that there was a general crisis in the discipline of jurisprudence in early eighteenth century France. A centuries-long focus on the principles of Roman civil law as a means to bolster the state was met by a new awareness of the unique legal characteristics of the nation as a whole and of the incapacity of traditional frameworks to capture them. The developing sub-discipline of French law was designed (and imposed) to overcome this tension. However, despite this structural affinity between legal thinking and political awareness, at a professional level the continued emphasis on civil law in the schools perpetuated a practical hiatus between the doctrine as taught and as practised. This is most clearly illustrated by the general state of decadence within the institutions most closely connected with the transmission of the discipline. It is in turn this context of disciplinary decline which sets the problematic for Montesquieu's enterprise.

The library of the Académie de Bordeaux was established shortly after the founding of the Académie in 1712. As a library catalogue can be deemed a privileged document in the search for an understanding of the organisation of a

discipline in the past, the extant catalogues of the Académie offer a unique insight into how the discipline of jurisprudence was perceived by a provincial elite of the eighteenth century, an elite composed largely of jurists. The collection harboured a relatively poor selection of books until the death of Jean-Jacques Bel (1693-1738), a lawyer and councillor of the Parlement de Guyenne and close friend of Montesquieu.[6] Bel's collection of about three thousand volumes along with various effects and three houses were willed to the Académie on the condition that the collection be open to the public three days a week, a gesture reflecting a more general commitment to values of public stewardship among members of the association.

After this precedent, various other members contributed to the collection, the most significant being Jean Barbot, a trained jurist, président of the local Cour des Aides and another good friend of Montesquieu.[7] Of his collection of 1,277 works, 377 dealt with legal matters and this whole collection, apart from roughly 70 works, was donated to the Académie in 1749.[8] While a librarian was also hired for the cost of 800 livres a year, according to the provisions of Bel's will (a position filled by five different individuals from the years 1740 to 1790), there was no consistent method of cataloguing. The first catalogue of the Académie's public collection was drafted in 1739 and listed the works in alphabetical order.[9] Another catalogue lists the books by their format (i.e. size).[10] A third catalogue drafted in mid-century (just after the publication of L'Esprit des lois and after the donation of Barbot) offers a list of books under subject headings. Here the works relating to jurisprudence are divided into five categories: politics and public law, canon law, civil law, French law and foreign law.[11]

While a selection of books may tell us something about the qualities of the owner, a standard approach for the analysis of the distribution of literary material during the old regime, the catalogues and the owners also have something to tell us about the books and the organisation of various fields of knowledge.[12] In addition, as a catalogue of a collection designed for public use yet formed by the legacies of some of the most wealthy, powerful and respected citizens in the

community, this particular artefact stands not only as a document for the reflection of a structure of classification, it also subtly suggests an active ordering and shaping of priorities. This is particularly significant given the new scholarly attention on the académies as training grounds for political actors and as instruments in the development of a new political culture in France at a time when the universities were in a relative state of disarray.[13]

In the wider structure of the catalogue, the subjects of law and politics top the list, followed by history (forming a large part of the collection), geography, medicine, philology and rhetoric, philosophy (divided into speculative and moral), mathematics, natural history, arts, literature and finally theology. It may offer little as a testimony of the actual reading habits of the public (although a record of borrowed works found at the back of the later catalogue shows borrowing was restricted to members and of these, only a few actively exercised the privilege). However, it gives us a sense of the perceived importance of legal matters in the organisation of knowledge (as they head the catalogue's listings), especially when one recognises that the vocation of the Académie was consciously one of promoting scientific knowledge and experimentation as opposed to the promotion of letters.[14]

The significant feature of the catalogue in the organisation of the literature of jurisprudence is that it does not adopt the categories generated from within various schools of legal rationalisation, but instead reflects an ad hoc historical state in transition from universalist and rationalist theories of law to national ones. The catalogue rejects the Gaian triology (laws of persons, things and actions) taken up in the Institutes and the Digest, a triology based on the nature of the object regulated. Neither did the compiler of the catalogue adopt in a consistent manner the newly ordained principles of legal organisation on the basis of the natural ordering of the rational principles informing the law and its commentaries (eg. laws of the state of nature, contract and public law, private and arbitrary law). Rather, we find a five-fold classification: three categories encompass the fields of legal scholarship in the French law school curriculum of the early eighteenth

century (ie. civil law, canon law and French law); the fourth category is devoted to texts of foreign law; and the last category called public law (droit publique) includes a wide range of literature which had emerged as a separate field of jurisprudence in France a century before and which was not formally taught as a discipline in the schools. Within this seemingly static structure, one may discern a certain shifting of sensibilities from universal maxims of legal knowledge (civil law and public law) to an awareness of the legal particularities of territorial and political jurisdictions (French law and foreign law).

Earlier disputes between Bartolists, neo-Bartolists and humanists in France centred on questions of Roman civil law. By the eighteenth century, the subjects of jurisprudence were more diverse and in part determined by established political arrangements. It meant that while the Roman model continued to hold inordinate influence over the form and universal aspirations of legal discourse, it was recognised to be adapted with difficulty to a political reality which was legally fragmented and evolving. While this was an important element in the great divide between academic and practical jurisprudence (as we shall see later) it also had repercussions within the organisation of the discipline itself.[15] The basic tension which emerges from this particular categorisation of the fields of jurisprudence (and which lends a certain ambiguity to the very categories of civil and public law) is between the basic ordering principles of jurisdiction (administrative or territorial), recognising the supremacy of political factors and rendering the field multiple, and that of universality and transcendent rationality, making the apparent diversity a smokescreen for roughly the same truths. It is perhaps one indication of a discipline in flux, if not crisis.

To examine the catalogue in greater detail, looking at the placing of texts within the five categories, no alphabetical nor chronological reason can explain the order of the lists. Despite a lack of any formal principles of organisation, there is, nonetheless, an informal order which can be discerned in a perusal of the entries. Thus, within the category of politics and public law (politique et droit publique) works pass from a focus on natural and international law (Ivo, Selden,

Grotius, Goldasti, Pufendorf and others) to works of reason of state (eg. Silhon, Amelot de la Houssaie, Maalvezzi and Guicciardini), reflections on republics (Harrington and More), and monarchy (Machiavelli, l'abbé de St. Pierre, Quesnel and others) and finally works on commerce (several anonymous tracts), French public law (Seyssel, Lajonchère, Richelieu) and the public law of various states of Europe (de Mozambano [Pufendorf] and Temple). The groups are not rigid and one can find the same text listed at different points within this same category (for example, a 1631 edition of Grotius' De jure belli ac pacis and Barbeyrac's 1724 translation are grouped with works of natural law, while a 1642 edition of the same work by Grotius is listed with tracts on commerce). Nonetheless, it shows among other things that there was a sense of the importance of the works in the field of modern natural law, despite their dispersal among works inspired by traditional Thomism. It also attests to a sense of the particularity of the French polity as a more specialised area of enquiry within a broader study of basic political principles, interstate relations and possible forms of regime.

The categories of canon and civil law reflect a traditionalism shared in certain ways by their pedagogical counterparts in the faculties of law. Authors cited as canon lawyers include Hooker, Molina and Grotius, a timid venturing beyond the widespread commentary on the Décrets and Gregorian Décretales.[16] In the field of civil law, we find the commentaries of the great humanist jurists Cujas and Hotman alongside the work of Gravina and Domat.[17]

The field of French law can be traced in form, despite its long history in actuality, to the 1679 ordinance consecrating the discipline by the appointment of a professor of French law in every law school of the kingdom to be directly responsible to the king.[18] Despite this legal inauguration of the sub-discipline, it incorporated a wide range of material and issues, giving the professor great freedom in designing his course. This heterogeneity is reflected in the entries in this category of the catalogue. The works (the majority published after 1650) include various sources of law such as texts and commentaries of royal edicts and ordinances and parlementary rulings, customary law and various codifications of

local practices from the sixteenth century onwards; works of the Institutes genre seeking to reconstruct French practices as a whole on the model of Justinian's sixth century compilation (and which is seen to be a precursor to actual codification as institutionalised in the modern Code civil); studies of feudal property law; and finally, works on the nature and responsibilities of judicial and administrative office. Of these different genres within the field of French law, apart from compilations of edicts, ordinances and rulings, all reflect a grappling with the need to graft particular and diverse legal practices within France, to a wider rational structure whose justification and principles of ordering come largely from without. This process could have the double effect of distorting particularities contributing to a general uniformity of practice and doctrine (hence the story of the Institutes genre as a precursor to the civil code), and, in the case of the codification of local customs, protecting the local practice by providing it with a written record and rational justification.

William Church has argued that French jurisprudence of the seventeenth century increasingly avoided questions of public law, as a form of tacit acceptance of the institutions of absolutist monarchy, thereby equating a focus on matters of private law as a form of either political acquiescence or sheer apoliticism (an argument mirrored in Nannerl Keohane's discussion of the rise of individualism in the seventeenth century).[19] While Church may in some ways be correct in recognising the trend of substantial focus on questions of private law, the diversity of approaches within this same tendency does not mean it was a means for jurists to pass the monopoly of political discussion to other genres and professions.[20] Originally ordered by Charles VII in 1453 to facilitate central control and encouraged by his royal successors as well as by the Estates General of 1484 and 1576, these codifications of provincial customary law, much like the institutions of parlement themselves, could be used by the local powers to preserve their traditional privileges and practices.[21] In a context of increased discussion of the need for a uniform legal code and the passing of national ordinances, a jurist's exposition and discussion of local private law could have an alternative political

message.

It is also these trends within the field of French law which show a different course from jurists in other countries, most notably the modern theorists of natural law. The continued hegemony of the Roman model in academic jurisprudence in France meant a constant striving to redescribe legal practice in the country to conform to a concrete and powerful ideal. It was, in principle, driven by a logic of conceptual adaptation. This is perhaps evidence that the early-modern jurists in France had not worked through the full implications of their humanist past which should have led them to the conclusion (as some such as Hotman did) that the Roman model was in certain ways irrelevant to the French context.[22]

In contrast, despite the continued influence of the Roman model in all juridical thinking of the time, its more mitigated presence in the case of modern theorists of natural law was a condition allowing them to adopt a more clearly deductive approach. These theorists shared a commitment with the Roman jurists to universal principles of law, but the actual content of these principles was no longer accepted solely on the basis of the ancient compilations themselves. Instead, the project of the modern theorists of natural law was in part to rediscover and reformulate those universal principles through a reconsideration of the natural and by an uncovering of the rules which remained common to the majority of nations.[23] This rethinking of the Roman model (which, as in the Institutes, quickly passed over the concept of jus gentium as merely the elements of law which Rome happened to share with other nations) allowed these theorists to draw a greater distinction between natural (i.e. those principles which are derived from the very characteristics of the nature and needs of human beings) and arbitrary legal principles (i.e. those devised to regulate varying forms of social existence).[24] It was assumed by the dominant scholars of modern natural law that the diversity in the actual content and objects of positive laws rendered them incapable of any sustained systematic analysis.[25]

However, while the content of positive law was not studied in depth, the formal grounding of this law and the basis of obedience was a central issue of

concern within this school. The link between natural rights and duties and civic obligations was characterised by considerations of utility and formally governed by a natural law of promise-keeping. Thus, in these theories, the act of consent, whether expressed or tacit, was always at the basis of an understanding of positive law. Such a position implied a unity of political obligation and legal authority (for in Grotius, varying forms of civil law emerge from varying types of submission).

This position, though not without its uses for a critical study of French institutions, was in this premise far removed from the realities of the French polity. The rhetoric that the king was the sole source of law in France could not be sustained in any credible way; nor could it be argued that the existing patchwork system was rooted solely in an act of common consent. Here, legal systems diverse in both sources and content were complementing and competing with each other. In the first instance, most jurisdictions were governed by local customary law with varying prescriptions or the relatively rare national ordinance or edict. In the case of continued legal uncertainty, the courts would appeal to either written civil law (in the south) or neighbouring forms of customary law or the customary law of Paris (in the north). This meant that in France there was an important divide between obligation to the law as such, which was piece-meal, diverse and multi-layered, and to the nation as defined politically. Rather than seeking to construct a fiction which would graft legal authority on to a one-dimensional and linear process of political consolidation, therefore, French jurists for the most part were engaged in constructing a practical and evolving unity by directly adapting and imposing the diversity of custom and practice onto pre-established categories of Roman law, as a means to make up for the lack of a strong tradition of politically engendered legal unity. As we will see later, it is precisely a recognition of a decoupling of political and legal authority which is a feature of Montesquieu's early arguments.[26]

At the same time, questions of public law (as opposed to constitutional implications of analyses of private law), while a central feature of French

Renaissance jurisprudence and a constant within foreign circles throughout the early-modern period, were not often addressed in the discipline by the early eighteenth century. Instead, debates in France over the character of the constitution were colonised by the field of history, grounding the understanding of the basic principles of the French polity in contingencies of circumstance and common follies and failings, rather than on a rationalist and universal framework.[27]

Thus, overall one has the impression of a discipline characterised by excessive formalism, whose very framework was increasingly questioned as to its relevance for the actual practice of law in France, but which generated its own sense of rational legitimacy. Several new developments were either ignored, or transferred to other fields of inquiry, contributing to a sense of progressive fragmentation. Despite this, the discipline could not be characterised as being fully static for despite the formalism, there was also an emerging sense of a need to develop a territorial and specifically national theory of law which could be reconciled to universal principles and not bound unconditionally to tradition. An examination of the institutions in France of this period involved in the transmission of knowledge of legal matters will serve to reinforce this impression.

II. Institutional weaknesses.

It has become a commonplace to speak of the general state of decline in the universities of France of the early-modern period and most particularly the law faculties.[28] Evidence for this comes from accounts of professorial corruption and trafficking of degrees (the faculty at Orléans was particularly noted for the latter); dry and 'intellectually stagnant' teaching methods in the form of commentaries on a narrow range of texts; the rise of new centres of intellectual activity outside the university forum; and several projects of reform devised by various administrative officials.[29] Of course, in making such a judgement, one must be careful not to attribute to the institution an ahistorical function irrespective of the society in

which it is found. However, keeping this in mind, one can note that even for many of the students and the state which became increasingly interventionist in the field of legal education in the early-modern period, the institution did not fulfil its expected function.

For the student, the taking of a law degree was an occasion to gain the formal qualification and training for a professional career as a bureaucrat, lawyer or magistrate. For the state, the university and in particular the faculties of law (the other faculties being medicine and theology), provided a breeding ground for a set of trained and qualified officials to offset the traditional bias towards established privilege of the sword which had ruled administrative appointments prior to the reign of Louis XIV. The two waves of attempted university reform (1560-1600 with the ordinances of Orléans and Blois, and 1660-1700), therefore, combined measures ruling course content to make the curriculum more relevant, formal regulations to ensure regular attendance and to fight degree fraud, and a set of legally defined academic qualifications for professional and administrative office, thereby streamlining possible paths of entry into the state apparatus.[30] Despite these attempts, and certain superficial compliance to the new measures, widespread corruption and complicity in fraud meant that they were on the whole ineffective- a means, as one author has stated, to formalise the delinquency.[31] Royal edicts requiring regular role-calls, a set period of study (three years of study for a licence, unless one received the dispense d'age given to all those above the age of twenty-four, in which case only six months of study were required) and oral exams for both the conferral of degrees and for the acceptance of a parlementary post were circumvented or rendered dead-letters by administrative and faculty collusion, student fraud and official laxity.[32] The corollary to an official breakdown was a student body which had a reputation for being particularly truant, unruly, violent and sometimes riotous.[33]

The curriculum itself, despite official attempts to integrate the teaching of French law, was still largely devoted to canon and civil law. The former was structured as a study of the texts of major papal decrees, and the latter in the form

of commentary on the Corpus juris civilis. The study of French law was required only in the final year of the course and despite a lack of formal regulation, it was often structured as a commentary on a series of royal ordinances or on the Paris custom, thereby harbouring a bias towards a uniform, national legal system.[34] While, as Brockliss notes, these professors of French law were given the added exegetical challenge of having to explain the deviations of French law from the standard civil law solution, their analyses often ended in confirming the standard civil law principles by justifying the new in terms of legal prudence or higher reason, rather than developing new forms of explanation.[35] Their special status in the university brought them resentment and downgrading by their colleagues.[36] As direct appointees of the king with no official responsibility to the university, drawn from the ranks of lawyers rather than from legal scholars and assigned to teach in the French language (as opposed to the traditional Latin) to interested members of the public as well as to registered students, their presence was a strong political challenge to a tradition of autonomy and insularity in higher education as well as to traditional conceptions of qualifications and methods of teaching. This engendered a certain amount of faculty resistance to their new colleagues ranging from delays in accepting the faculty appointment to impeding their use of facilities and blocking access to university funds for wages.[37] While the law regulating the exercise of justice and the qualifications for office became more and more insistent on the need for a university law degree for an ever-wider circle of positions, the corresponding efforts to adapt the curriculum to the practice often met with concerted resistance, thereby showing some of the informal barriers to an early-modern strategy of state-building.[38] Thus, at least in the early years, royal attempts to institute a new regime in the law schools were not highly successful.

What this meant in terms of the legal profession was that the universities did little to prepare students for their future positions, both by presenting historical questions of legal science in an overly conventional and unappealing way, and by inadequately covering contemporary legal realities.[39] Certainly there were those

who defended the traditional curriculum. In his Cinq livres du droit des offices (1613), Loyseau defends the study of Roman law on the basis that it is a representation of reason itself and carries legal authority in this alone, as well as for the fact that it serves as a form of common law for the realm.[40] However, the rise in practices geared to supplement the university experience in the hope of professional competence, and state endorsement of these routes could be seen as evidence of the ultimate malfunctioning of the university institution as it was envisioned by state authorities (or at least as the university institution is portrayed in the edicts and decrees which governed their curriculum and conferral of degrees).

Thus, complementary paths developed alongside the formal streams of legal training. It is clear firstly that a legal student needed to engage in a large amount of independent work. Montesquieu himself does not refer to his university experience specifically, but merely to the fact that at the time of his departure from the college of Juilly, "on me mit dans les mains des livres de droit; j'en cherchai l'esprit, je travaillai, je ne faisais rien qui vaille."[41] Within the families of the robe, various plans of independent study were drawn up, including that of the future chancellor d'Aguesseau for his son.[42] This project sets up a detailed regimen of study of key civil and canon law texts which, while fitting into the prescribed three year time-limit, shows no concern for a possible conflict over priorities or order of study with the boy's professors. In addition to independent study, it became an acknowledged fact that a period of apprenticeship, with the chance of both close study of the arguments and actions of a prosecutor, and informal contact and discussion with a wide range of professional jurists, was an important foundation for a successful career as a magistrate. For those entering a parlement, the rule requiring that a councillor be twenty-five years old before being able to vote served to enforce this practice; however, the ubiquitous special dispensations waiving the age requirements also meant that it was by no means universally followed. It may also be that a wider first experience was sought.

In the case of Montesquieu, despite reception as a lawyer in the parlement

of Bordeaux on August 14, 1708, two days after receiving his law degree, he went to Paris and stayed until the death of his father in 1713. Little is known about this period of Montesquieu's life, however, from his notes in the manuscript Collectio juris, it is clear that he attended several trials and reflected on the arguments and points of law addressed.[43] In fact, this move away from the jurisdiction in which he was sworn as a lawyer would seem to contravene the specifications of article 16 of the 1679 edict which states that:

> ...ceux qui voudront entrer dans les charges du judicature, seront tenus après avoir preté le serment d'avocat d'assister assidument aux audiences des cours et siéges où ils feront leur demeure, pendant deux ans au moins, et d'en prendre les attestations en bonne forme chaque année, tant de nos avocats que du batonnier ou doyen des avocats.[44]

Montesquieu, even if he was fulfilling the requirements of an apprenticeship, was not doing so in the jurisdiction where he was sworn in and where he was due to inherit a presidential charge. Notwithstanding, it seems probable that a period of apprenticeship in a central jurisdiction was an important motivation for this move to Paris; perhaps even an indication that the family had judicial ambitions for their son which went beyond their provincial forum.

Alternatively, it may be an indication that even the regional law courts themselves could no longer set a good professional example for a young magistrate. According to the judgement of the marquis d'Argenson, a future chancellor of France, the parlement of Bordeaux was "une des plus mauvaises jugeries du royaume."[45] It opens the possibility for a consideration that a rather unique trend of interpretation was being meted out in the regional parlement. The preamble of the 1679 edict was frank in recognising that the deficiencies in the teaching of law were having a bad effect on the quality of judgements rendered, at least as far as the central government was concerned.[46] This is hardly surprising if one considers that with the possibility of special dispensation, the actual age of practising and deliberating magistrates could be quite young. Examples of improper training and general professional incompetence were

acknowledged more readily in lower jurisdictions. While a major focus of criticism from the time of Loyseau had been the state of seigneurial justice, the charges and admonitions that were handed down from the higher court to various lower royal courts show that the abuses and outright corruption were by no means unique to the fiefdoms.[47]

Hence, alongside the tension and disarray in the field of jurisprudence, there is a weakness in the very institutions intended to convey and perpetuate the discipline. This continued in the face of repeated attempts by royal officials to regulate the teaching and practice of law.[48] The politics of national consolidation had used for centuries a language of universal rationality as instantiated in Roman civil law, thereby engendering an increasing sense of legal nationality- a new form of political identity- and the tools for a defence of traditional regional loyalties. By the late seventeenth century, there was an increased awareness that this idiom needed reworking. This was recognised even by Domat, a supporter of absolutist rule. The growing disaffection with the teaching of law in the universities is another sign, and the source of new popular pressures, of a need for new ordering and priorities of legal understanding. It was only a question as to whether the existing traditions were flexible enough to provide it. As later developments prove, they were; but it did not rule out attempts at new forms of synthesis.

Such a conclusion is evidence of the fact that a full understanding of the developments in the field of jurisprudence in France in the early-modern period cannot be derived exclusively from a narrow study of changing methodologies in the field; for it is precisely these changes which need to be explained. Only a consideration of the complex relation between the field of study and the political and legal context can help provide us with the needed clues. This in turn requires a new understanding of the nature of jurisprudence itself: that is, as a discipline both shaping and shaped by legal practices.

III. The Missing Scientific Paradigm.

However, given this understanding of jurisprudence, would it still not be possible to bring to it a new approach from a different field of study, as I mentioned in the opening of the chapter? More specifically, does its particular realm of autonomy in the early modern period permit the conjecture of the adoption of new scientific methods? It is possible that a contextualist approach, while offering a more full and satisfying account of the process, may do little to change the bottom line of previous interpretations.

As we have argued already, the importance of this account lies not only in its more satisfying narrative, but also in its development of a new understanding of the nature of jurisprudence itself as a potentially powerful vehicle of politics, both directing and being directed by various political pressures. Nevertheless, to explore the possibility of the influence of scientific methodology on Montesquieu's work, we must also examine his work in this field. For the major proponents of this view, Montesquieu's participation in the discussions and experiments of the Bordeaux Académie provides a perfect forum for the learning and application of new methods, an experience which despite its intrinsic deficiencies, is held to be a form of apprenticeship for his more creative and ingenuous social scientific enterprise.[49]

It is important to examine these assertions in greater detail. There are three main assertions implicit in this aspect of the argument: first, there was a consistent scientific method practised in the work of the Académie; second, Montesquieu adopted this method in his experiments and arguments brought before this group; and third, this method was applied to his study of legal and social phenomena. A closer look at the history of Montesquieu's involvement in the group will reveal that all three of these assertions cannot be easily defended.

The Bordeaux Académie, officially the Académie royale des sciences, belles-lettres et arts, was founded in 1712 (the patent letters were registered by the Bordeaux parlement in May 1713) and modelled after the Parisian Académie des

sciences, established forty-six years earlier (though not receiving any legal recognition until 1699), part of a wider project by Colbert to promote the arts and learning. Bordeaux's association was one of thirty-two provincial Académies established to encourage the spreading of knowledge, and, in the case of Bordeaux, to fight against a more recent change of heart in Paris and at the royal court scorning scientific exploration and heralding in a new period of intellectual disfavour.[50] Despite the awareness of an important public mission, however, the association remained quite exclusive with only twelve full members until the middle of the century (two other classes of members were associates and students, a hierarchy which reflected roughly the hierarchy of membership in the Académie royale des sciences) and who were for the most part parlementary magistrates and doctors. The group met every Sunday from December 1st to August 25th and had two public sessions a year, one of which was dedicated to the distribution of essay prizes.[51]

One must ask, given the great importance attributed to this association for Montesquieu's later work, if there was any consistent methodology or philosophy of science which informed the collective work of the Académie and which they actively promoted in their various public competitions. While it is impossible to do a full survey of all the literature and presentations produced by the Académie after 1712, it can be discerned even from the summaries of presentations that are available in Montesquieu's own notes, that a variety of scientific approaches were entertained.[52] The approach of the members can best be described as piece-meal and eclectic, for while there is a certain shared tendency to repudiate the traditional principles of scholastic science which grounded explanation of phenomena in a consideration of their final, rather than their efficient, causes, there is borrowing from both Cartesian and Newtonian frameworks for the interpretation of experiments and direct observation, as well as differing interpretations of these very frameworks themselves.[53] As the understood objective of the association was a practical one, it is not surprising that there was little indepth consideration of the varying principles and systems informing the

experimentation. It is even claimed as a general trait of all scientific presentation in the provincial academies that it was primarily a forum for the flourishing of a new discourse designed to impress and to provoke public curiosity- quick to promote an illusion of knowledge but rarely capable of recreating an authentic scientific enterprise and atmosphere.[54]

Montesquieu was elected as a member on April 3, 1716 while he was still a young councillor in parlement.[55] In his long association with the Académie (he was director in 1718, 1726, 1739 and 1748) he is noted to have made at least forty-two interventions, many of which were summaries of received papers for the purpose of distributing essay prizes.[56] While he had close friendships with several of the members, his participation in the activities of the Académie quickly waned after his first years as a member given his frequent absence from Bordeaux and his preoccupation with domestic affairs and his own literary projects. Nonetheless, he did make a point of representing the group in Paris.

A survey of the subjects addressed by Montesquieu shows a predilection for natural history and medicine, although he did give some presentations in the field of history (Dissertation sur la politique des Romains dans la religion, 1716) and moral science (e.g. Traité des devoirs, 1725). The priorities of the group are reflected in his own choices. In the same manner, his approach is characterised by theoretical eclectism. While finding fault with traditional Aristotelian assumptions with regard to the causes of transparency and the growth of plants, his positive endorsements of scientific principle range from Cartesian assumptions on the body as machine, the existence of animal spirits to explain involuntary movement, and the air as matter for which the transmission of sound must be explained; Malebranchean assumptions that particular movements can only result from general laws of movement (despite another intervention asserting that the discussion of a case of a child born without a brain serves to undermine the whole Malebranchean system); and Newtonian conclusions on the phenomena of opacity, transparency and colour as well as a questioning of his assertions on the causes of the tides.[57] At times, the philosophical generalities and flights of rhetoric leave

the scientific aspiration as a mere promise. The joining of art and science as a cultural ideal may obscure the new demands of science. Witness, for example, this summary of M. Sarrau's dissertation on sounds:

> On a bien raison de dire, Monsieur, que, pour réussir dans presque toutes les productions de l'esprit, il ne suffit pas de penser, il faut encore sentir. Egalement maitre de la science et de l'art, vous vous servez de l'un pour parvenir à l'autre, et vous les rapprochez, malgré la distance infinie qui se rencontre, presque toujours, entre l'artiste et le savant.
>
> Oserai-je le dire, il n'est pas possible que ceux qui ont entendu la douceur de vos concerts et cette dissertation, ne se rappellent l'idée de cet Orphée de la fable, qui touchait si mélodieusement la lyre, et dont il nous reste des morceaux si admirables de philosophie.[58]

The flights of scientific oration, however, unite the lyre and philosphical reflection in the same work, sometimes at the risk of valuing the presentation over the principle. The novelty of the Académie's perceived role, to promote a public conception of knowledge against a tradition of private and secretive scholarship raised with greater urgency the question of the representation of science.[59]

Thus, it would be difficult to attribute to Montesquieu any consistent and rigid scientific method learned in his experiments with the Bordeaux Académie and subsequently applied to the field of jurisprudence. Rather, it would seem that apart from a general appreciation for empirical verification and a disposition to not accept doctrine solely on the basis of authority, Montesquieu's affiliation with the Académie trained him in a type of scientific discourse which could render added legitimacy to his arguments, perhaps a raiment of scientific reason to generate a feeling of truth.

IV. Conclusion.

This chapter, then, has shown that the study of law in early eighteenth

century France was not a simple matter of adopting certain scholastic or humanist methodology to a set of authoritative texts, but a discipline of varied and competing approaches which reflected certain tensions of collective self-understanding associated with the emergence of an integrated national state. Attempted political intervention in the shaping of the discipline as part of a wider process of state-building reinforces the point. In addition, dominant forms of academic legal argument had shaped the structure and understanding of the process of integration and resistance to it. The relative disarray in the discipline by the early eighteenth century, then, had more than merely local and academic significance. The opportunity it provided for the building of new frameworks of understanding could have important political consequences as well.

Furthermore, a survey of the scientific discipline as witnessed and practised by Montesquieu himself in early eighteenth century Bordeaux shows that despite an almost universal rejection of traditional scholastic assumptions, alternative methods were neither uniform nor consistently invoked. This practical eclecticism is coupled with Montesquieu's own general silence on major questions in the philosophy of science. Both these points help to call into doubt a dominant reading of Montesquieu's enterprise and serve as a prelude to an alternative narrative.

Endnotes

1. Proponents of this view include Simone Goyard-Fabre, La Philosophie du droit de Montesquieu, and Louis Desgraves, "Introduction," Pensées, ed. Louis Desgraves (Paris: Robert Laffont, 1991).

2. For a discussion of the use of the Roman law concept of imperium to bolster the power of the French monarch, as well as the invocation of new interpretations to provide checks on that same power, see Myron Piper Gilmour's Argument from Roman Law in Political Thought 1200-1600 (New York: Russell and Russell, 1941, 1967).

3. See for example Emile Durkheim's Montesquieu et Rousseau comme précurseurs de la sociologie, (Paris: Marcel Rivière, 1953); and Raymond Aron, Les Etapes de la pensée sociologique (Paris: Gallimard, 1967).

4. Donald Kelley has argued that this sociological sensibility is in fact wholly compatible with the pre-existing tradition of jurisprudence and finds its immediate predecessor in Bodin's Six livres de la république. See "The Prehistory of Sociology: Montesquieu, Vico and the Legal Tradition." In History, Law and the Human Sciences. The key point of transition is the move by both Bodin and Montesquieu to expand the traditional category of jus gentium to include customs and institutions from a wider variety of nations, both past and present, than was usually done. While this may be a feature of continuity, this thesis will argue that there is another more immediate source for the structures of Montesquieu's thinking. Kelley's emphasis on the centrality of the concept of jus gentium fails to explain how it was possible and acceptable to dilute the concept to such an extent, as well as to use it to dwell on cultural and institutional differences as opposed to the traditional emphasis on the rules which were common to a variety of nations.

5. He distinguishes his approach from that of standard works of jurisprudence by his assertion "Je n'ai point séparé les lois politiques des civiles: ...comme je ne traite point des lois, mais de l'esprit des lois...". Montesquieu, L'Esprit des lois, I, iii. Direct quotes from this text for this study are taken from L'Esprit des lois, volume 1, ed. Robert Derathé (Paris: Garnier Frères, 1973) and L'Esprit des lois, volume 2, ed. Robert Derathé (Paris: Bordas, 1990).

6. It was named officially the Académie royale des sciences, belles-lettres et arts de Bordeaux and was recognised by letters patent signed by the king and dated September 5, 1712. These letters were registered by the Bordeaux parlement on May 3, 1713. The Académie, along with other civil associations, was outlawed on August 8, 1793.

For more details about the founding and history of the library consult

Marie-Joseph Payot,"La Bibliothèque publique de l'Académie royale des sciences, belles-lettres et arts de Bordeaux au XVIIIe siècle," Revue historique de Bordeaux et du département de la Gironde 31(1985), 29-43 and Pierre Barrière, L'Académie de Bordeaux, centre de culture internationale au XVIIIe siècle (Bordeaux and Paris: Editions Bière, 1951). This library was the precursor to the present municipal library of Bordeaux (still harbouring an excellent rare books and manuscripts collection).

Jean-Jacques Bel had known Montesquieu from their school days in Juilly. He became a member of the Académie only two years before his death.

7. Barbot had been elected to the Académie in 1718 after being presented by Montesquieu himself. He served as director four times (1721, 1727, 1731 and 1739). He also sought hard but unsuccessfully to dissuade Montesquieu from selling his parlementary charge. (See Barrière, L'Académie de Bordeaux, 171-73).

8. Payot, "La Bibliothèque publique", 35. The books which he refused to give to the Académie were those which he had annotated as well as some tracts against the Jesuits for whom he did not wish to encourage disrespect.

In addition to the donations of Bel and Barbot, some yearly purchases and small gifts, the library's collection was completed during the century by further donations from the doctors Pierre Campagne (1743) and Joseph Cardoze (1747) as well as other members such as Etienne Pédesclaux de Chesneau (1775), and François de Lamontaigne (1786) and non-member Nicolas Beaujon (1786). It came to comprise roughly 10,400 works in 20,000 volumes (Ibid., 42).

9. B.M. de Bordeaux, Ms 867.

10. B.M. de Bordeaux, Ms 833.

11. B.M. de Bordeaux, Ms 835. The most recent book in the catalogue is a 1755 edition of Coste's translation of Locke's Essay concerning Human Understanding. Assuming that the catalogue was drafted in that year or shortly after, we can surmise that the compiler of the catalogue was Dominique Castet, librarian for the Académie from 1751 to 1764. According to Payot, Castet was a doctor by profession and an acting professor of botany at the faculty of medecine in Bordeaux. (Payot, "Bibliothèque", 40).

12. For example: Daniel Mornet, Les Origines intellectuelles de la révolution française 1715-87 (Paris: Armand Colin, 1934) and Roger Chartrier, Lectures et lecteurs dans la France d'ancien régime (Paris: Editions du Seuil, 1987).

13. See the article on the academies in eighteenth century France in Keith Baker ed., The French Revolution and the Creation of Modern Political Culture (Oxford and New York: Pergamon Press, 1987-89) as well as the work of Douglas Roche, Les Républicains des lettres (Paris: Fayard, 1988). For Barrière, the wave of

newly created provincial académies in the beginning of the eighteenth century was in part a direct response to what was perceived to be an overly rigid and authoritarian approach to learning which was held in traditional educational institutions of both the centre and periphery. In its intellectual functions and real tasks, the Bordeaux Académie is understood as aspiring to a form of alternative university. (L'Académie de Bordeaux, 9-10, 28-29). In his correspondence to Barbot, Montesquieu himself asserts the need for the group to mount experiments open to the public free of charge and to invite, in particular, the students of the two main local colleges. [letter of December 20, 1741, Correspondance, ed. François Gébelin (Bordeaux: Librairie Champion, 1914), vol. 2, 285]

14. As Douglas Roche notes, the Bordeaux Académie was not unique among provincial academies in actively choosing to model itself after the Parisian Académie des Sciences (1666) rather than the Académie française (1637). See Les Républicains des lettres.

A curious feature about the catalogue is the range of works included under the category of mathematics. This subject heading is used to bring together not only standard texts of arithmetic and calculation, but also treatises on astrology, navigation and most prominently, the art of ballistics and war, including Blondel's L'art de jetter les bombes(1699).

15. Another indication of this difficulty can be found in the work of Domat. In his Traité des lois he admits the awkwardness of the original classification of legal principles on the model of Justinian and proposes a more sound and rational ordering.

16. See Brockliss' French Higher Education in the Seventeenth and Eighteenth Centuries (Oxford: Clarendon Press, 1987), chap. 6, for a survey of legal education at this time.

17. It is important to note that in this classification, Domat is not considered to be a theorist of natural law, as some modern commentators have wished to make him out to be. This has significance not only for the interpretation of Domat's own enterprise, but also for the debate over the relative strength of a natural law school within France. It seems to support the arguments of Tuck and Hochstrasser that despite toying with the vocabulary of natural law, the French intellectual tradition of the Enlightenment could be said to have largely by-passed it. See Richard Tuck "The Modern Theory of Natural Law." In The Languages of Political Theory in Early-Modern Europe. ed Anthony Pagden (Cambridge: Cambridge University Press, 1987), 99-119 and Timothy Hochstrasser, "Natural Law Theory, its historiography and development in the French and German enlightenment, c. 1670-1780", unpublished Ph.D. thesis, Cambridge University, 1990.

18. On the 1679 ordinance and the creation of these new academic chairs see Christian Chene, L'Enseignement du droit français en pays de droit écrit (1679-1793), (Genève: Librairie Droz, 1982); Alfred de Curzon, "L'Enseignement du droit français dans les universités de France aux XVIIe et XVIIIe siècles," Nouvelle Revue historique de droit français et étranger 43(1919), 209-69 and 305-56; Brockliss, French Higher Education, chap. 6.; Isambert et al., eds., Receuil général des anciennes lois françaises depuis l'an 420 jusqu'à la révolution de 1789 (London: Farnborough Gregg Press Limited, 1966, first published in Paris, 1822-33), vol. 19, n. 886.

19. Keohane, Philosophy and the State in France.

20. William Church, "The Decline of French Jurists as Political Theorists, 1660-1789," French Historical Studies 5(1967), 1-40. While showing an admirable wealth of scholarship, the article also too hastily concludes that modern natural law theories in general replaced domestic theories of public law in directing general political debate within France, as a sort of theoretical deus ex machina. In fact, as a recent thesis has concluded, the importance of the modern natural law tradition for major theorists of the French Enlightenment is negligible or at least highly ambiguous. See Hochstrasser, "Natural Law Theory". The relative lack of discussion of principles of public law in the field of jurisprudence in the latter seventeenth and early eighteenth century is also acknowledged by Edouard Laboulaye in the "Avertissement" to his edition of Claude Fleury's Institution au droit français, (Paris: Auguste Durand, 1858), xxii.

21. The diversity of customary law in early-modern France is rooted in the decline of a system of legal personality developed by the various Germanic tribes who took over the territory of Gaul after the fall of the Western Empire. The Franks (in the north), the Visigoths (in the south-west) and the Burgondes (in the east) all developed legal regimes which incorporated a summary of Roman law (based on the Theodosian code as Justinian's project had not yet begun) into their own authoritative texts and which allowed the former Gallo-Romans to choose which legal regime they would be judged by. With the cumulation of time and the onset of a climate of relative ignorance in the dark ages, the legal knowledge to apply these texts was lost. In addition, the original distinction of races was no longer relevant. Instead, various localities developed their own version of legal practice which drew on the original legal elements as well as the particular needs of their own territory. By the eleventh century all traces of the system of the personality of law were lost and replaced by what became known as territorial customs. These reflected somewhat the former regime in that there was a greater resonance of Germanic law in the north and of Roman law (via the Theodosian code) in the south. (The revival of Roman law studies in the twelfth century based on Justinian's Corpus juris civilis was therefore a completely extraneous element to the codes constitutive of French legal practice up to that time.) The division between the regions of written law and customary law was recognised by

the thirteenth century.

While certain informal treatises sought to codify local practices, it was not until the orders of local seigneurs, from the thirteenth to the fifteenth century, and the ordinance of Montil-les-Tours of Charles VII in 1453, that official codifications were begun to be drawn up slowly to be eventually adopted by the courts. Esmein recognises their ambiguous nature in both consecrating regional diversity and promoting legal uniformity within these regions, as well as marking a transition from popular legislative practice to a written code which could facilitate royal pretensions to appropriate the grounds of its legitimacy through the act of publication and registration. See Adhémar Esmein's Cours élémentaire d'histoire du droit français, 2e éd. (Paris: Librairie du Receuil général des lois et des arrets, 1895), 745ff.

22. Georges Benrekassa, in La Politique et sa mémoire (Paris: Payot, 1983), 273-81 notes the problem of articulating the political and developing legal realities of the early-modern French state within the language of Roman civil law.

23. In this statement I have Grotius in mind. He recognised the need to support his argument for the existence of basic laws of nature drawn from a consideration of the basic characteristics of individual and social existence with a series of practical examples taken from the laws and customs of a majority of the 'most civilised' nations.

24. See Title II of The Institutes of Justinian, ed. J.A.C. Thomas (Cape Town: Juta and Company Limited, 1975).

25. See Grotius' distinction between natural and arbitrary law in his 'Discours préliminaire', ss.16 and 31 In Le Droit de la Guerre et de la paix, trans. Jean Barbeyrac (Amsterdam: Pierre de Coup, 1725). It is the nature of the connection between natural and arbitrary law in Grotius, i.e. the emphasis on the notion of promise-keeping leading to the conclusion that all positive law is based on some form of express or tacit consent, that makes it difficult to accept Courtney's argument that Montesquieu is only continuing Grotius' enterprise, or taking up the challenge as it were of conceiving of a rationalised and systematic treatment of what was deemed unchartable in any scientific manner. See C.P. Courtney's "Montesquieu and the Problem of 'la diversité'."

26. In the Traité des devoirs he adopts the genre and language of modern natural lawyers but in a way which through this distinction progressively undermines the tradition, a prelude to his aborting and abandoning the work altogether. This will be discussed in the fourth chapter of this thesis.

The closest ardent defenders of royal prerogative in France could come to bringing together political and legal authority was to emphasise the king's role as a legislator through various edicts, declarations and ordinances, as well as his exclusive responsibility in ordering the drafting of customary law. However, the

contemporary power of the king as a unique maker of law could not, without great distortion, be construed as a claim to be its unique historical source.

27. For a survey of the debates in historical scholarship concerning the basic principles of the French polity as they were advanced in the early eighteenth century (which goes beyond the standard exposition of the work of Dubos and Boulainvilliers and the polemic of the Romanist and Germanist schools), see chapter 4 of Elie Carcassonne's work, Montesquieu et le problème de la constitution française au XVIIIe siècle (Paris: Presses Universitaires de France, 1927). The earlier public law/consitutionalist tradition is well covered by William Church in Constitutional Thought in Sixteenth-Century France (New York: Octagon Books, 1969). It is Nannerl Keohane's contention that Montesquieu's thought is in essence a continuation of this earlier constitutionalist tradition, despite Church's assertion that it faded more than a century earlier. While there are certainly points of continuity, Keohane does not address the question and problem of the return to an earlier tradition after more than a century of alternative legal scholarship, as well as the novel features of Montesquieu's work, first and foremost his implicit rejection of the label of theorist of public law. See Philosophy and the State in France.

28. See Roger Chartier et al. L'Education en France du XVie au XVIIIe siècle (Paris: Société d'édition d'enseignement supérieur, 1976); Dominique Julia and J. Revel "Les Etudiants et leurs études dans la France moderne," in Les Universités européennes du XVIe au XVIIIe siècle: histoire sociale des populations étudiantes, tome 2 (Paris: Editions de l'école des hautes études en sciences sociales, 1989), 25-486; Jacques Verger, ed., Histoire des universités en France (Paris: Bibliothèque historique Privat, 1986); Francis Monnier, Le Chancelier d'Aguesseau (Genève: Slatkine-Megariotis reprints, 1975, 1st ed. 1863); Alfred de Curzon, "L'Enseignement du droit français dans les universités de France aux XVIIe et XVIIIe siècles,". There were twenty-four universities established in France in the early eighteenth century.

29. Examples of reform include the 1679 Ordinance and the plans of chancellor d'Aguesseau for widespread educational and university reform.

30. Of l'Edit touchant l'étude du droit civil et canonique, et du droit français, et les matricules des avocats, St.-Germain-en-Laye, avril 1679, In Isambert et al, eds., Receuil, vol. 19, n. 886, article 12 rules specifically against professorial fraud in the discerning of degrees, article 14 introduces the teaching of French law, article 15 rules that a register of attendance and certification of successful completion of the university degree are required for the graduate to be considered for the position of lawyer or prosecutor, and article 18 rules that all candidates for judicial office must also pass an oral examination in front of at least two councillors of each chamber of the parlement of the jurisdiction applied to. A declaration of January 26, 1680 added that all chief judges of the lower courts

(bailli, sénéchal, prevot, chatelain, and other heads of seigneurial courts) would also be required to have a degree in law and to have taken the lawyer's oath. This same declaration specified that no foreign law diplomas would be accepted for professional qualification. (Déclaration sur l'édit d'avril 1679, portant reglement sur les degrés de licence en droit civil ou en droit canon, Saint-Germain-en-Laye, 26 janvier 1680, In Ibid., n. 912)

31. Dominique Julia and J. Revel, "Les Etudiants et leurs études", 128.

32. For example, in the case of university examinations, it has been reported that the arguments sought by the professors were often handed out in advance to the students and in some cases the examination requirement was wavered altogether. The University of Orange reported no failures between the years 1679 and 1703. (Dominique Julia and J. Revel, "Les Etudiants et leurs études," 132.) It has been widely noted that the parlementary exam was seen as a purely formal matter.

Also, by the latter eighteenth century, almost half of the law school population had received the dispense d'age, requiring them to study there only six months before receiving their professional qualifications. (See Verger, ed. Histoire des universités en France, 186).

33. Verger, ed. Histoire des universités en France, 204; Brockliss, French Higher Education, 64-65. Also see the case of the student riot in Bordeaux as reported by Jean Dalat in Montesquieu magistrat (Bordeaux: Archives des Lettres Modernes, 1971).

34. This argument is developed fully in Christian Chene's work, L'Enseignement du droit français en pays de droit écrit (1679-1793). Oliver-Martin in his lectures on the Coutume de Paris also refers to the importance of this code in the teaching of French law in the eighteenth century. Its supra-regional importance is symbolised by the ruling that it would also serve as the basic law for French colonies in North America. It stands, therefore, as an important historical source of the modern code civil in Quebec.

35. Brockliss, French Higher Education, 282ff. In this passage he also presents a picture of the standard four-step analysis used by professors in explaining a legal text: namely, an interpretation of the law based on the author's intentions, a history of the law, a comparative analysis of other similar laws, and an explanation of the law in rationalist terms as justified by the principles of justice and utility. He calls this approach eclectic insofar as it combines the approaches of the Bartolists and the Renaissance legal humanists.

36. This question is explored more thoroughly by Christine Bège-Seurin in "Des Difficultés de mise en oeuvre d'une réforme universitaire sous l'ancien régime: le cas de l'ordonnance de 1679 à Bordeaux," communication faite à l'Académie Montesquieu, juin 1990.

37. Bège-Seurin, "Des Difficultés de mise en oeuvre d'une réforme universitaire," 8. She notes that the king had foreseen the possibility of this latter action and thereby had suggested a separate source of funding for the professor through the Treasury, however, this was never implemented. Instead, it was ruled in 1682 that the professor would receive 6 livres from each student receiving a record of attendance at his course. Still, the insufficient guarantees led in Bordeaux to a doubling of responsibilities such that the first two professors of French law, including Blaise Fresquet who taught Montesquieu, combined their royal appointment with posts as professors of civil law in the same faculty. It was not until the edict of 1738 which guaranteed 32 livres from each student examined in the field of French law, that professors of French law were guaranteed an adequate income.

38. The progressive demand for greater academic preparation in the holding of judicial office can be illustrated by an examination of four royal ordinances or edicts: in 1551 when the presidial courts were established it was required that these magistrates hold a licence in law and be at least 25 years old; in 1579 (the Blois Ordinance) it was asserted that the same conditions would apply to anyone wishing to hold an office of councillor, in a sovereign court, or parlement, and that the office of president in the same institution would require ten years experience as a councillor or lieutenant general and an age requirement of at least forty years; in 1679 a licence was required for officers in lower jurisdictions with a special certificate as proof of attendance at the law faculty; in 1680 this requirement was made more precise with the specification that the charges of bailli, sénéchal, prevot, chatelain, or other head of seigneurial justice could only be held by those deemed to have received a law degree. (In Verger, ed. Histoire des universités en France, 156-57).

39. As presented by a lawyer in the presidial court of Orléans, M. le Trosne: "Ce n'était pas proprement la science du droit qu'ils enseignaient: ils ne présentent de cette science si belle et si lumineuse par elle-meme, que ces épines et ces contrariétés qui lui sont étrangères et qui n'y ont été introduites que par l'incapacité et la mauvaise foi des rédacteurs des pandectes. Au lieu d'expliquer les textes d'une manière propre à instruire, ils ne remplissaient leurs leçons que de ces questions subtiles, inventées et multipliées par les controversistes.

A cette manière d'enseigner, on auroit pu croire qu'ils n'avoient d'autre objet que de fermer pour toujours le sanctuaire des loix aux etudiants par le dégout qu'ils scavaient leur inspirer, semblables à ces anciens patriciens qui, pour tenir le peuple dans leur dépendance, lui cachaient avec un si grand soin les formules des actions, et s'étaient approprié la connaissance des lois, qu'ils avaient soin de voiler sous une écorce mystérieuse." In Eloge historique de M. Pothier, cited in James E. Montmorency, "Robert Joseph Pothier" Great Jurists of the World,eds. John Macdonnell and Edward Manson (New York: Augustus M. Kelley, 1968), 448.

40. Charles Loyseau Cinq livres du droit des offices (Cologne: Isaac Demonthovz, 1613), I,iv.

41. In Correspondance, 433. Montesquieu entered the faculty of law of the University of Bordeaux in 1705 and received a degree on August 12, 1708.

42. D'Aguesseau, Oeuvres complètes, ed. M. Pardessus (Paris: Fantin et Compagnie, 1819), vol. 15.

43. This little discussed notebook is found at the Bibliothèque nationale, N.A. Fr. 12837 à 12842. Its contents are summarised as an appendix to Iris Cox's study Montesquieu and the History of French Laws (Oxford: The Voltaire Foundation, 1983).

44. Edit touchant l'étude du droit civil et canonique, et du droit français et les matricules des avocats, St.-Germain-en-Laye, avril 1679, In Isambert et al., eds. Receuil, n. 886, art. 16.

45. D'Argenson, Journal et Mémoires, ed. E.J.B. Ratheny (Paris: Jules Renouard, 1863), vol. 5, 410.

46. Edit touchant l'étude du droit civil et canonique, et du droit français, et les matricules des avocats, St-Germain-en-Laye, avril 1679, In Isambert et al., eds., Receuil, n. 886.

47. See chapter three for further study of the patterns of administrative corruption in the jurisdiction of the parlement of Bordeaux, as revealed in the inventory of criminal cases brought before La Tournelle 1714-24.

48. The most visible piece of legislation aimed at curbing official corruption in the court system was the declaration of August 4th, 1688 which set up a commission for judicial reform. The declaration states: "Nous avons jugé à propos de nous servir du même moyen [que pour les finances] pour remédier aux abus qui se peuvent rencontrer dans l'administration de la justice; et pour prévenir l'impunité des crimes et pourvoir à l'oppression que les faibles souffrent par la négligence ou connivence des juges, nous avons résolu d'envoyer de temps en temps des commissaires de notre conseil dans toutes les provinces de notre royaume, pays et terres de notre obéissance, pour prendre connoissance de la conduite des officiers de judicature, de l'inobservation de nos ordonnances, et généralement de tous les abus qui se commettent sur le fait de la justice, tant civile que criminelle..." In Isambert et al., eds., Recueil des lois, vol. 20, 59.

49. Proponents of this view, to cite only a few, include: Jean Brethe de la Gressaye, "Ce que 'L'Esprit des lois' doit à l'Académie," Actes de l'académie nationale des sciences, belles-lettres et arts de Bordeaux 18(1962), 49-54; idem,

"Introduction" In L'Esprit des lois, ed. Brethe de la Gressaye, vol. 2 (Paris: Belles Lettres, 1950-61); Pierre Barrière, Un Grand provincial; Louis Desgraves, Montesquieu (Paris: Mazarine, 1986); Pierre Grenaud, Montesquieu (Paris: Lettres du Monde, 1990), 87.

50. This impression is conveyed by Montesquieu himself in his reception speech to the Académie delivered on April 18, 1716.["Discours de réception à l'Académie de Bordeaux," In Oeuvres complètes, ed. Daniel Oster (Paris: Editions du Seuil, 1964), 38-39.] While a majority of provincial academies modelled themselves after the Académie française (est. 1635), Montpellier adopted the same alternative model as Bordeaux. (Daniel Roche, Les Républicains de lettres, 174) Roche argues that despite a sense of local pride which fueled the introduction of local academies, the ideology of academism with its emphasis on the collective utility of popular education led by a cultured and royally sanctioned elite was an integral part of the structure of what he calls enlightened absolutism. It created a forum wherein a traditional society of distinctive orders and privileged bodies were used to help construct a new social order sharing a common language and aspiring to a single cultural and ethical ideal.(Ibid., 160-69)

51. Further details of its founding and organisation can be found in Pierre Barrière's L'Académie de Bordeaux; Académie des Sciences, Belles-Lettres et Arts de Bordeaux, Table historique et méthodique (1712-1875); Documents historiques 1711-1713; Catalogue des manuscrits de l'ancienne Académie (1712-1793) (Bordeaux: Imprimerie G. Gounouilhou, 1879); and Jean de Feytaud's "L'Académie de Bordeaux sous l'ancien régime," Revue historique de Bordeaux 23(1974), 71-86.

52. See "Résomptions diverses," In Oeuvres complètes, ed. Daniel Oster, 56-59.

53. The allusions to Newtonian theories in Bordeaux by 1720 is also evidence that the infiltration of Newton's world view into France was earlier than the late 1720's after the conversions of Voltaire and Maupertuis. See Seymour L. Chapin's "Science in the Reign of Louis XIV," In The Reign of Louis XIV, ed. Paul Sonnino (Atlantic Highlands, N.J.: Humanities Press International, 1990), 179-94. The recognition of differences of opinion over the frameworks invoked is shown in Montesquieu's remarks in "Observations sur l'histoire naturelle," In Oeuvres complètes, ed. Daniel Oster, 55.

54. Roche, Les Républicains des lettres, 214.

55. Jean de Feytaud, "L'Académie de Bordeaux," 78.

56. A list of these known interventions is provided in Pierre Barrière's biography of Montesquieu, Un Grand Provincial, 176ff.

57. On Montesquieu's criticism of Aristotelian principles of science in his interventions at the Académie see, Oeuvres complètes, ed. Daniel Oster, 51 and 54; on Cartesianism, Ibid., 47, 48 and 53; on Malebranche, Ibid., 55 and 57-58; on Newton, Ibid., 51, 52 and 58.

58. Ibid., 58. This commentary was read by Montesquieu to the Académie on August 25, 1720.

59. Montesquieu himself recognised this distinguishing feature of the institution: "L'utilité des académies est que, par elles, le savoir est plus propagé. Celui qui a fait quelque découverte ou trouvé quelque secret est porté à le publier, soit pour le consigner dans les archives, soit pour en receuillir la gloire et meme augmenter sa fortune. Auparavant, les savants étaient plus secrets." In Pensées, ed. Louis Desgraves, n. 2203.

CHAPTER TWO

POLITICS OF THE PATRIE: INVENTING A NEW LANGUAGE.

There is a paradox governing the dominant assessments of Montesquieu's relation to the parlements of pre-revolutionary France. On the one hand, many historians of this period and of the parlements in particular interpret Montesquieu's work, L'Esprit des lois (1748), as providing a theoretical grounding for the political claims of the parlements in their periods of public struggle with the monarchy. It is widely recognised that by the 1750's the parlements were finding resources for their arguments from his work and that the development of public disaffection with Montesquieu's ideas corresponds with the parlements falling out of favour after the call for the convocation of the Estates General.[1] On the other hand, acclaimed biographers of Montesquieu stress his disinterest in the institution during his own career as a magistrate.[2] His cumulative absences from the courtroom and the selling of his charge of président à mortier at the early age of thirty-seven, despite the protests from some of his closest friends, are cited as evidence of this disposition.[3] Explanations include his professed inabilities to master the fine-points of legal procedure and his growing literary and diplomatic ambitions.[4] From this latter perspective it would seem an irony of history that he has come to be identified as the parlements' most loyal defender.

In an effort to reframe our understandings of the political realities of early-modern France and Montesquieu's relation to them, this chapter and the next will study the major trends of argument in the Bordeaux parlement during the years in which Montesquieu served as a magistrate. Two areas will be explored. First, there is a study of the parlement with regard to general administrative or policing functions (in the eighteenth century understanding of police) and of the institution's relations with various other administrative bodies in the region. Second, in chapter three, the patterns of judicial decision of the criminal chamber (the Tournelle), to which Montesquieu was assigned for most of his judicial career, are examined. What will emerge is a picture of an institution in shifting alliances

with a variety of administrative bodies, in a public space where it will cultivate a unique form of argument relative to its own capacities, resources and perceived mandate. An exploration of this particular provincialist perspective will in its turn serve as a more credible and useful background from which to make sense of Montesquieu's debts to, and repudiation of the parlementaire traditions of his day.

From a study of the Bordeaux parlement's public and private pronouncements in this chapter, it will be argued that the parlement, acting within a series of constraints, generated a form of argument which was substantially new, both in relation to its own past as well as to the contemporary arguments of the Paris parlement.[5] This new approach was not predominantly constitutionalist, understood as an appeal to fundamental laws and procedures; but, rather, what I shall call associational, that is, deriving its values and grounds of justification from forms of social interrelation. Associational language is characterised by close attention to the nature, mechanisms and internal standards of the public realms of association being judged and respect for the principles which sustain them. In addition, it involves a recognition of a variety of forms of association within one community with the consequent need for flexibility in the application and enforcement of rules. In doing so, it also includes the understanding that some forms of association are more basic than others. Underlying this form of argument one finds a shift in focus from questions of pure legality to judgements of appropriateness and utility as defined by enhancing fulfilment of the given objectives of an association. These objectives are discerned not by a study of a set of individual wills and their common motivating reasons, but by a consideration of the ends implied in practice and to which the actions tend, as well as the public sentiments necessary to sustain them. By embedding political and legal judgement in a whole array of social and economic considerations in this manner, the court's discourse pointed towards new directions in the science of politics and law.

I. A new look at absolutist monarchy.

Before embarking on an analysis of the particular occasions in which such arguments were invoked, it is necessary to question in more general terms traditional historiographical conceptions of the political environment in which such developments were possible. A dominant understanding of the workings of absolutist monarchy in France in the recent past was shaped by particular interpretations of the works of Bodin, Bossuet and de Tocqueville.[6] It portrayed a political system in development as a progressive concentration of power in the person of the king, engaged in extracting and accumulating ever-increasing financial resources, while building a strong central bureaucracy. While the king's power was seen to be subject to the theoretical limits of religion or divine law, accepted juridical traditions and the institutionalised division of offices and executive functions, it was argued that these checks were largely self-enforced and could be whittled away in political casuistry and legislative encroachment in the context of growing international prestige, militarisation and mercantilist rivalries.[7] A corollary to this understanding of central power was a picture of a progressive erosion of local and corporative (sometimes labelled feudal) powers and the eventual impotence of a multiplicity of modes of self-governance in the face of a uniform and resounding sweep of royal prerogative. In this context, the legitimating discourse of divine right supported by a practical justification of reason of state were seen as hegemonic.[8]

Within this general framework, the parlements were seen to play one of three roles: chief defenders of the fundamental laws and constitutional rules necessary to guard against the rise of political tyranny; representatives of an aristocratic class whose visions and objectives were anachronistic; and advocates of essentially their own privileges and traditional institutional interests engaging, for reasons of self-promotion, in a strategy of opposition which eventually backfires.[9] However, while trying to account for a strategy of open and unified opposition as manifested in the latter half of the eighteenth century, these accounts

largely took for granted the unity of the parlements. This thesis was first proposed by the chancellor L'Hopital in 1560 as a means to ensure the subservience of provincial courts to the king, as all were to be presumed divisions of the royal parlement. When invoked by the Paris parlement itself in 1755, it was a theoretical means to promote institutional solidarity in opposition to royal policy. Nonetheless, this new use did not betray fully L'Hopital's intention to marginalise long traditions of regional particularities in the exercise of sovereign justice and general administration.[10]

More recently, however, this understanding of the nature of the absolutist regime in France, and consequently the role of the parlements within it, have been questioned increasingly. An array of local and specialised studies have led many historians to recognise in fact the highly fractionalised, competitive and restrained features of the political system, one in which the parlements played ambiguous roles as both defenders of the monarchy and periodic, though relatively weak, critics of royal policy.[11] It may mean also that we can no longer presume the primary unity of the parlements. In addition, with a recognition of a greater diversity of traditions and institutional structures comes the possibility to acknowledge the room for the growth of other forms of political discourse which had their own positive roots in the institutions of their day.

II. The Bordeaux parlement between king and province.

At one level, it is clear that the Bordeaux parlement shared the essential characteristics and same functions as the other twelve parlements operating in France at the beginning of the eighteenth century. It served as a sovereign court of appeal for all royal (of which 29 were senechaussée courts) and seigneurial courts in the regions of the Guyenne, Gascony, Landes, Agenais, Labourd, Limousin, Périgord, Bazadais and Saintonge.[12] It was the second largest parlementary jurisdiction in France and included roughly two million people (the Paris parlement, the largest jurisdiction, administered over ten million inhabitants

or half the population of France). While sovereign in its jurisdiction, it always ruled in the name of the king and saw itself as an instrument of royal justice to enforce whatever decrees and ordinances which had been registered. As the other parlements it also had responsibilities in regional administration, especially for questions of public security and provision of basic goods (in the form of arrêts de règlement), as well as the duty to register royal edicts and declarations to ensure their regional enforcement, a duty which carried with it the right of remonstrance; that is the chance to voice grievances over the measure to the king and his council.[13]

In the face of repeated parlementaire resistance, the king had the procedural tools to enforce his policy through the issuing of a lettre de jussion and the eventual calling of a lit de justice in which the contested piece of legislation would be registered in the king's presence. All parlements were governed by the same general procedure in these matters, and were liable also to the more harsh measures of the king against a recalcitrant company including exile (imposed on the Bordeaux parlement from 1675-90), the abolition or transfer of traditional responsibilities (the Maupeou experiment in the 1770's), as well as the limiting of the right of remonstrance (the subject of edicts in 1667 and 1673 requiring that legislation from the king's council be registered prior to the voicing of objections). The latter edicts, it should be noted, did not eliminate that right, nor were they designed to be permanent measures.[14] The pre-1667 regime was reinstated by the Regent in 1715, in return for a wavering of provisions in Louis XIV's will regarding the composition and functioning of a proposed regency council.[15] However, in 1718 these rules were again modified for the Paris parlement with the provision that all remonstrances were to be emitted within a week of receiving an edict.[16]

While the size and precise organisation of the parlements differed in their details according to the needs of the jurisdiction concerned, most followed the basic organisation of the parlement of Paris with its main Grand'Chambre where the most pressing matters and cases would be discussed, a Chambre de la

Tournelle to deal with all criminal cases (or those judged by the lower courts to merit corporal punishment), one or several Chambres des Enquêtes to deal with all civil cases submitted in written form, and a Chambre des Requêtes to deal with litigants holding a letter of committimus giving them the privilege to argue their case in first instance in the parlement. While each chamber was in many ways autonomous, there was still a strong sense of relative ranking. The order of their listing here reflects a general order of precedence jealously guarded in times of public ceremony.

In addition, all parlements included the same classes of titled official: a first president (premier président); several présidents à mortier; a couple chevaliers d'honneur; presidents of the Enquêtes and Requêtes; a large number of councillors (including a few clerics); a procurator-general (procureur général) and advocates-general (avocat général), often called collectively the gens du roi; and, head clerks.[17] The Paris parlement, however, did distinguish itself in being the sole body in which the peers of the realm sat and were judged.

In addition to the sharing of similar principles of internal organisation, the parlements were joined in their common subjection to a vast array of royal pronouncements regulating the acquisition and transfer of office. These included the requirement that all new magistrates have a degree in law and pass a public examination, provisions for the venality of office (introduced under François I) and rules governing the hereditary transfer of office, granted through the payment of a special tax, la paulette (1604).[18] While most of the offices in the parlements were venal, the offices of first president and procurator-general remained direct royal appointments.

Finally, as a result of a long historical process of central regulation, all parlements were required to follow the same basic procedures. The great civil and criminal ordinances of 1667 and 1670 focused almost exclusively on procedural matters and served to promote a uniform practice in all royal courts, including the parlements. Thus, in its organisation, procedures and function as an instrument of royal justice and administration, the Bordeaux parlement shared many basic

features with the other parlements across France. As such, it cannot be denied that the parlements did play a role in national consolidation.

However, at the same time, the parlements were to function in provincial environments which were vastly different and through their powers of local administration and interpretation, they were able to build upon and to develop their own specific traditions. The distinctiveness of the provincial parlements derived firstly from the circumstances of the various acts of founding. The Paris parlement itself was in its origins an administrative outgrowth of the curia regis or king's council following the reign of Louis IX. The first known parlementary records, the Olim, date from 1254. It was deemed a technical and administrative necessity given the increased importance of and growing demands on royal justice in the context of the abolition of judicial combat and the development of a system of appeal (on modern terms). As such, its jurisdiction extended no further than that of the king's domain, as it stood at that time. On the surface, with the added conquests of the monarchy and the extension of royal territory in the fifteenth to eighteenth centuries, the establishment of local parlements might seem a mere extension of monarchical control. However, these provincial institutions were established in quite a distinct spirit, with the precise recognition of the importance of preserving local customs and privileges, and in most cases as completing, rather than abolishing, an already long-established tradition of regional seigneurial justice as it had existed in each great fiefdom.[19] As such, they could be considered as outgrowths of the medieval tradition of a territorial conception of justice, hitched to the political designs of a consolidating monarch.

In this, the Bordeaux parlement was no exception. While promised at the point of capitulation when, by the treaty of Bretigny, the English relinquished their hold of the province of Aquitaine, the parlement, dating from 1462, was established in a spirit of certain generosity recognising the continued authority of traditional privileges and customs. Communal privileges, traced to a charter of 1224, included municipal control over all general matters of police and administration, criminal matters, the keeping of the city keys and the command of

a militia.[20] The bourgeois of the city of Bordeaux were granted their traditional exemption from all personal and commercial taxes and were granted special commercial status, that is a monopoly, for all wine sold in the city. The parlement itself succeeded to the jurisdiction and work of the Cour supérieur of Guyenne.[21]

Throughout its history the various patterns of direct royal intervention in the administration of the region, and the nature of popular responses to it were also important in shaping a unique tradition for the court. In 1548, popular revolts against a salt tax (la gabelle) sparked a riot and the eventual massacre of a royal tax collector, and led the parlementary magistrates, who up to then were pleading for popular submission, prudently to back the protest until calm was restored by military occupation.[22] In 1635, again in protest against an accumulation of financial impositions, popular demonstrations brought the parlement to suspend the collection of a tax on wine.[23]

By the time of the Fronde (while Joseph Dubernet, the father-in-law to Montesquieu's grandfather, was serving as first president of the parlement), the parlement's early initiative in protesting the office and extended jurisdictions of the new intendants led them to court popular favour by refusing to collect another new wine tax and by blocking export of local grain to Spain.[24] However, by stirring the brew of rebellion, and in the aftermath of a series of military clashes between the forces of parlement and those of the provincial military governor, the parlement found itself once again overtaken by popular ferment. The Ormée movement, composed largely of artisans, petty merchants and professionals, drew up a new municipal constitution in opposition to the magistrates. With the final peace in 1653, a general amnesty was declared, except for the leaders of the Ormée, and the parlement returned to Bordeaux from an imposed state of exile.[25] The actions of the parlement in these matters had always been conducted in the spirit of loyal opposition. However, the experiences could not have left them without an acute sense of both the potential for popular volatility in the region, especially in reaction to fiscal measures, and the consequences of prolonged dissent.

This latter sensitivity was reinforced when the parlement was to undergo a fifteen year exile from the city of Bordeaux after a riot in opposition to new taxes on tobacco and tin in 1675. The privilege of return was bought at the cost of 4,000 livres. It was a history of failed strategies of direct and active confrontation in matters of contested policy, and a need to lead and to manage rather than be caught up in movements of popular protest, that led the magistrates of the Bordeaux parlement to develop a distinct political strategy subsequent to their return to the city in 1690.

III. Internal regime of the parlement

It was also in this context that Montesquieu started his legal career as a parlementary councillor in 1714, in the shadow of his uncle who had been serving as a président à mortier since 1678 and from whom Montesquieu was designated to inherit the charge.[26] A study of the issues and arguments arising in the rulings of the court from 1714 to 1726, the years of Montesquieu's service, will show how through a dual sense of local responsibility and corporate self-interest a modified form of political and legal understanding informing the strategies of this institution could emerge. These rulings revolved around various fields of local administration including provision of food in times of crisis, health, security and commerce. In addition at times to being expressions of support or dissent with regard to royal policy, they might also involve various conflicts of jurisdiction with other local administrative and policing bodies.

As a prelude to the presentation of this new political strategy, however, it is important to provide a short introduction to the internal regime of the parlement. It will serve to suggest that the emerging form of argument was shaped not only by history, but also by the contemporary nature of the court. This included both material circumstances and attempts to reconcile in public discourse, the principles of duty and honour which often came in conflict in the daily course of justice.

The court's internal regime and basic resources of argument were affected,

sometimes in significant ways, by its physical surroundings. The Palais de l'Ombrière, where the parlement sat, and which it shared with a variety of other local judicial and administrative bodies, was in a tragic state of disrepair.[27] The building itself was several centuries old and had served at one time to house the dukes of Aquitaine. By the eighteenth century, it was known as the site of a large fire which in 1704 had destroyed several parlementary chambers along with various judicial records, with particular losses among the records of the previous century.[28] Furthermore, the lack of heating in the chambers was one factor encouraging a high rate of truancy in the winter, to the point that the court would have difficulty at times meeting its quorum. Questions of prolonged absences and of the first president's power to enforce a 1574 ruling to withold wages from those présidents à mortier who refused to attend all sessions gave rise to disputes, especially in the 1720's, and helped to sour the working mood of the institution.[29] In addition, the lower floors were home to the notoriously decrepit Bordeaux prison whose walls were easy to break through and from which prisoners often escaped.[30] In the 1720's reports were commissioned to address the important structural problems apparent in the main parlementary chambers.[31] But despite the surrounding decay, the magistrates were readily caught up in the pomp and pageantry of office and occupied with matters concerning their own personal and official honour.

The conduct of the court itself was governed by royal ordinances, written style and unwritten custom (which sometimes took its lead from the practice in Paris), directives from the first president, periodic recitations of the public duties of magistrates as offered in the speeches delivered on the occasion of the annual recall of the court (on the day following St. Martin's day falling on November 11) and mercurials.[32] As the group was preoccupied with its relative privileges and status, it found effective instruments of regulation in measures of exceptionalism and favour and in sanctions of public moral admonition and public apologies. The privileges of office included full noble status for all presidents, councillors, advocates-general and procurators-general, since a 1644 edict governing the Paris

parlement was subsequently applied to other sovereign courts; thereby also exempting officers from paying the taille (already a privilege with the bourgeois of Bordeaux). In addition, all magistrates had the privilege of being tried by their peers and were given additional fiscal and commercial privileges.[33] In internal affairs, official regulations governing accession to office with respect to age, education and training, and conflict of interest, were circumvented as a matter of course with the frequent granting of special dispensations.[34] This was perhaps a direct outgrowth of the practice of transferring judicial charges on the basis of venality and patrimonial inheritance, for with these latter it was no longer possible to control as strictly the qualities of the candidates for office.[35] Loyseau had always been critical of these measures for in his view they encouraged a form of judicial independence, in contrast to revocable appointments made on the sole grounds of public service and personal loyalty to the monarch. However, they were not a step towards a new impersonal conception of office but merely a modification in how the personality of office was to be defined. The transition from beneficiary to limited proprietor in the official's relation to his function only brought a need to seek through the holding of an office the very status and public recognition which had once been its very reward.

An example of a response to professional misconduct illustrates the continued importance of personal honour. In 1722, the advocate-general Dudon, who had been previously reprimanded by the first president, Gillet de La Caze, for remarks questioning the political motivations of the judges, was again under fire for having written to the Chancellor himself complaining in a libellous manner about the first president.[36] This was settled by the chancellor's ruling that Dudon not only offer an apology to La Caze, but that he do so in public.

Montesquieu himself was not only a subject of this intricate system of moral economy running on the granting of privileges and the currency of status and relative preeminence, but also a regulative voice. In his Discours sur l'équité qui doit régler les jugements et l'exécution des lois delivered on the opening of the parlement November 12, 1725, and sold outside the palais on the same

occasion every year thereafter, Montesquieu addressed the main bodies of officials successively and offered maxims of conduct to improve the dispensing of justice.[37] While this speech is dismissed by Shackleton as a "rhetorical exercise", its success is surely evidence of it having struck a chord with the institution.[38]

As a participant in this practice of moral instruction, Montesquieu, assuming a basic sense of justice in the magistrates without which no instruction would be possible, examines the features which promote its flourishing. In doing so, he is also identifying those faults which he perceives in the practices of the court. He argues that justice must be enlightened, suggesting that more than good intentions are needed and that the knowledge of one's own limits may impose the duties of either further effort or change of profession. Second, justice must be prompt (criticising those who unnecessarily prolong cases to the detriment of the parties involved in order to increase their fees). Third, magistrates should cultivate a sense of humanity and not confuse neutrality with austerity and harshness, despite the trials of flattery. Finally, justice should be universal: the magistrate should be just in both his public and private affairs, both to guard against the corruption of judgement and to set a good and honest example. In these matters, the private self is regulated to be instrumentally beneficial to the public persona.

> Les jugements que nous rendons sur le tribunal peuvent rarement décider de notre probité; c'est dans les affaires qui nous intéressent particulièrement que notre coeur se développe et se fait connaître; c'est là-dessus que le peuple nous juge, c'est là-dessus qu'il nous craint ou qu'il espère de nous. Si notre conduite est condamnée, si elle est soupçonné, nous devenons soumis à une espèce de récusation publique; et le droit de juger, que nous exerçons est mis, par ceux qui sont obligés de le souffrir, au rang de leurs calamités.[39]

This burden of setting a public example in private life is not, however, extended to the advocates and procurators who are directed to watch their tongues in court and not to promote the dishonour and disrespect of the pleading parties. They are

also to remember their duties to their adversaries and not to be so overcome with their function that they mislead the judges. As such, the speech sheds light on some of the weaknesses of the institution, including a selection of unqualified magistrates, young officials with more flamboyant lifestyles and a tendency for rashness and officials concerned with the honours and emoluments of office over and above the vocation of promoting justice founded on a genuine respect for the people served. A significant feature of the piece is Montesquieu's recognition that out of a particular tradition of regulating institutional behaviour partly through shame and reproach, there is moreover a logical necessity for an underlying sense of justice.[40]

In addition, he uses the forum to present a typology of justice systems: first the type of ancient monarchy found in a pastoral, relatively poor, militaristic society with few basic needs, few laws and a popular system of magistrature, as well as simplistic and unjust modes of settlement through ordeal and combat; and second the type of modern monarchy in a society shaped by commerce, agriculture, the growth of wealth and greed and more complex ways of ordering business and of cheating, bringing with it the need for more laws and a class of magistrates with specialised knowledge. This early classification of regime types was a device to facilitate the identification of the appropriate duties for the practice of justice in his own era and region with an explicit rejection of the early historical model. Given the rather wry and cutting tone in which the faults of his colleagues are exposed, it is not surprising to note that shortly after delivering this speech, Montesquieu sold the rights to use his charge to d'Albessard, with the provision that on d'Albessard's death, the charge would be transfered back to Montesquieu or to his own son, Jean-Baptiste.

Thus, we find behind the more open strategies of the court, and as a very precondition for their possibility, in a combination of various measures granting personal privileges and various collective forums in which the public role of the court was addressed in a form of institutional self-evaluation, an ongoing attempt to combine the dictates of both personal honour and public duty. It may be that

this could be best achieved when the body was confronted by policies that posed as much a benefit or threat to its institutional integrity as it did to the well-being of its jurisdiction.

IV. Forging new forms of argument.

During Montesquieu's time as a magistrate, the Bordeaux parlement was far from being a mere usine de justice.[41] While it is true that the parlements had been subject to the provisions of the 1670 edict restricting their rights of remonstrance, it is also evident that registration of royal ordinances, edicts, declarations and letters patent was still necessary. The Bordeaux parlement had continued to issue remonstrances and various protests prior to the death of Louis XIV (remonstrances were not outlawed but merely allowed after registration), and in any case, much of the parlement's real political importance was not at this time tied up with its relations with the central government, but rather in its role in responding to local needs and concerns.[42] Loyseau had already distinguished the role of parlementary magistrates from the judges of the courts of extraordinary justice (eg. the Cour des aides, the Table de marbre and the judges of the Eaux et Forêts, the prévôtal courts, etc.; that is, courts assigned to deal with specialised issues and specific classes of people), in that comprehensive territorial jurisdiction brought with it the power of command (imperium).[43]

Evidence of this local involvement is shown by an incident noted on the registers of February 20, 1715 in which the parlement protests the exclusion of its representatives in a recent meeting of the thirty prud'hommes, a municipal council responsible for both the election of nominees to serve on the jurade (governing council) and the discussion of matters of certain importance to the city. This was distinguished from the Assembly of the One Hundred and Thirty (composed of local notables, the thirty prud'hommes and representatives of local administrative bodies) in which more critical issues were to be discussed.[44] The protest offered by the first president appealed to an edict of 1566 (followed by letters patent

registered by the court) that gave all parlements of the kingdom the right to be informed of all municipal assemblies and to be able to send observers. Because of the 1704 fire which destroyed records of the previous century, as well as the disruptive effects of the period of exile from the city, the court was not able to argue from recent example. However, the letter did stress the rational justification for the rule, namely that without the presence of observers from the parlement, it was possible for the councillors to introduce arbitrarily into this more restricted assembly, issues which should be treated in the larger forum of the one hundred and thirty. In this case, the councillors were to discuss a plan of compensation for municipal offices recently abolished by the crown (lieutenant mayor and honourary jurats in an edict of September 1714), touching at a sum of 300,000 livres. After the letter of protest was sent to the king, the parlement received a note from the Chancellor stating that he would defend the rights of the parlement when the matter was to be addressed in the royal council.[45]

This case sets out explicitly the constraints placed on the Bordeaux parlement in its sources of political argument. Lacking both the historical records and the physical presence to construct a solid case on the basis of precedent, the court must reject a standard juridical reflex. Instead, it works towards a new resolution, evident in its invocation of the principles involved, ie. fear of arbitrary action by the municipal council, given the particular circumstances. While the parlement was arguing for the enforcement of an edict already promulgated, it still felt required to offer a justification which would fit the logic of the rules to the circumstance. In the case of opposition to new measures, there would be an added impulse to ground the judgement of the appropriateness of legislation on a consideration of the underlying principles of various social practices and regional characteristics. Thus, the regional focus and objectives of the parlement's work was to be matched by a discourse which drew on local social, political and economic characteristics to justify legislation.

V. Bakers and butchers.

One continuous concern for the parlement relative to the needs of the local community was to ensure an adequate provision of basic goods. While the Guyenne was an agricultural district, the amount of land devoted to vineyards was a sign of the relatively poor quality of the soil and of the risks growers were willing to take to achieve prosperity. The monarchy, and particularly the administration of Colbert, had encouraged diversification. However, while grain was produced and sometimes exported, there were also periods of great shortages.[46] A pervasive fear of famine, which most recently became a reality in 1709, had led to a strongly interventionist tradition with regards to the storing and selling of grain within the Guyenne as well as to its export from the region.[47] In 1720, such a fear was again looming, particularly within the city of Bordeaux (with a population estimated at 55,000).

The issue was raised in a general assembly by De la Vie, a président of the first Chambre des Enquêtes, on April 30. He argued that given the pressing needs of the people in the jurisdiction, those storing grain should be required to bring them to the markets, and meat prices as well as tariffs on incoming grain should be reduced.[48] An order went out on May 3rd that all grain was to be brought out of storage and in August there was an agreement on the fixing of prices for meat and bread.[49] However, after a long period of storage, the grain had begun to deteriorate, so that by September, the parlement had to deal with growing popular hostility against the bakers. Sacks of rotten flour were thrown into the river by parlementary and municipal officials and two merchants were arrested. With the return of the official session in November, the king sent a notice expressing his displeasure with the parlement's actions in these matters.

In a related affair the next spring, the court sent remonstrances to the king for a ruling of his council overturning a decision of the court requiring the municipality to register with the court all regulations concerning the price of meat before their enactment.[50] The court in its arguments recognises that in its period

of exile from the city, the municipality was able to set a precedent of having exclusive control over setting the price of meat, despite the parlement's authority in this field prior to 1675. However, they also argue that the public interest requires upholding a subsequent ruling of 1694 in which the municipality agreed to register its claims in the court. The reason for such a regulation was to keep public confidence; that is, to provide a check on the municipality and guard it against the accusation of being too partial to the butchers. Here again for the court the accumulation of past precedents could not serve as a strong foundation for their arguments; so they argue their position from a conception of the local public interest and a consideration of the needs of the city.

It is important to stress how distinct such arguments were from the standard fare of juristic writing at the time, and indeed of the parlement's own past. A reading of a 1616 remonstrance by the same court in protest against the king's overruling of a court order evokes a fear of divine wrath and argues for consistent procedures to ensure the sanctity of royal authority.[51] In contrast, in the remonstrance of 1721, there was no appeal to principles of universal justice or divine law, neither to the needs of the royal office, nor to authoritative principles of traditional civil law, and nor to the fundamental constitution. In this 1721 declaration, the law was conceptualised as responding to and sustaining a need for popular confidence vis-à-vis the municipal institutions. This would be done by ensuring against the triumph of particular and factional interests (in this case the avaricious butchers in league with the jurats). While harbouring certain constitutionalist overtones in the critique of arbitrary power, this position was unlike traditional constitutionalist theory: first, it did not centre on the nature and functions of monarchical power and its bridles of religion, justice and la police, but rather on the need for checks on la police and local corporations themselves; and second, these provisions were not derived from a consideration of the attributes of office and sovereign power but considered to be instrumental to preserving effective legitimacy which had been eroded in the past with excessive food prices. Still, the distinct nature of the approach was not a guarantee of its

strength. With the unfavourable royal response announced to the court on August 1st, it was decided to charge de Pichon, the parlement's current deputy in Paris, to make further efforts to convince the chancellor of the justice of their position.

It is also significant to note that here the central government is upholding the powers and claimed jurisdiction of the municipality above the claims of the parlement, at a time when, it has been argued, the powers of the municipal governments had been progressively reduced to very little. In fact, as this exchange shows, municipal powers had in fact been enhanced in certain ways during the period of parlementary exile.[52]

VI. Questions of health.

The parlement also was involved in overseeing the general state of public health in its jurisdiction. The spread of disease was an added cause of fear among the population, increased with incidence of epidemics and in particular the outbreak of the plague in Marseille in 1720. The matter was first addressed in the assembled chambers in September 1720. However, it was not until 1721 when the sindic of Languedoc made a request to the king that their goods destined for export to Holland be able to pass through the port of Bordeaux (the port of Marseille being closed) that the magistrates took action.[53] Remonstrances were sent in May. Again the citizens of Marseille themselves demanded of the Regent and chancellor that their goods be able to pass through Bordeaux for export. In their letter to the Regent dated July 29, the Bordeaux magistrates speak of the devastating effect a ruling in favour of Marseille would have on popular fears and on the suspicions of foreign merchants. The king took heed of the parlement's demands and did not fulfil the wishes of the petitioners.[54] The parlement was particularly sensitive to the commercial practices of those in its jurisdiction and of the undue harm an increased climate of fear would have on trade.

These concerns, however, were not always so apparently honest and sometimes served to protect or expand the parlement's traditional powers. Such

was the case in the Hôpital St. André affair. The hôpital St. André was one of the few institutions in France denoted by the same term which was exclusively devoted to the care of the sick. The dispute centred around proposed changes to the administrative board of the hospital. The hospital was itself the product of the amalgamation of two institutions which had ties to the parlement and jurade respectively. Each felt that its historical claims and presence on the board were of a greater significance than for the other; and more importantly, each sought numeric control of the board as a means to keep its administration under their own jurisdiction.[55] On April 1st, 1718, the parlement called for remonstrances regarding the letters patent modifying the composition of the board, remonstrances which were entered into the court record on the 29th. The letters to the king argue first, that the municipal officers are only guided by their particular interests, second, that the historical claims of the parlement regarding the founding of the hospital by a former président à mortier were of more weight, and, third, that the proposed changes in the governing structure would be prejudicial to the good of the patients. Ultimately, it must be public utility which justifies the continuation of the current structure, despite a past of fluctuating practices and precedents. To include members of the class of bourgeois on the board, as the letters patent rule, is to bring unqualified people to the administration and to detract from the distinguished nature of the board, an important feature for attracting donations. The parlement also argues that the period of exile was a test for municipal administration which they ultimately failed given their poor financial management. This picture of administrative incompetence is juxtaposed with the image of the caring and concerned parlementaire commissioners who, it was claimed, visited the sick each day, listened to their grievances, consoled them and looked after their every need on request.[56] In closing, the parlement accuses the municipality of seeking their humiliation above all other concerns.

The rather rosy picture of conditions inside the hospital as portrayed by the parlementaire's case, is nonetheless misleading, given the appalling conditions of the institution. By the end of the eighteenth century it was described as

harbouring "un atmosphère pestilentielle" and despite poor ventilation, it was not until 1785 that tobacco smoke was banned from the wards.[57] The previous month a prisoner, deathly ill, held for reasons of debt, refused to go to this hospital despite the formal suggestion by the prison commissioner.[58]

Another letter bearing the same arguments was sent to the Regent on April 30. However, by May 2 the king notified the parlement that their objections were unacceptable and that he would be sending lettres du jussion to ensure the registration of the letters patent. Again the parlement wrote to the Regent and to the Chancellor, but changing its argument to take on a roughly constitutionalist tack so as to stress the importance of the founder's original intention and of the king's orders to maintain established institutions in their original form. It then alludes to the dangers of novel arrangements:

> Les nouveautés ne sont jamais introduites que pour reformer un abus ou procurer un plus grand bien. Il est pourtant vray de dire que l'hopital ne sçauroit etre mieux gouverné qu'il est actuellement. Et l'on peut craindre que s'il prend une forme nouvelle, il ressentira les effets de ce changement qui ne peut etre profitable qu'aux jurats.[59]

But while the court would seem to be taking a substantially traditionalist position here, one must also remember that in the previous letter the court had recognised a variety of administrative arrangements in the hospital, all of which could be hoisted up as precedents, and that furthermore, the court was not adverse to change when it would seem to increase their jurisdiction and administrative control. Thus, what may be read as an ideological conservatism is rather a foil for protecting their own interests, which they also see as complementing general public utility. In pursuing all forms of recourse, the court also wrote to the Duc de Bourbon, head of the Regency council, who promised to place the matter on the agenda. However, two weeks later the king signed lettres de jussion to be delivered to the court by the acting representative to the regional governor, and friend of Montesquieu, the Duc de Berwick.[60] The letters patent were duly

registered. By August, the municipality was petitioning the parlement who had not yet implemented the new provisions.

We see then in these arguments of 1718 a rather eclectic array of principles of appeal, some more substantive than others. Part of this can be attributed to the very nature of the struggle, that is, various royal officials seeking confirmation of the king's authority and flattery for his favour.[61] Nonetheless, the basic tenor of the parlement's argument in this affair was to sketch a position in which the institutional and jurisdictional interests of the magistrates coincided with public utility seen in terms of more efficient financial administration, greater care and concern for the constituency, and a tried and tested remedy in the face of a new order which threatened to be dishonouring to the institution and irresponsible in its use of power. Also, as in other expressions of discontent, the parlement stresses a fear of arbitrariness as coming from below as a result of a progressive erosion of their powers in favour of the municipality.

VII. Public security.

Along with the unpredictable and seemingly arbitrary ravages of famine, plague and disease, the pervasiveness of violence by wandering bands, military deserters and one's own neighbours, created a underlying current of fear and insecurity for many of the inhabitants of the jurisdiction, especially for those outside the towns.[62] In such an environment, it was also only natural that the parlement should be concerned to promote a general climate of safety, alongside the strict settlement of disputes. Many of the measures to address these problems were initiated by the central government itself. However, it also received active support by the parlement, including declarations to restrict the carrying of weapons among those outside the noble classes and to facilitate the policing of vagabonds.[63] Given the rather weak position of the military governor in the region, the intendant was also an important figure in assuring peace and order. The intendant's encroachment in these matters is well illustrated by the outcome

of a inquest regarding the death of one student and one soldier of the municipal guet (apparently shot by his own company) as a result of a jurat's order that the municipal force shoot on a body of demonstrating students.[64] The parlement, in its study of the matter, declared the jurade to be acting incompetently and asserted that they should have been consulted at the beginning of the protest. However, in a ruling of the royal council, the intendant Claude Boucher (1720-1743) was given the authority to judge the matter by commission. He ruled that it was not a matter for the parlement and that in future crises the jurade was to leave matters of policing to the intendant. Given the lack of a parlementaire militia, it is understandable that it was not able to make strong claims for the extension of its powers in these matters, beyond that of a final court of appeal. As such, the concerns were more effectively met by other jurisdictions.

VIII. Taking care of business.

However, often overshadowing these other concerns in the discourse and agenda of the court, was the sense of a need to protect the financial and commercial interests of the region and the city, mainly those of the merchants and of the wine-producers. A study of the various pronouncements of the Bordeaux parlement on these matters from 1714-26 will reveal, among other things, that it was hardly the feudalistic institution some authors have made the parlements out to be.[65] They show a unique approach to the larger economic questions of the day. On four occasions during these years the court made long and eloquent pleas to make the royal council sensitive to the particular needs of the jurisdiction in these matters.

Montesquieu's parlementaire service began in a period of acute financial crisis for the regime and the region.[66] At the finish of the Spanish war of succession, trade was slow given increased international competition and the scarcity of money. A flurry of bankruptcies led the parlement to extend a ruling to outlaw the execution of all orders emitted by the judges of la Bourse (a

commercial court) to arrest merchants in default.[67] It could be seen as a period of financial decline far worse than the later troubles with the fall of John Law's bank and trading company, in which context the first letters of remonstrance for this period were drafted.[68] The magistrates had a vivid understanding of the perils of economic depression and a strong willingness to avert repeated disaster.

However, despite this will, the Bordeaux parlementaires adopted quite a different stance than their Parisian counterparts. On September 20, 1720, when the court entered into its registers a copy of a letter of remonstrance regarding letters patent that created a system of banking credit for commercial transactions in the city, the Paris parlement had already been in exile in Pontoise since July.[69] The magistrates in Paris had led both a vigorous and singular campaign against the financial policies of the crown. In 1718, two years after the establishment of Law's bank, the Paris parlement called for a meeting of deputies from parlements all across France to protest an act of monetary devaluation (to encourage the popular use of the new bank notes of a more stable value). The courts, however, refused. In continuing its opposition, the Paris parlement sent delegations to the Regent to protest the policies on the basis of their procedural validity, that is, their ultimate constitutionality. Because the new measure was not sent to the parlement for registration (but to the Cour des Monnaies), the parlement argued that it could not be considered legally binding in the jurisdiction and issued a degree outlawing distribution of the new money. The Regent annulled the act and proceeded to limit the magistrates power of remonstrance in arguing that the parlement had no business in issuing decrees in a field in which it was not competent. It was declared that all remonstrances were to be limited to those acts sent to the court for registration and that, even under these circumstances, if remonstrances were not issued within eight days, the act would be considered duly registered.[70] Two years later, after continued opposition, the order for exile was issued.

The Paris parlement's strategy characterised by persistent and aggressive attacks on the royal policies and its emphasis on the constitutionality of the adopted measures can be contrasted with the position of the Bordeaux parlement

as voiced in its remonstrances of 1720. It helps to explain why the earlier call to parlementary unity failed. The letter of remonstrance drafted by the Bordeaux parlement in opposition to the act establishing bank accounts and requiring commercial payments to be taken up in a wide system of credit, sets up its objection by tracing an economic sketch of the region. Lacking self-sufficiency, the Guyenne must trade in order to survive and centres its commerce on the selling of wine and brandy (as such this also attests to the still rather limited importance of colonial trade for Bordeaux in the early years of the century). However, what is essential to the well-functioning of the trading mechanism is a sense of confidence, sustained by a widespread circulation of funds.[71] The recognition of the importance of circulation and popular confidence as elements of prosperity were ideas the Bordeaux parlementaires shared with Law, despite their general opposition in many other matters, and was a departure from the traditional tenets of mercantilism which judged a nation's wealth from the size of the state treasury alone.

The major objection to the new arrangement was that the generalised system of credit detached from actual state of reserves was designed for a homogeneous and commercially developed society. In contrast, in the Guyenne, international trade was not the sole activity but was supported by primary industries whose products could only be paid for in cash; and, in addition, it was not solely a coterie of merchants, but included a wide range of occupations whose workers would not survive without a regular cash in-flow.[72] In this context, the introduction of a general system of credit would deprive the merchant of the funds necessary to support the very economic structure of the province which sustained his trade. To dramatise its case, the parlement also alludes to the possibility of popular rebellion in the case of economic hardship in the province. Its objection, therefore, to a system of credit is not to its nature as a commercial device, nor is it opposed on any constitutional grounds. It is in the consideration of the interrelations of the various levels of economic development and the varying forms of economic activity in the region that the system of credit is judged to be

undesirable. In doing so, the parlementaires also lay claim to be articulating popular grievances.[73]

Two years after the fall of Law and with the state debt estimated at two billion livres (as it had been in 1715), royal officials continued to search for new ways to raise revenue. A declaration of May 15th, 1720, was the culmination of a series of royal acts which were direct assaults on the traditional privileges of Bordeaux. It ruled for a tax of forty sols the cask to be levied on the wine and brandy produced and sold by the inhabitants of the city. The parlement proceeded in the same manner it had under similar circumstances in 1704 (in which a council of the hundred and thirty was called to come up with a counteroffer to buy back their privileges for a certain sum). The public treasury, eager for ready cash, was not averse in general to these arrangements. In this case, however, the intendant was not being cooperative in allowing this process of meeting and negotiation to occur. After a letter was sent by the parlement to the chancellor informing him of the state of affairs, the parlement recognised Montesquieu's role as representative of the court in Paris and sent to him, as well as to the royal council, mémoires in which their position was explained. They pointed to the precedent of 1706, arguing that the collection of taxes by a traitant was wasteful and counterproductive and that by subscription (abonnement), the region could, like a pays d'état, arrange its own method for collecting the required sums in a manner less prejudicial to the commercial interests of the region.[74] What is less harsh on the inhabitants is in fact in the greater interest of the king, and as such, the question is more a political one, the best means to raise funds being one of permitting certain local flexibility. A tax limited to wine (both sold locally and for export) would be disastrous for the wine industry and would be difficult and wasteful in its collection.[75] In Paris, Montesquieu suggested to the intendant des finances that the wine tax for the city of Bordeaux be replaced by a general tax of 200,000 livres on the whole of the généralité of Guyenne. This became the final compromise accepted by all parties. It shows that the royal court was not insensitive to local concerns. It also shows that the local powers were not

insensitive to the problems of public debt and that they were well aware of the practical problems of tax collection.

Another tax measure introduced at a time when Montesquieu was considering selling his charge was the cinquantième, a direct tax proposed by the new administration of the duc de Bourbon to collect one fiftieth of all revenue in kind from all citizens.[76] While the regime had been subjected in theory to other forms of direct taxation which were to combat the rampant exceptionalism and inequality in the administration of the taille- namely the capitation (introduced 1695 as a form of graduated income tax) and the dixième (1710-1717)- the actual implementation of these had led to a modified recognition of the same privileges, such that in certain cases they had come to be perceived as merely extensions of the more ancient tax.[77] The proposal for the cinquantième showed more determination than ever to avoid these weaknesses and ensure a wider tax base. In answer, the resistance to this new measure was strong and equally determined, as voiced by both the traditionally privileged classes as well as the general population. But despite its part in a movement of opposition which stretched across the realm, the Bordeaux parlement had its own particular and local reasons for opposing the measure.

In a letter addressed to the king (dated July 16, 1725), the court firstly invokes the rather shaky economic climate given the recent demise of Law's enterprises, an experience from which, the court argues, only certain small-time merchants, artisans and workers escaped relatively unscathed. In the momentary climate of prosperity before the fall, land-owners planted a large number of vines in the hopes of increasing their wine production. However, in the fall, they found themselves overextended, "ils n'avoient travaillé que pour se ruiner."[78] This is a double calamity in that wine production was the key industry of the region, served to give a boost to all the others and in general favoured the circulation of money which was regarded to be an essential part of economic prosperity. Apart from the wine industry, the area produced several regional specialities (chestnuts, hemp, plums and poix raisins) in small quantity, and some wheat, lumber, and

hay. Of the latter, wood was rare and expensive given the great demand in the region both for the construction of wine barrels and to fuel the refineries and ovens in the production of brandy. In addition, because of the poor quality of the soil, much effort was required to produce even enough hay to feed the horses and other beasts of burden who worked on the farms. As for wheat production, the region was not able to meet its annual needs. Thus, as tax revenues depended on the prosperity of the province, and the prosperity of the province depended in the end on the health of the wine industry, it was argued that it would be contrary to the government's interests to introduce a measure which would adversely effect that industry.

The court apologist went on to demonstrate how the cinquantième would in fact do just that, by encouraging wine-growers to either sell their land or to cultivate them poorly. The argument contains a long detailed description of the features of the wine industry in the region and its relation to various methods of growing grapes and the type of labour required. The basic argument is that the universal requirement of taxing all produce at one fiftieth of its quantity, while in theory a gesture of equality, showed great insensitivity to the nature of the wine industry, which used its produce in various ways and for various products of different value, was labour intensive, and carried with it a variety of added expenses not incurred by other crops. In the case of the best quality grapes for wine production ("des vins de grave et autres de la même classe"), the tax would in fact result in the collection of one sixth the expected return. For this reason, the proposed measures would promote vast inequalities and unjustly penalise an industry which was already subjected to a great number of risks, both agricultural and commercial. If these conditions were to be perpetuated, producers would not be able to continue to support themselves, in which case both the subjects and the royal treasury would suffer in the long term, not to mention more immediate short-term effects of massive unemployment among the over a million labourers on the vines in the lower Guyenne alone (an exaggeration, given that the whole jurisdiction of the parlement held roughly two million).

> Si le proprietaire tombe dans l'impuissance de faire travailler ses vignes, ces gens de journées dans les années de cherté des grains seront bien tost reduits à la derniere misere et l'on peut craindre qu'un peuple dans une indigence extreme ne soit affligé par des maladies contagieuses ou n'écoute les pernicieux conseils de la necessité.[79]

Thus, while sustaining an argument on the basis of interest, the court is also playing on (and stirring up) a certain element of fear, a fear haunted and fed by the recent plague in Marseille, as well as a tradition of popular unrest in the Guyenne region itself. It is also an argument which counters the logic of aspiring fiscal responsibility and the necessity of budgetary constraints in the public sphere, with the primary necessity of a certain amount of private prosperity without which the first would neither be possible nor of any significance. It takes the form of a warning to those administrators who in seeking to sustain political glory, ignore at their peril the need for a deeper understanding of the characteristics of their constituency and the limits of their resources.

The final assault by the court dwells on the inconveniences and the cost of collection, given the intensive nature of the grape harvest and the number of officials required. The letter ends with a recollection of the failed Bank project as if to raise the spectre of repeated financial disaster, and an allusion to the possibility of fading royal glory. Despite these arguments and general widespread resistance throughout France, the measure was passed by the various parlements of the realm, either through lettres de jussion or in the case of Paris, a lit de justice. However, it was to be revoked in July 1726 as popular resistance made it impossible to collect.

Directly after issuing its protest against the new tax, the court raised its voice once more in opposition to an edict confirming the powers of the Compagnie des Indes occidentales and ruling that all disputes involving the trading company would be judged by the court of the consuls in Paris, with appeal to the Paris parlement. While obviously angered at the diminishment of its jurisdiction (note that this was how the possibility of appeal to the Paris parlement was

perceived), the Bordeaux parlement also argued that, more significantly, the ruling was a hindrance to good economic development in the region. While ostensibly informed by a principle of equity, by consolidating several companies and subjecting all traders to the same rules, the measure in fact creates a powerful economic association, bolstered by exclusive trading privileges in many corners of the world. In such circumstances, it is already a risky affair to plead against such an organisation, and even more so when one factors in the time delays and costs involved in bringing a case to Paris. Such costs and delays are also very harmful in that they threaten the very sense of confidence and freedom which are preconditions for a flourishing commercial economy.[80] This freedom is protected by such political measures as that found in Louis XIV's 1673 ordinance (title 12, article 17) which allows the creditor to subpoena his client. In contrast, the new measures governing the activities of the trading company allowing it to expand its trade in sometimes ruthless ways will create a climate of uncertainty and fear and kill any sense of ambition among independent merchants, thereby encouraging laziness and apathy. As the trading of independent merchants is more aggressive and inventive than that of the large companies, commerce will ultimately suffer greatly with such a loss. In regulating the field of commerce, the government should always be attuned to the need to respect the sovereign law of interest and ambition on which the activity in this sphere is founded and sustained. This is also relative to the type of regime:

> ...la puissance et la protection ne sont pas les plus surs moyens de faire fleurir le commerce dans un etat monarchique, le genre et l'industrie d'un grand nombre des particuliers animés à l'envy par un esprit interressé multiplie ses opperations (sic) et entretient avec plus de succes la confiance et la circulation.[81]

The parlement's appeal ends with praise of the policy of Colbert who understood that a trading company should not be given too extensive a monopoly, nor too much protection, for these will in the end be prejudicial to the cause of commerce.

IX. Conclusion.

In the year following this protest, Montesquieu sold his charge to d'Albessard and left Bordeaux soon after for his travels throughout Europe. For some, this is evidence of Montesquieu's disinterest and even disdain for his judicial career. However, this gesture does not override the fact that Montesquieu kept his title of le président. Also, on d'Albessard's death in 1747, and with the knowledge that his son was not interested in taking on the charge, Montesquieu was not so adverse to the profession as to write to his friend l'abbé Guasco asking him for help in the decision of whether or not to take on the charge himself again.[82] He ultimately declined and sold it without conditions. But whatever the case, it is important to separate the particular occasion for Montesquieu's departure and the prolonged experience and possible intellectual training he acquired in this association. For this reason alone, it is worthwhile to examine the general trends of argument fashioned by the Bordeaux parlement.

It was not the intent behind the preceding exposition to offer a thorough study of all the issues alluded to, or to presume that the parlement consistently presented accurate or even acceptable understandings of the policies it portrayed. Rather, in summary, it has been shown that the institution, acting within a series of constraints, articulated a language of politics which was substantially different from both its earlier traditions of argument, as well as the arguments of its counterpart in Paris.

With an accepted dependence on the monarchical framework, its general procedural rules and privileges, its financial needs (the court did not contest the need to raise taxes in one form or another) and its promises of protection and security, the Bordeaux parlement acted in a forum of local institutional competition to ensure its traditional privileges and powers which were deemed to be more vulnerable in the context of a new royal administration. Yet it had limited resources with which to do so. Not only had its records of the earlier century been destroyed (1704), it also had suffered a recent period of exile from

the city which tarnished its claims to certain privileges and served as a living reminder of the sanctions possible if its attempts to stand as a credible regional voice backfired by stirring up popular local fears which it could not subsequently control.

Within these various constraints, the parlement developed a mode of argument which I have called associational. In the case of Bordeaux, it involved five main features. First, it is characterised by a focus on regional concerns and on the local consequences of royal policy (reflecting a conscious political priority, given its active rejection of the Paris parlement's calls for national solidarity). Second, one perceives in these pronouncements a further emphasis on various forms of activity and institutions with a strong sensitivity of the particular values and popular sentiments which sustain them. Third, this in turn is allied with a recognition of a need to give these values and sentiments, as well as the objectives of the activity, real weight in the determination of public policy. This includes in the field of commerce, a perceived need for the protection of the sovereign law of interest, ambition and confidence. With regard to public security it involves greater concern for the managing of popular fears. In questions of public finance, the balancing of the needs of the treasury, the available resources for an adequate and efficient collection of funds and the imperative to not provoke excessive public anger and despair both to cultivate respect for public authority and to preserve the integrity of the tax base for the future are the dominant concerns. Fourth, the discourse carries the consequent position that universalist and excessively uniform treatment will result in injustices given a blindness to the diversity of association, thus calling for a limited reliance on legal precedent, unless justified, and limited constitutionalist concern. Finally, it is accompanied by a certain caution in reform, founded on the recognition that reform is only justified to correct an abuse or procure a greater good, and that any new venture is open to the perils of unintended consequences.

In his 1978 lecture on 'governmentality', Michel Foucault singled out a similar development in the theory and techniques of the art of government from

the latter seventeenth century.[83] For Foucault, the decentring of the paradigm of juridical sovereignty from the practice of government was made possible through the rise of 'population', itself becoming both a new object or target of rule and the source of new forms of political knowledge ("political economy"), to be distinguished from principles of household management. This turn allowed the practice of government to evolve away from the tautological justification of upholding sovereignty for its own sake, to adopt a new kind of finality embedded in the plurality of ends corresponding to the qualities of the population and their activities and relations. For Foucault, this new finality residing in the people and things to be managed is pursued by the adoption of tactics, legal or otherwise, seeking to mould this new object of political action. It is this process of adopting ends which are immanent to the population which he calls 'governmentalisation' of the state, in which the state became implicated in a whole continuum of social relations of governance.

In this study of the political discourse of the Bordeaux parlement as it emerged in the early eighteenth century, we have seen that this process of adopting extra-juridical ends in political rule was not a result of the spread of social techniques of control and new forms of social knowledge, but the outgrowth of institutional self-interest. The parlement was brought to have heightened concern for social and economic welfare given the dire consequences for its own integrity if it became unable to manage popular fears and aspirations. These concerns were in turn channelled by the pressures of other institutional and juridical constraints which helped to mold the idiom in which the court's interests could be effectively expressed. In consequence, in the case of the Bordeaux parlement, the turn is less easily construed in terms of the development of new and more powerful and possibly more insidious forms of social control. Rather, it is to be understood as a strategy of institutional defence to preserve a traditional jurisdiction in a context of both fragmentation and competition among various institutional powers.

Nonetheless, the accumulated result of the various features of associational discourse suggests a distinct understanding of law and politics. While not

removed from the need of royal promulgation and parlementary registration, the arguments point towards a conception of legality which draws its justification from the context and activities which are to be regulated. The essence of policy-making is not a set of authoritative statements, nor a strict adherence to long-standing rules, as circumstances may prove them to be unsuitable. Rather, it is a question of judging the constituency, ascertaining what is more permanent and valuable and what means would be most efficient and least damaging for the objectives sought. In this defence of local integrity combined with a defence of traditional jurisdictional limits, the parlement of Bordeaux not only generated a discourse which would conciliate the tension between the personal honour and public duty of office, it also provided a rudimentary groundwork for an emerging intellectual sensitivity, one which for some would crystallise in the form of a new discipline of social science.

It is this turn in legal discourse which can be seen to provide a starting point for Montesquieu's theoretical project. Even in his early works, Montesquieu can be seen to be forging a deeper commentary on these general legal intuitions. In particular, he will be concerned to develop an understanding of the moral grounds on which the centrality of associations to questions of public welfare must be addressed. He makes explicit what was implicit in the turn, namely that if rulers are to look to the qualities of populations to discern the finalities of their strategies of governance, there must be some standard by which this priority of the social is justified. Montesquieu will find this in the study of the independent ethical dynamics in various forms of association. We will see how this is developed in his early and mature works in chapters 4 and 5. However, before doing so, it is necessary to sketch also a picture of the criminal process before the chamber in which Montesquieu spent much of his judicial carreer to discern whether the court was generally consistent in its approach and arguments. The next chapter is devoted to a study of this question.

Endnotes

1. On September 27th, 1751 Helvétius wrote to Montesquieu: "...Avez-vous lu toutes les remontrances du Parlement de Paris? Et n'y avez-vous point remarqué comme nous que c'est dans l'Esprit des loix qu'on a puisé toutes ces belles maximes sur l'autorité? La question est de savoir si l'on en a fait une application convenable aux circonstances." In Montesquieu, Correspondance. See also "Montesquieu et 1789", a special edition of Dix-huitième siècle 21(1989). Historians who identify Montesquieu's work as a defence of parlementaire claims include Franklin Ford in Robe and Sword; J.H. Shennan, The Parlement of Paris (London: Eyre and Spottiswoode, 1968); William Doyle, The Parlement of Bordeaux and the End of the Old Regime 1771-1790 (London and Tonbridge: Ernest Benn Limited, 1974); Ibidem., "The Parlements," In The Political Culture of the Old Regime, ed. Keith M. Baker (Oxford: Pergamon Press, 1987); and Alfred Cobban, "The Parlements of France in the Eighteenth Century," History 35 (1950), 64-80.

2. Biographers of Montesquieu recognising his disaffection with his legal career include Robert Shackleton, Montesquieu. A Critical Biography (Oxford: Oxford University Press, 1961); Louis Desgraves, Montesquieu (Paris: Editions Mazarine, 1986); Jean Dalat, Montesquieu magistrat; and Pierre Barrière, Un Grand Provincial.

3. In particular, Montesquieu's friend Barbot wrote to him with these words: "Non, mon cher Président, et je l'espère, vous ne vendrez point cette charge de président. Vous la devez à vos ancêtres, à votre postérité, à vous-même, à la province enfin qui jouit depuis longtemps de présidents de votre maison." (In a letter of April 9th, 1726, presented in Correspondance, ed. François Gebelin, n. 101.)

4. Dalat in Montesquieu magistrat argues that Montesquieu's main reasons for leaving the profession combined a frustration with limited responsibilities, as he had been granted dispensation to hold the office of président before the age of forty but not the consequent rights of presiding, the lack of financial return on the investment of office, the greater appeal of the Parisian salons and the thought of a literary life. Apart from the last two, however, these were conditions largely shared with his colleagues and were not unusual impediments nor ones which precipitated widespread defection. Others, such as Shackleton, stress his own admission of inability to master the fine points of procedure and his greater concern for the status, rather than the duties, of office. (In Montesquieu. A Critical Biography, 18-19) In this context, Montesquieu's reflection on his legal career in his own self-portrait is often cited: "Quand à mon métier de président, j'avais le coeur très droit, je comprenais assez les questions en elles-mêmes; mais, quant, à la procédure, je n'y entendais rien. Je m'y étais pourtant appliqué; mais,

ce qui m'en dégoûtait le plus, c'est que je voyais à des bêtes ce même talent qui me fuyait, pour ainsi dire."(Pensées, n. 213)

5. For a recent analysis of the discourse of the remonstrances of the Paris parlement, see Jeffrey Merrick's "Patriarchalism and Constitutionalism in Eighteenth-Century Discourse," In Studies in Eighteenth-Century Culture, vol. 20, eds. C.S. Brown and P. Craddock (East Lansing, Michigan: Colleague Press, 1990), 317-30 and idem, "Subjects and Citizens in the Remonstrances of the Parlement of Paris in the Eighteenth Century," Journal of the History of Ideas 51(1990), 453-60.

6. Despite the association of these thinkers in their portraits of absolutist government, their frameworks of analysis and suppositions are vastly different. For Bossuet, the argument in favour of absolutist monarchy combines a view of natural human sociability, which, through the nefarious effects of pride and original sin can only be partially restored through the ordering capacities of an absolute monarch achieving office either through the force of arms or by consent. The purely divine justification and sanctification follows this firstly secular account. It is consistent with his Gallicanism and his recognition of the legitimacy of the two spheres of church and state. See La Politique tirée de l'écriture sainte, ed. Jacques Le Brun (Genève: Droz, 1967).

De Tocqueville, in his critical stance, analyses the development of absolutist government in France from an historical perspective as a growing contradiction between firstly, a trend of social equalisation and freedom of moeurs, and secondly, a progressive intrusion of central power in local administration. The end result of this double dynamic is to render the apparent legal and institutional diversity a meaningless facade. As he states in his "Etat social et politique de la France": 'A la fin du dix-huitième siècle, la France était encore divisée en trente-deux provinces. Treize parlements y interprétaient les lois d'une manière différente et souveraine. La constitution politique de les provinces variait considérablement. Les unes avaient conservé une sorte de représentation nationale, les autres en avaient toujours été privées. Dans celles-ci on suivait le droit féodal; dans celles-là on obéissait à la législation romaine. Toutes ces différences étaient superficielles et pour ainsi dire extérieures. La France entière n'avait déjà à vrai dire qu'une seule âme. Les mêmes idées avaient cours d'un bout du royaume à l'autre. Les mêmes usages y étaient en vigueur, les mêmes opinions professés; l'esprit humain, partout frappé de la même manière s'y dirigeait partout du même côté. En un mot, les Français avec leurs provinces. leurs parlements, la diversité de leurs lois civiles, la bizarre variété de leurs coutumes, formaient cependant, sans contredit, le peuple de l'Europe le mieux lié dans toutes ses parties, et le plus propre à se remuer au besoin comme un seul homme.' [In De la Démocratie en Amérique; Souvenirs; L'Ancien régime et la révolution (Paris: Editions Laffont, 1986), 941] This same idea is reiterated in his later essay "L'Ancien Régime et la révolution" (In Ibid., 974). Tocqueville's argument hinges on the identification

of the conseil du roi and the provincial intendants, perceived as the only officials with real governing power outside Paris and themselves merely an instrument of the central government.

7. For this view of absolutism see for example Menna Prestwich's "The Making of Absolute Monarchy (1559-1683)" In France: Government and Society ed. J. McManners and J. Wallace-Hadrill (London: Methuen and Company, 1970), 105-33; Lemaire, Les lois fondamentales de la monarchie française d'après les théoriciens de l'ancien régime (Genève: Slatkine-Megariotis Reprints, 1975, 1st ed. 1907); N. Keohane (with insights into its theoretical affinity with constitutionalist doctrine) in Philosophy and the State in France, and Church, Constitutional Thought in Sixteenth-Century France. A brief survey of the traditional historical account underlying this view of absolutism is provided by Peter Campbell in The Ancien Régime in France. Campbell argues against the trend to view France's early modern regime as a nascent form of the modern bureaucratic state; instead, he points to the need to recognize its specificity as a system of rule, unique in the central importance of the features of patronage and clientelism as well as the role of the court in linking administrative and social facets of political power (See Ibid., 60-68). See also the works cited in endnote 23 of the introduction of this thesis.

8. For a classic account of the development of the reason of state tradition in France, see William F. Church's, Richelieu and Reason of State (Princeton, New Jersey: Princeton University Press, 1972).

9. For the argument that the parlements were defenders of constitutionalism see J.H. Shennan, The Parlement of Paris ; for a view of the parlements as in essence defenders of an aristocratic class interest see Franklin Ford, Robe and Sword, Alfred Cobban, "The Parlements of France in the Eighteenth Century," and Roland Mousnier, Les Institutions de la France sous la monarchie absolue (Paris: Presses Universitaires de France, 1974); finally, an argument for the primacy of institutional and corporate self-interest can be found in the work of Bailey Stone, The French Parlements and the Crisis of the Old Regime (Chapel Hill and London: The University of North Carolina Press, 1986). For Stone, the pursuit of traditional corporate interests was compatible with the articulation of a variety of social and governmental interests.

10. Shennan, The Parlement of Paris, 84-5.

11. For this new understanding of absolutism see eg. Jean Barbey et al., Histoire des institutions de l'époque franque à la Révolution, 4e édition, (Paris: Presses Universitaires de France, 1992); Parker, The Making of French Absolutism; Mettam, Power and Faction in Louis XIV's France; Michel Antoine, "La Monarchie absolue," In The Political Culture of the Old Regime ed. Keith M. Baker (Oxford: Pergamon Press, 1987); and Jeffrey Merrick,The Desacralization

of the French Monarchy in the Eighteenth Century (Baton Rouge: Louisiana State University Press, 1991).

For the argument that the parlements were in essence defenders of the monarchy and too weak to save it, see William Doyle's "The Parlements,"In The Political Culture of the Old Regime.

12. The term 'sovereign court' applied to all parlements within France. This remained a common term of reference despite Louis XIV's attempt to label them 'superior' courts in official texts. In fact, they were not fully sovereign (in modern understandings of the term) in that they still were regarded subservient to the crown and the royal council, who could ultimately on special petition annul their rulings and whose orders they applied and enforced; but the term did convey the sense that it was a last court of formal appeal. See Maurice Bordes, L'Administration provinciale et municipale en France au XVIIIe siècle (Paris: Société d'édition d'enseignement supérieur, 1972), 37.

13. As Shennan argues, the practices of registration and remonstration derive from the roots of the court as a royal council giving judicial and administrative advice to the king, that is exercising an active role in policy formation. By the eighteenth century, the formal act of registration, in the assembled chambers with the act being studied, opined upon by the magistrates in order of seniority and transcribed into the official register, served both as a form of publicity and education as well as a way to ensure that there was an official record of the act. (In The Parlement of Paris, 159) Remonstrances, if agreed upon, were generally in Bordeaux presented in the form of a letter draw up by an appointed commission of several magistrates and addressed to either the king (or regent) or chancellor or both.

The arrêts de règlement included rulings on the duties of the court officers, and procedural questions in addition to matters of local security, provisions, etc. For a survey of the various matters covered by such rulings see Stone, The French Parlements, 19. For Bordes, such local responsibilities were not inherently special but a logical extension of the court's judicial functions constituting a practice of regional justice in a wide sense, as an active presence in promoting internal peace and order. (In Bordes, L'Administration provinciale, 42).

14. Thus, we find in the registers of the Bordeaux parlement references to the drafting of remonstrances prior to 1715. In March 1710 the parlement assigned commissioners to draft remonstrances over an edict regulating the practice of wine and brandy merchants. A letter read to the court and written by the intendant to the chancellor over a falsely assumed case of illicit parlementary prerogative in calling for a municipal assembly to protest the measure, contained, nonetheless, a recognition that "la cour [était] en droit de faire des remonstrances au Roy sur les edits et declarations quelle enregistre."(François de Verthamon, ed., Registres secrets, manuscript n. 758-809, A.M.B., le 7 au 22 mars, 1710, 146-152). Again, in the summer of 1715, remonstrances were called for in the case of an évocation

of a dispute regarding the conflict of jurisdiction between the lieutenant general and the lieutenant criminel, a dispute which was removed from the jurisdiction of the court and brought to the royal council for a ruling (Ibid., le 18 juin, 1715, 361-62). Ten days later there was another call for the drafting of remonstrances against a declaration, duly registered, regarding the attribution of all cases of bankruptcy to the court of the Bourse, with no right of appeal to the parlement. (Ibid., le 28 juin, 1715, 370-71).

15. See Isambert et al., eds. Receuil, vol. 18, n. 503, 103-80; vol. 19, n. 715, 70-73; and vol. 21, n. 6, 40-41. The last declaration was dated September 15, 1715, noted registered by the Paris parlement the next day, but not registered in the Bordeaux parlement until November 18.

Montesquieu makes an allusion to the powers of the parlements in letter 92 of Lettres persanes: "Les parlements ressemblent à ces ruines que l'on foule qux pieds, mais qui rappellent toujours l'idée de quelque temple fameux par l'ancienne religions des peuples. Ils ne se mêlent guère plus que de rendre la justice, et leur autorité est toujours languissante, à moins que quelque conjoncture imprévue ne vienne lui rendre la force et la vie. Ces grands corps ont suivi le destin des choses humaines: ils ont cédé au temps, que détruit tout, à la corruption des moeurs, que a tout affaibli, à l'autorité suprême, qui a tout abattu.

Mais le régent, qui a voulu se rendre agréable au Peuple, a paru d'abord respecter cette image de la liberté publique; et, comme s'il avait pensé à relever de terme le temps et l'idole, il a voulu qu'on les regardât comme l'appui de la Monarchieet le fondement de toute autorité légitime."

If this letter was written in the year it was dated (1715), it was a judgement made by Montesquieu through Usbek only after a year of service as a magistrate. It recognises that the Regent's recognition of the parlementary right of remonstrance in 1715 was of significance for popular perception of the parlements' role within the broader institutional framework. Montesquieu shows in this passage the long term threats to parlementary authority are firstly the force of time, secondly, the corruption of morals, and thirdly other sources of political authority.

16. See Isambert et al., eds., Recueil, vol. 21, n. 165, pp. 159-62. This ruling was made in the context of strong parlementary opposition to royal financial policy as crafted by John Law. The Paris parlement had just drafted remonstrances repeatedly protesting new inflated coinage. In these letters, the parlement claimed that registration of edicts was necessary for them to be legally binding, and that as an institution it played a tribune role representing the voice of the people in the absence of the Estates General. The Regent offered no reply, but subsequently sent an order-in-council to be registered which ruled that all remonstrances were to be made within a week of receiving legislation or it would be considered duly registered, and that remonstrances were not receivable on edicts not sent to be registered (the Cour des Monnaies was deemed to be competent in

this case of recoinage). In addition, the parlement was forbidden to meet with other sovereign courts (it had tried to arrange a joint meeting with the Cour des Monnaies, the Cour des Aides, and the Chamber of Accounts) and to discuss royal policy except when requested by the king. See James D. Hardy, Judicial Politics in the Old Regime (Baton Rouge: Louisiana State University Press, 1967), 104-21; Shennan, The Parlement of Paris, 290-91.

17. Thus, at the beginning of the period of Montesquieu's service, the Bordeaux parlement employed 117 titled officials: the first president, Gillet de Lacaze (serving from 1714-1734); nine présidents à mortier; two chevaliers d'honneur; four presidents of the Chambre des Enquêtes; two presidents of the Chambre des Requêtes; ninety-four councillors (eighty-eight lay and six cleric); one procureur général; two avocats généraux; and two head clerks. In addition, there were 137 lawyers and 60 prosecutors serving the court.

18. The selling of parlementary offices as a means to acquire funds was first practised by the monarchy in 1522; however, it was not until 1543 that the practice was introduced in Bordeaux, the same year the chambre des requêtes was established. See C.B.F. Boscheron des Portes, Histoire du parlement de Bordeaux, volume 1 (Bordeaux: Charles Lefebvre, 1877), 98.

Defenders of venality pointed to its role in encouraging industry, in providing a source of able officials by rewarding those with business success and in promoting the independence of the judiciary by isolating them in part from certain political pressures. Critics of the institution saw it as undermining a traditional conception of public service in promoting irresponsibility and disloyalty or, more narrowly, saw it as a threat to entrenched institutional interests,(In Ford, Robe and Sword, 120ff).

19. Adhémar Esmein, Cours élémentaire d'histoire du droit français (Paris: Librairie du Receuil général des lois et des arrêts, 2e édition, 1895), 394; Arlette Lebigre, La Justice du roi (Paris: Albin Michel, 1988), 88; John McManners "France" In The European Nobility in the Eighteenth Century ed. A. Goodwin (London: Adam and Charles Black, 1953), 33. The dates of the founding of the various provincial parlements are: Toulouse 1443 (date of its being rendered permanent), Grenoble 1451-53, Bordeaux 1462 (although some claim the earlier date of 1451 when the institution was first promised to the region), Dijon 1476 (replacing the superior court of the dukes of Burgundy), Rouen 1515 (in the former jurisdiction of the superior courts of the dukes of Normandy), Aix 1501 (the ancient comte of Provence), Britanny 1553, Béarn 1620, Metz 1663, Franche-Comté 1676. Douai 1713 and Nancy 1775.

20. François-Georges Pariset, ed. Bordeaux au XVIIIe siècle (Bordeaux: Fédération historique du Sud-Ouest, 1968), 51. To help protect these privileges and immunities, the community had them written down as the "Livre des Privilèges". By the eighteenth century, these powers were not respected in the

same spirit as they were enacted in that, for example, while the city continued to judge criminal matters in the first instance, its decisions were subject to appeal to the parlement. In addition, by this time, all municipal spending was subject to the approval of the intendant. But while these political privileges had been largely overridden, there was still a strong sense of a need to preserve traditional financial privileges, such as an exemption from direct taxation. See also Robert Boutruche, ed. Bordeaux de 1453 à 1715 (Bordeaux: Fédération historique du Sud-Ouest, 1966), 294 and 461.

21. See Georges Hubrecht, "Jurisdictions and Competences in Guyenne after its Recovery by France," In The Recovery of France in the Fifteenth Century, ed. P.S. Lewis (London: Macmillan, 1971), 82-101.

22. See Boutruche ed. Bordeaux de 1453 à 1715, 303ff and Boscheron des Portes, Histoire du Parlement de Bordeaux, vol. 1, chap. 3, for accounts of this incident. While the riots were initiated by the general public, the jurats (or city council) were emprisoned, in punishment for the violence in which over twenty were killed, the city was occupied by royal troops for three and a half months, the city's privileges were suspended and the parlement and jurade were rendered powerless until a general amnesty was declared in October 1549. In the interim, the municipal institutions were modified reducing the number of jurats to six (from twelve) of which half would be replaced each year and setting the mayor's term at two years on election by the jurats. While Boutruche argues the more restricted size was a strategy of the central government to facilitate their control over the municipality, it is not clear how such a change would do so. It is rather the later establishment of a royal tutelle over the finances of the municipality in 1550 which must be seen as a key instrument of centralisation.

23. Boutruche, Bordeaux de 1453 à 1715, 327.

24. Ibid., 335ff.

25. In fact, several magistrates who were generally sympathetic with the position of the king and governor, including the president Dubernet who was eventually forced to resign through pressure from his own colleagues, had fled from the city before the official ruling. See Boscheron des Portes, Histoire du parlement de Bordeaux, vol. 2, chaps. 1-3.

26. Montesquieu's uncle, Jean-Baptiste de Secondat, was an active and highly respected président à mortier. He served at the court from 1678 until his death in 1716. He is perhaps best known for his insistence on the gallican reservation to the papal bull Unigenitus, condemning the presumably Jansenist propositions in a recent work by the Père Quesnel, sent to be registered by all parlements in 1715. His position was to refuse to condemn the ninety-first proposition which stated that fear of excommunication could not serve as a determining motive when one's

duties were at stake. "La crainte d'une excommunication injuste ne doit jamais nous empêcher de faire notre devoir. Nous ne sortons jamais de l'Eglise, même quand nous en paraissons expulsés par la méchanceté des hommes lorsque les liens de la charité nous enchaînent à Dieu, à Jésus-Christ et à l'Eglise lui-même." On Montesquieu's uncle, see François Cadilhon, "Jean-Baptiste de Secondat, oncle et mentor de Montesquieu," Revue française d'histoire du livre 76-77(1992), 301-06.

Jean-Baptiste de Secondat, the eldest son of nine children, had himself inherited the charge from his father Jean-Baptiste Gaston de Secondat who had married the daughter of the first président, Joseph Dubernet, and had used the dowry to buy a councillor's charge. He subsequently became a président à mortier, as well as the step-son to the first président when his mother, now a widow, married his wife's father! Dubernet was the first président of the Bordeaux parlement at the time of the Fronde, after having occupied the same position in Provence and Bourges. He was rejected by his parlementary colleagues and eventually was run out of the city being thought to have too close an affiliation with the king and cardinal Mazarin. He died in 1652 in exile in Limoges. See François Cadilhon, Montesquieu. Parlementaire, académicien, grand propriétaire bordelais, travail d'étude et de recherche, l'Université de Bordeaux III, UER d'histoire, Juin 1983.

27. The Palais also housed the offices of the Seneschal of Bordeaux, the Eaux et Forest, the Amirauté, the Table de marbre, the prévôté of Bordeaux, the Chancellerie, the parlementary archives, as well as all the prisons and lodgings relative to these various jurisdictions.

28. The Secret Registers of the court state for the day of February 8, 1704: "Ce jour la cour a repris sa seance au palais dans les lieux cy devant occupé par le senneschal pour y rendre la justice attendue l'Incendie qui consumma la salle de l'audience, la chambre du conseil et la Tournelle et les registres qui estoient dessus la nuit du 31 du mois dernier." According to Boscheron des Portes, the documents destroyed in the fire included: the originals of all the rulings of the court from its founding to 1670; two large bundles of rulings rendered from 1670 to 1687; two wooden chests containing letters sent from Louis XIII and Louis XIV; the secret registers of the court for most of the seventeenth century; two large boxes containing various patent letters from the sixteenth and seventeenth centuries; and all the arrêts d'audience from 1462. (In Histoire du parlement de Bordeaux, vol. 2, 238-39.)

29. According to regulations, the court was to start its working day at six a.m. in the summer and seven in the winter. In practice, sessions began around eight, although sometimes it was required to send an usher into town to call on the magistrates to attend. The court would work until twelve and on certain days a week also hold relevée sessions in the afternoon to study matters of urgency or the appeals of the poor, etc., for whom court fees were generally waived. A detailed discussion of the dispute among the présidents à mortier, councillors and the first

president at this time, starting as a question of presence and quickly evolving into a question of official duties and prerogatives, is offered in Dalat, Montesquieu magistrat, c.3. As noted in this text, for Barbot, this dispute and the ill feeling which it gave rise to were major factors in determining Montesquieu's decision to sell his charge in 1726, just after obtaining the full privileges of his office.

30. The court records state that on the morning of January 31, 1719, the Commissioner of the prisons found a large breach in the wall which the prisoners had made the night before. (Registres secrets, vol. 42, 44) Notice of similar attempts was brought to the attention of the court on July 30, 1721. (Ibid., 597-98).

The Bordeaux prison had long had a reputation as a centre of escape. As André Zysberg remarks: "Entre 1700 et 1712, une quinzaine d'évasions collectives se produisent dans cette geôle miraculeuse où tous les moyens sont bons pour s'enfuir: descellement des barreaux et des grilles, percement du plancher et des murailles, enfoncement de la porte principale." In Les Galériens (Paris: Seuil, 1987), 14. This is confirmed by Jean Dalat in Montesquieu magistrat, 13.

31. On April 14, 1722, the procurator-general announced to the court that the foundation and walls of one of the towers of the Palais were in such disrepair that the tower was in risk of collapsing. (Registres secrets, vol. 42, 741-42) The next week the first president announced that the main salle d'audience was itself in jeopardy which led the court to send its own delegation to the intendant to ask that the repairs be effected and paid for by him. (Ibid., 747-48) It is not noted whether these negotiations were successful.

32. As Marion explains, mercurials were speeches given by the procurator-general or the first advocate-general to the assembled chambers and which reminded the members of the company of their duties. The device had been introduced by the ordinance of Viller-Cotterets (1539) and they were to be delivered originally every two weeks and eventually every six months by later legislation. In fact, the practice had been abandoned altogether by the Bordeaux parlement until September 1717 when charges of financial fraud were laid against a councillor of the Chambre des Enquêtes, Lombard, and a councillor of the Chambre des Requêtes, Touchard, so damaging the honour of the court that the President des Gourges ordered that the mercurials be resumed. See Marcel Marion, Dictionnaire des institutions de la France aux XVIIe et XVIIIe siècles (New York: Burt Franklin, 1968, 1st published 1923).

33. Ford, Robe and Sword, 61-69.

34. As was discussed in chapter 1, the 1679 edict required that all magistrates have a law degree and take an exam before taking on their charge. As we have also seen, the exam was largely a formality and it was relatively easy to obtain

dispensation from the degree requirements. In matters of age, the edicts required that all présidents à mortier be at least forty years of age and have served ten years as a councillor, that councillors be at least twenty-five, and that lawyers and prosecutors be at least thirty. However, such rulings often were in conflict with the principles of venality and subject to frequent override. In certain cases, while the right of holding office at a younger age was recognised, the court would not grant the holder full powers of deliberation and precedence until the required age was attained. Finally, with regard to relational ties, the ordinances outlawed the practice of having close relatives serve on the same court. However, the parlement consistently waived this rule with the provision that in the case the two were to be voting on the same case, their votes would only count as one. In such a case, the candidate would still have to be issued a dispense de parenté. In the case of a relation on the basis of marriage, the court would issue a dispense d'alliance.

Montesquieu himself was subject to many of these special dispensations. Arriving at the court in March 1714 as a councillor (at the age of twenty-five) he received dispensation (dispense de parenté) given the presence of his uncle as a respected président à mortier. In inheriting this title in 1716, Montesquieu was able to have the age requirements waived but was not granted rights to preside and report cases until 1723 when he was thirty-four. Jean Dalat argues that this state of relative occupational limbo was a great frustration for Montesquieu, for its limited responsibilities, more limited status, and barrier to the possibility of collecting special fees (épices) outside the common allocation for his chamber. It is arguably a reason for his eventual decision to give up the charge, although he did so just at the time when he was given full responsibilities, greater status as first president of la Tournelle, and possibilities for a larger share of court fees. (In Montesquieu magistrat.)

35. As Loyseau states offices were first made hereditary by edicts of Charles IX in 1568 but this was subsequently revoked and not reinstated until 1604 when it was ruled that an official could pay one sixtieth of the cost of his office to obtain the right to leave the office to the family. The name of the tax comes from the main proponent of the measure, M. Charles Paulet, Secretary of the King's Chamber. [In Cinq livres du droit des offices (Cologne: Isaac Demonthovz, 1613), II, x].

36. On August 13, 1717, Dudon is reported to have said that if he had not had brothers who had become Jesuits, his arguments, in a case regarding the possible merger of two priories from Limoges to the Collège des Jesuites of the city of Tulle, would have been accepted. The court was shocked at the insinuation that its rulings were determined by motives other than that of justice and the first president sent for Dudon to deliver a reprimand. The anonymous letter (later attributed to Dudon) severely attacking the integrity of the first president was first sent to the Chancellor himself who then sent it to the procurator-general of the

jurisdiction in December 1721. When the parlement caught wind of the affair they asked of the Chancellor the prerogative to rule on the matter given that it was a case of privilege involving their own officers. The Chancellor refused on the grounds that the letter was first sent to himself.

37. In Oeuvres complètes, 184-87.

38. Shackleton, Montesquieu. A Critical Biography, 18.

39. Ibid., 186.

40. As such, it is a slight echo of one of the lessons of his earlier Troglodyte story in Lettres persanes.

41. Dalat, Montesquieu magistrat, 11.

42. An edict was used to denote a legislative act which regulated a specific policy matter; an ordinance referred to more general acts of legislation; and a declaration referred to a legislative act to modify or clarify earlier edicts and ordinances. Each were sent to the parlement for registration with their specific forms of presentation. See Marion, Dictionnaire des institutions, 165 and 197.

43. Cinq livres du droit des offices, I, vi. For Loyseau, this power of command was derived from direct participation in the power of the king. He distinguished magistrates from mere officials.

44. Municipal institutions were comprised of: a mayor (Louis Godefroy, comte d'Estrades serving from 1714-68) who was directly appointed by the king and whose position was largely ceremonial; six jurats serving two year terms with half being replaced in alternate years and appointed by the king from a list of names chosen by the council of thirty (and of which two were by custom gentilshommes, two advocates and two merchants, although the office itself conferred benefits of nobility); the council of thirty chosen each year by the jurats, generally including those jurats just replaced, who would judge matters of some importance to the community; the council of one hundred and thirty (that is, a council of notables joined with the council of thirty) to meet to discuss matters of great importance; and several more minor officials (72 in 1789) including the procureur syndic, or municipal prosecutor, appointed by the mayor and jurats, a city clerk, a treasurer, and a militia, the guet, which according to the city's traditional privileges, was the only military force allowed within the city walls (despite violations at certain times of crisis such as in 1548 when royal troops occupied the city after a tax revolt). There never was a system of direct election of higher municipal officials, contrary to the practices of certain cities of the south. Montesquieu's father, Jacques de Secondat, served as a jurat gentilhomme in 1689. See Pariset, ed. Bordeaux au XVIIIe siècle, 54-58 and

Cadilhon, Montesquieu. Parlementaire, académicien, grand propriétaire bordelais, 21.

45. Registres secrets, vol. 41, pp. 338-50 and 353.

46. On Colbert's agricultural policy see Pierre Clément, Histoire de Colbert et de son administration (Paris: Didier et Compagnie, 1874), vol. 2, 62-63.

47. Marion, Dictionnaire des institutions, 117-19. These practices were a major grievance for the Physiocrats, who sought to establish a free-trade zone across France.

48. Registres secrets, vol. 42, pp. 261-62.

49. Ibid., 263 and 289-91. Beef was set at 14 sols the pound, lamb at 15 sols, and veal at 17 sols until the end of October when they would be reduced further by 3 sols.

50. Ibid., 498-99, 525ff and 557ff.

51. Antoine Castagnet was declared guilty by the court for several murders as well as various acts of rebellion. As he was of a well-known and powerful local family, other public officials being unsuccessful in pressuring the king to overturn the judgement, arranged under the leadership of the Cardinal de Sourdis, the seizure of Castagnet before his proposed execution. Subsequently, the king sent an order to halt the proceedings against Sourdis but the parlement sent a delegation to the king in protest with a letter of remonstrance dated January 4, 1616 containing the following passages:
"Sire, vostre cour de Parlement de Bordeaux nous a deputés vers Vostre Majesté pour vous représenter les justes motifs au'elle a eus de ne procéder pas à l'enregistrement des lettres d'Etat et de surseoyance qu'il a plu à Votre Majesté leur envoyer pour arrester le jugement du procès criminel...Ces lettres estoient directement contraires à vos ordonnances et n'alloient qu'au mépris de votre justice et authorité royale...le sieur cardinal de Sourdis est accusé d'avoir viollé les lois les plus sacrées, d'avoir forcé le temple sacré de justice, rompeu vos prisons, enlevé à main armée un prisonnier condamné à mort, et d'avoir faict répendre le sang innocent du concierge de vos prisons et secoureu le meurtrier et l'assassin.

Vostre présence, Sire, n'a pu arrester ces violences; au contraire, à tous ces crimes on a emploié vostre nom, et qui pis est, et dont Dieu vous demande vengeance, on a abusé avecq impiété des marques vénérables de nostre Rédemption.

Surseoir, Sire, la punition de ces crimes c'est attirer et enflammer l'ire de Dieu sur nous, assujettir les loix et la justice à la violence, oster le respect d'heu à Vostre Majesté Royale, et en effect establir et authoriser le désordre que nous voyons à nostre grand regret s'élever partout...

La justice souveraine est comme foudre; elle n'épargne personne et frappe sur tous, mesme sur les plus grands, et il n'y a dignité si eslevée qui les puisse affranchir de sa souveraineté...

Sy vostre Parlement enduroit cet outrage, il seroit comptable devant Dieu de ces crimes desquels il n'auroit fait justice, et odieux à vos bons sujets qui ne trouveroient plus d'azille en icelle, et blâmables de lascheté par toutes les companies souveraines de vostre royaume."

Cited in C.B. Boscheron des Portes, Les Registres secrets du Parlement de Bordeaux (Paris: Auguste Durand et Pedone Launel, 1867). By August 1616 the Cardinal was restored to his seat in Bordeaux.

52. It is argued that the apparent political powers of the municipal government of the early eighteenth century were in fact only subordinate administrative powers to the provincial intendant, given the financial control the intendant had over the city. (In Pariset, ed., Bordeaux au XVIIIe siècle, 51-52.) However, while it is clear that municipal autonomy was no longer what it had been in the late Renaissance, the fact that the parlement was eager to express its concern and pursued its case in the face of rejection shows that the political links among the royal council, the intendants and the municipal governments were not unyielding. The continued invocation of traditional municipal liberties was part of a collective self-understanding which would inhibit consistent capitulation. The charter of 1224, granted by Henry III, still remained the basis of Bordeaux's municipal institutions.

53. Registres secrets, vol. 42, pp. 310ff. and 519-20.

54. Ibid., 591-96 and 609-11.

55. For a history of the founding of the hospital and of protracted disputes between the municipality and the parlement see Fernand Durodié, Les Médecins et les hôpitaux du vieux Bordeaux (Bordeaux: A. Destout, 1924) and Paul Courteault, Le Vieil Hôpital Saint-André de Bordeaux (Bordeaux: Raymond Pacquot, 1944). The claim of the municipality, that the institution was founded by Vital-Carles by a willed donation in 1390, is generally acknowledged to be more acceptable, without denying the later contribution of Bohier, a president in parlement, by his will of 1538. The quarrel over the founding and the competence of its administrators extended throughout the latter seventeenth century.

56. "Oserons nous, Sire, representer encore à votre Majesté dans l'interest qui nous doit etre le plus sensible, votre Parlement gouverne l'hopital neuf Saint André depuis 1539. Ses commissaires y ont des fonctions qui n'ont point d'exemple dans aucun hopital du Royaume, ils visitent tous les jours les pauvres de chaque lit sans crainte des maux les plus contagieux, ecoutent leurs plaintes, les consolent dans leurs malheurs et pourvoient sur le champ à leurs besoins." Registres secrets, vol. 41, pp. 873-74.

57. Philippe Loupes, "L'Hôpital Saint-André de Bordeaux au XVIIIe siècle," Revue historique de Bordeaux et du département de la Gironde (1972), 90-91. At the time, the hospital had about 200 patients distributed in a dozen rooms and a staff of 79, 65 of whom also lodged there. In the popular mindset there was both fear of the unhealthy conditions of the institution and of the humiliation of dying there.

58. Registres secrets, vol. 41, pp. 810-11 (le 15 mars, 1718).

59. Ibid., 907-08.

60. For the whole affair see ibid., 818ff.

61. This was perhaps inevitable given the rather piece-meal nature of institutional evolution in France at this time, an evolution which proceeded by the creation of new bodies for new responsibilities without disbanding others whose responsibilities were in decline or no longer as important and which generated a multitude of conflicts of jurisdiction. See Bordes, L'Administration provinciale et municipale en France au XVIIIe siècle, 324.

62. A recognition that fear was a constant element of daily life, especially for those living in the countryside, is offered by Arlette Lebigre in La Justice du roi, 117 and Robert Muchembled in Culture populaire et culture des élites dans la France moderne (XVe- XVIIIe siècles): essai (Paris: Flammarion, 1978). A picture of the general contingency and fortuitousness of a long healthy life, against all odds, in eighteenth century France can be found in John McManners, Death and the Enlightenment (Oxford: Oxford University Press, 1981).

63. Marion cites the various measures of 1598, 1669 (the ordinance regulating the eaux et forêts), 1716 and 1737 to regulate the carrying of weapons(In Dictionnaire des institutions, p. 24). The fact of repeated legislative effort is evidence of the general failure of these measures.

The declaration concerning vagabonds was registered in Bordeaux on April 19, 1719.

64. Full details of the affair and analysis of the various mémoires from the parties involved is offered in Dalat, Montesquieu magistrat, chap. 4. See also J. Poussou, "L'Agitation étudiante à Bordeaux sous l'ancien régime, spécialement au XVIIIe siècle." Revue historique de Bordeaux et du département de la Gironde 19(1970), 79-92. Philosophy students from the Collège de la Guienne and others from the faculty of law had been demonstrating for several days in protest against the revocation of the traditional privilege of providing them with free theatre tickets. This action follows a history of student violence such that the jurats in 1712 had ruled that all student demonstrations were outlawed and that they were not to bear swords or other weapons. For Dalat, the case represents examples both of the

routinisation of exceptional, arbitrary justice and of the intendant's administrative strategy to play local bodies off one another so as to increase the power and privileges of his own office.

65. The most prominent of this school is Alfred Cobban.

66. Montesquieu's interest in these matters is shown by the drafting of his "Mémoire sur les dettes de l'Etat" (1716) in response to a circular letter sent out by the Regent seeking general advice in financial and commercial policy. He advocates the suppression of the dixième (a direct tax which in fact was supressed in 1717, but not for good), through a system of selling tax exemptions (the achat, already a common practice for certain localities in France), as well the eventual suppression of the capitation. This would eliminate what Montesquieu perceived as the most onerous taxes. In addition, he advocated a declared reduction in the value of state annuities (rentes) taken out by the clergy, the provinces, cities and communities and which depleted the royal treasury with regular payments of interest. He suggested that this be done in a way such that those with more invested would lose a greater proportional return. See Oeuvres complètes, 36-38.

67. Registres secrets, vol. 41, pp. 455-56.

68. See Paul Butel, ed. Histoire de la Chambre de Commerce et d'Industrie de Bordeaux des origines à nos jours (1705-1985) (Bordeaux: Chambre de commerce, 1988), 49.

69. Montesquieu relates to this exile in Lettres persanes: "Le parlement vient d'être relégué dans une petite ville qu'on appelle Pontoise. Le conseil lui a envoyé enregistrer ou approuver une déclaration qui le déshonore; et il l'a enregistrée d'une manière qui déshonore le conseil.

On menace d'un pareil traitement quelques parlements du royaume.

Ces compagnies sont toujours odieuses; elles n'approchent des rois que pour leur dire de tristes vérités; et pendant qu'une foule de courtisans leur représentent sans cesse un peuple heureux sous leur gouvernement, elles viennent démentir la flatterie et apporter aux pieds du trône les gémissements et les larmes dont elles sont dépositaires.

C'est un pesant fardeau, mon cher Usbek, que celui de la vérité, lorsqu'il faut porter jusqu'aux princes. Ils doivent bien penser que ceux qui le font y sont contraints, et qu'ils ne se résoudraient jamais à faire des démarches si tristes et si affligeantes pour ceux qui les font, s'ils n'y étaient forcés par leur devoir, leur respect et même leur amour." (letter 140)

70. See Shennan, The Parlement of Paris, pp. 285-91; and Hardy, Judicial Politics in the Old Regime, chap. 5.

71. "Votre province de Guienne ne peut se soutenir que par la vente de ses denrées, les vins et les eaux-de-vie y sont le principal objet du commerce. Les Marchands qui les achetent payent en argent le provenû des ventes aux proprietaires des fonds. A peine cet argent est reçû qu'il commence à circuler. la circulation entretient la confiance et la confiance seule fait fleurir le commerce." In Registres secrets, vol. 42, pp. 334ff.

72. In fact, the lack of ready cash was already a problem in the local economy and one which lasted throughout the eighteenth century. See Butel ed., Histoire de la Chambre de Commerce et d'Industrie de Bordeaux des origines à nos jours (1705-1985), 29.

"Si la Province de Guienne etoit un pays sterile ou inculte et que ses habitans ne formassent qu'un corps de negociants qui n'auroient que l'industrie en partage et que la ville de Bordeaux ne fut qu'un entrepot de toutes les marchandises qui viendroient de toutes les parties du monde, on convient qu'une banque accreditée pouvoit avec peu d'argent soutenir un commerce etendu." Registres secrets, vol. 42, pp. 343-44.

73. "Nous sommes persuadés, Sire, que dans les differends arrangemens, votre Majesté n'a eu d'autre objet que de procurer la félicité et l'abondance parmy ses sujets. Mais, Sire, les peuples ne connoissent que leurs Effets, les maux qu'ils souffrent attirent leurs plaintes. Il est de notre devoir de les faire entendre." Ibid., 351-52.

74. The pays d'état were those which held regular assemblies to determine the distribution of the tax burden for the taille within their region, to arrange for the collection of their own taxes and to settle various administrative matters. These were contrasted with both the pays d'élection in which the élections, under the authority of the regional intendant, determined the relative local tax burden and pays d'impositions, in which the intendant had virtually direct authority. While the provinces under the jurisdiction of the Bordeaux parlement were pays d'élection, the borders of the généralité of Guyenne did not coincide with the larger jurisdiction of the parlement. While many contemporaries favoured the system of the pays d'état given its possibilities for greater local autonomy and greater efficiency in the collection of taxes, it is disputed whether these advantages were real. See Bordes, L'Administration provinciale et municipale en France au XVIIIe siècle, 17 and Marcel Marion, Histoire financière de la France depuis 1715, tome I (New York: Burt Franklin, 1914), 49.

75. Registres secrets, vol. 42, pp. 845-936.

76. For a close look at the nature of this tax and its relation to previous financial policy of the Regency period see Marion's Histoire financière de la France depuis 1715. Tome I: 1715-1789, chaps. 1-5.

77. Nobles were required to pay the capitation tax (although the Church was exempt). Montesquieu's payment of capitation was deducted directly from his wages (or gages, which was a payment of interest on the amount initially paid for the charge, usually paid several years late); in fact, the amount due in tax was equivalent to his wages such that the only monetary return possible for him was a share in the court fees (or épices). It is understandable why he devoted much attention to his wine-producing ventures as they were in essence his only source of real income.

78. Registres secrets, vol. 43, p. 214-15. This pronouncement cannot be read with a certain amount of irony in that the intendant, recognising the need to encourage greater agricultural diversity in the region, imposed a ruling in February of the same year (1725) that no new vines were to be planted in the généralité. It seems, thus, to acknowledge the same problem of excessive specialisation. However, this measure was in fact actively resisted and remained a dead letter. See Louis Desgraves, "L'Intendant Claude Boucher (1720-1743)," Revue historique de Bordeaux et du département de la Gironde (1952), 24-25.

After having bought a new tract of land at Pessac in 1726, Montesquieu was eager to extend his wine-producing activities and expressed his opposition to this rule in a mémoire addressed to the royal contrôleur général, Le Pelletier. He argued, rather, for the need of agricultural specialisation in the area given that wine production was of proven economic strength and of certain flexibility given the diversity of wines produced in the region. Montesquieu eventually was granted permission to plant vines on the land.

79. Registres secrets, vol. 43, p. 229.

80. "Personne n'ignore que le commerce enrichit les etats et que la confiance et la liberté sont les seuls moyens de faire fleurir le commerce. La même raison nous apprend que tout ce qui le gene et le decredite, le derange ou le detruit." Registres secrets, vol. 42, pp. 289-90.

81. Ibid., 294.

82. See Correspondance, vol. 2, n. 366, p. 29 (written from Paris on March 28, 1748). The charge was eventually sold on August 4, 1748 to André-François Leberthon for 130,000 livres.

83. Foucault, "Governmentality," In The Foucault Effect.

CHAPTER THREE

CRIMINAL JUSTICE IN EIGHTEENTH CENTURY BORDEAUX (1715-24).

From the thirteenth century in France and into the early-modern period, the main function of government was considered to be the dispensing of justice.[1] It was this attribute, sanctioned by clerical and divine favour (supported by the words of St. Paul in Romans XIII, 4), which helped to bolster the claims of Louis IX (Saint Louis) in laying part of the foundations for the development of the early-modern French state and greater monarchical authority through projects of domestic reform and international crusade. It is not only that the king came to be perceived as a source of justice; but that justice as the ultimate princely virtue conceived as the exercise of ultimate authority to apply natural law, to regulate the final settlement of disputes, and to perform acts of clemency, was constitutive of kingship and was the attribute from which other functions of policing were derived.[2]

In contrast, it would seem in the modern period with its demands for the relative independence of the judiciary, as a specialisation in the function of settling disputes with limited political regulation and no direct responsibility to the institutions which draft and pass the laws, that we have undergone something more than a revolution. The change consists not only in devising a new institutional mechanism for the distribution of political power, but involves in its core a reconceptualisation of the very nature and sources of this power.

For many, Montesquieu is regarded as a major herald and guiding inspiration for the new orthodoxy. However, his articulation of the exercise of sovereignty could not have had such power without implicit claims to be giving expression to nascent political realities. It is for this reason that the position which he develops must be read in the context of the evolving features of the French state. As a parlementaire for twelve years and a criminal court magistrate for over ten of the twelve years, Montesquieu was aware of the effects of a more than century-long tradition of hereditary transmission of judicial office and of the

trends towards and justifications for increased professional specialisation in a more complex social setting. In addition, he would understand the evolving possibilities and need for a more efficient policing and prosecution network under direct political control. A close look at the practice of criminal justice in early-modern France in relation to the demands and tensions of the wider institutional framework as well as the varied strategies of social control and resistance will provide an important background from which to reconsider the nature and significance of Montesquieu's contribution. Thus, in working towards this objective as a means to resuscitate one of Montesquieu's interlocutors, this chapter seeks to reconstruct a picture of the principles and practices which guided the prosecution of criminal offenses in the Bordeaux parlement during the years Montesquieu served as a magistrate.[3] The court's records are read as a forum where a variety of evolving conceptions come together and interact including official definitions of crime, methods for the construction of a true narrative through changing forms of proof, and conceptions of the purposes and modes of punishment. The records also leave a space for a weak but alluring voice of a mostly hidden world of everyday life in early-modern France and a picture of its increased subjection to policing and various forms of official regulation. This chapter constructs this picture as a background to the analysis in chapters six and seven of Montesquieu's version of what Petit and Braithwaite have called "a comprehensive theory of criminal justice", that is one which incorporates various stages of the prosecution process and ties them to more general questions of political structure and informal modes of policing.[4]

If we abandon the idea of an unqualified unity of judicial practices throughout early-modern France, it will be possible to be more sensitive to the trends unique to the Bordeaux court, as well as to what it shared in common with others. In the latter eighteenth century, Salviat noted that the jurisprudence of the Bordeaux parlement was one of those least known in France and that previous attempts by jurists such as Lapeyrère and Automne and Dupin to articulate this tradition were largely insensitive to local particularities.[5] In seeking to avoid such

criticism, the first part of the chapter will be organised to show in what ways the provincial courts were bound by national legislation and rules, and to what extent they were given certain autonomy in the field of criminal justice. It will show how administrative structures and the indeterminacy of the law provided the basis for traditions of parlementary independence in judgement. The second part of the chapter presents a sketch of the crimes and criminals prosecuted in this appeal court. The third part of the chapter presents the pattern of sentencing in the court. The study is based largely on an analysis of the data gathered in an inventory of 897 rulings issued by la Tournelle between November 1715 (when Montesquieu was first assigned to serve on the chamber) and January 1724 (the date after which Montesquieu practically ceased to attend, as he prepared to sell his charge). While the information on the final rulings is often scanty, and the decisions generally presented without underlying justification or rationalisation (a privilege of silence reserved only for the sovereign courts), it is still possible to derive from them a portrait of general sentencing practices from the lower to the higher courts within the jurisdiction. In so doing, this chapter, combined with the conclusions of the previous one, outlines the institutional, jurisprudential and social resources from which Montesquieu's subsequent comprehensive theory of justice would be partly drawn. It will be argued that the French parlementary tradition of equity in sentencing provided a framework on which could be grafted more general theoretical predispositions, most notably that of associational discourse.

I. Introduction to the work of la Tournelle.

As part of a national system of justice, the Tournelle chamber of the Bordeaux parlement served as a sovereign court of appeal in criminal matters for courts of ordinary royal and seigneurial justice, as well as a certain number of courts of extraordinary justice, including the Table de marbre of the Guyenne (to enforce the 1669 ordinance regulating the use of natural resources on crown land) and the Amirauté (established to rule in disputes regarding navigation, commerce

and shipping).[6] The jurisdiction of the parlement, governing a population of appoximately 2 million, was comprised of twenty-nine sénéchaussée courts (of which nine were also presidial courts) which were themselves a court of appeal for an infinite number of royal prévôtés and various forms of seigneurial court.[7]

The Tournelle of Bordeaux was subject to the same procedural rules as other criminal chambers across France, although as a sovereign court it was given additional responsibilities. There were two general types of motion put before the court: appeals and requisitions. Appeals involved a request for the sovereign court to review decisions made at a lower level. Convictions, acquittals as well as interlocutory and procedural decisions (prior to final judgement) were subject to appeal. Decisions of the parlement were deemed to be of the highest instance. Requisitions were formal demands put before the court by either individuals or the crown prosecutor that orders be issued to modify court or policing practices given new information or a change of circumstances.

Table 1: Profile of the work of la Tournelle (January 1715 to January 1724)[8]

Type of motion presented	Number	Percentage of all motions
Appeals-definitive sentence	576	64.8
Appeals-interlocutory ruling	15	1.7
Requisitions- of procurator	92	10.3
Requisitions- letters of remission	42	4.7
Requisitions- figurative execution	61	6.9
Requisitions- other	100	11.2
Trials directly in court	3	.3
Total	889	100

(Please note that of a total of 897 motions, 8 could not be identified and were not considered in this table.)

Appeals, whether they be of definitive sentences or interlocutory judgements, accounted for two thirds of its work.[9] Lower-court sentences involving any form of afflictive punishment, including torture, perpetual banishment, the whip, as well as death, were appealed directly to the Tournelle and required no special act on the part of the accused or the civil parties.[10] On these occasions, the accused, if held in the prisons and not tried in absentia, was to be transferred directly into the prisons of the Palais de l'Ombrière. The lower courts also were to send all the relevant documents and records of procedures to the clerk in Bordeaux at this time. Appeals of definitive sentences with lesser punishments and of various interlocutory rulings, such as orders for arrest or demands for permission to begin preliminary proceedings (l'information), required more formal and costly procedures.

Requisitions were presented either by civil parties or by the procurator-general. Requisitions from civil parties included demands for the enforcement of a previous order, such as in the case of non-payment of damages, or to bring to the court's attention an intervening act which would change the criminal status of the accused, such as the issuing of letters of pardon by the king's chancellory. Through the requisitions of the procurator-general the court actively pursued the prosecution of various judicial officials who were seen to be abusing their positions or called for the prosecution of crimes left unpursued by local officials. This was fully consistent with the wider mandate of the parlement as a whole with a more general policing responsibility vis-à-vis the jurisdiction. While certain formal procedural rules for the trial of criminal cases were applicable across France, the disposition of the court in the application of the rules was also affected by its place in the institutional hierarchy.

In addition, the work of the Tournelle was affected by its position within the institutional structure of the parlement. The establishment of a separate chamber within the parlement of Paris devoted solely to criminal matters dates from 1515 in the reign of Francis I.[11] For some, the name is derived from the turret where the two presidents and eight lay councillors of the Grand'Chambre together with two lay councillors from each of the Enquêtes met. For others, it was the concern to avoid a judicial culture of complacency to torture and brutal punishment which dictated a rotating system of appointments to the chamber and from which it took its name. By not appointing any clerical councillors to the Tournelle, the court was continuing a tradition for which clerical councillors were prohibited from pronouncing sentences involving corporal punishment. For the other magistrates in the newly established chamber, no appointment lasted more than a year.[12] This initial and continued link with the other chambers of the parlement sustained by the administrative fact that no appointment to the Tournelle was permanent, was reinforced with the recognition that although the Tournelle was reserved most criminal work, there were also exceptional cases, such as the trial of high nobility, for which procedures would be conducted in front of the

Grand'Chambre.

These general principles regulating appointments were also accepted for the most part by the Bordeaux parlement, particularly with regard to the councillors. In 1634 the parlement had to grant special dispensation for Sauvat de Pomiers who was not able to be appointed to the same chamber as his uncle and was therefore obliged to extend his service in the Tournelle "dans laquelle on ne doibt servir qu'un an, pour ne s'acoustumer dans le sang, ce qui est tres important au publiq."[13] While the Tournelle was not an ad hoc institution, for most magistrates, service in the chamber was only an interlude in a judicial career focused largely on other matters. It is also generally acknowledged that the financial rewards of service in this field were considerably less, given the disadvantaged state of some of the clientele.

Each year from 1715 to 1724, the Bordeaux parlement appointed four présidents à mortier from the Grand'Chambre and twenty councillors drawn from several other chambers to serve on the Tournelle.[14] The tableau presenting the composition of the various chambers of parlement for the judicial year was read to all chambers assembled on the day after the opening (itself the first working day after the feast of St. Martin). From a study of these tableaux (particularly after 1717 as it is only after this year that the listings were complete and consistent) it is possible to surmise the general policy of appointments. During these years, just over a hundred officials served on the criminal chamber. In only six cases was a councillor named two years in a row and none for more than two. Those named to the chamber in 1717 or 1718, served on average a total of three years over the nine years, one exception being councillor Lombard who served five years. There seemed to be no general rule regarding the amount of judicial experience required before judging criminal matters as accumulated experience as a councillor prior to the appointment ranged from six months in the case of Jean-Jacques Bel in 1720 (at the age of twenty-seven) to over fifteen years.

With regard to the presidents appointed to serve on the Tournelle, the principles were less consistently applied. Of the ten appointed from 1717 to 1725

three served more than a total of three years: Le Berthon (who was to become the first president of the parlement as a whole after the death of Gillet de Lacaze in 1735) served six years in a row from 1717 to 1722, and again in 1724; Nicolas de Segur, having inherited the charge of president in 1718, served seven years in a row from 1719; and finally, Montesquieu, who was assigned to sit in the criminal chamber as first councillor, then president, from November 1715 until the selling of his charge in 1726, served a total of ten and a half consecutive years. No other magistrate was required to serve so long a term and it is particularly difficult to understand given that it contravened the general practice and doctrine which favoured short-term appointments to the criminal chamber, or at least allowed for the possibility of a professional break. Nonetheless, it was an experience which did provide the opportunity for acquiring an intimate knowledge of the practices and principles of criminal prosecution and for placing this knowledge in a longer historical perspective than that possible for other magistrates.

The chamber itself was self-regulating in a number of ways. It ruled on the allocation of judicial fees (les épices) and regulated the distribution of its own criminal work.[15] The number of cases reaching the court varied slightly over the years studied.[16] Despite a relatively even flow of work, its distribution among the magistrates was decidedly uneven. Two important distinctions must be examined in this context: the distribution of work as related to specific official function, and within these groups. The most important official distinction was that between the présidents à mortier and councillors. All présidents à mortier were responsible for chairing sessions (if of the requisite age of forty or having received special dispensation to chair despite the age requirement), however the most senior président à mortier alone had the responsibility to distribute work among councillors for them to summarize cases and report them to the other magistrates prior to interrogation of the accused and the final deliberation. There were 11 présidents à mortier from 1715-24. The remaining officials (over ninety) were appointed as councillors.

Second, it is important to examine patterns of reporting given that the reporting judge was the sole official who took on an intimate knowledge of the case and presented the issues as he perceived them to the rest of his colleagues prior to hearing the accused and pronouncing judgement. As cases were readily associated with the reporting judge in the court records, in tracking patterns of distribution we find that of at least 90 councillors who were eligible as reporters, 24 appear never to have been responsible for reporting a single case.[17] In contrast, a core group of seventeen councillors performed over 60% of the allotted reporting work.[18] While Dalat remarks that Montesquieu was isolated from the work of the court given that he could not fully exercise his rights as a deliberating magistrate (not having reached the age of forty) until the act of dispensation in 1723, it may be that a certain peripheral status was the condition for a large majority of the magistrates associated with the chamber.[19] Furthermore, within this core group there were certain tendencies for specialisation with some responsible for a much higher proportion of cases involving crimes of violence and others for crimes of theft.[20] These features of specialisation and concentration could have an impact on the trends of judgement in the court (depending on the personalities involved, about which we know very little).

Specialisation was encouraged by the lack of adequate financial compensation detering most magistrates from taking exclusive interest in their judicial career. It is widely recognised that the financial return on the office in terms of wages was minimal and inadequate for the burden of taxes and expected lifestyle of an official in that position.[21] Most were forced to devote large amounts of time to their domains for reasons of financial security. (Of course, magistrates, as a rule acquiring noble status after serving twenty years or inheriting the office, were prohibited from engaging in most forms of commercial activity.) It was partly for reasons of alternative occupations that while the formal timetable of the court extended from the first working day after November 11 to the eve of Notre Dame (September 7), there was relatively little judicial activity in the late fall and early winter.[22]

Independence in judgement was favoured by the very nature of criminal law which the court was required to apply in its judgements. For pre-revolutionary commentators on criminal jurisprudence, a crime was defined as any misdemeanor that harmed the public interest, either directly or through offence to individuals.[23] This understanding corresponded to a judicial practice of having no criminal case prosecuted without the participation of a public party, that is a procurator-general, his substitutes (at most royal courts of the first instance) or seigneurial equivalent (le procureur-fiscal). Although accusers as civil parties could have a formal role in the trial procedures in seeking damages for the particular harm the crime caused for them (in which case they would also be required to pay the trial fees), their arguments and participation were essentially separate from considerations of the crime as a public offence.[24] It both reflected and sustained a strong awareness of the distinction between public wrong and private injury. It also meant that all punishment was understood as a form of public vengeance, quite separate from the modes of particular redress which were understood in terms of reparation rather than penal justification. In this framework, the judge was not bound by a restrictive logic of civil vindication.

In addition, the law itself was in many instances incomplete and imprecise. Some argue that the development of royal justice was fueled by a market-driven need for increased rationalisation to counter the unpredictability and ultimate unprofitability of traditional modes of popular justice.[25] At one level, it is true that local customary laws across France were largely purged of criminal prescriptions in the process of official drafting from the sixteenth century, as part of a wider trend to fashion uniform standards in the practice of criminal prosecution.[26] However, one must recognise a continued general disarray in some legal sources. For some crimes such as arson, parricide, adultery, polygamy, incest and certain forms of fraud, no governing statute existed and it was not until 1791 that a penal code was drafted.[27] In addition, even when the crimes were identified by statute, often the prescriptions for sentencing were vague and as a result judges, by virtue of the law alone, were given great latitude in assigning

punishments. The deficiencies in a system of central control were reinforced by the very practical problems of prosecuting crime, given the built-in disincentives of cost, delay and distance, as well as the notorious lack of adequate policing resources.[28]

One cannot ignore, however, that some effort was being made for greater coordination among various levels of government for better methods of prosecution. In addition to the much discussed reorganisation of the maréchaussée force, the records of the Bordeaux parlement also show evidence of more informal modes of cooperation.[29] The case of Nanotes, the recidivist and many-time deserter of the royal troops, provides evidence of progressive coordination by officials in various fields of criminal administration to consolidate their efforts in the repression of crime. Nanotes' previous criminal record was discovered subsequent to a first judgement by the presidial of Guyenne and while the case was on appeal to the parlement of Bordeaux. The discovery required the active cooperation of the general commissioner of the galleys in Marseille who sent administrative records of Nanotes' admittance to the galleys to the court. Another example of administrative cooperation for the prosecution of crime is the record of a letter addressed to the court by the chancellor d'Aguesseau in June 1721. Given that it had come to his attention (we are not told how) that the so-called Perroquet de Varennes had been arrested by order of the parlement, he asked that notwithstanding the judgement of the court on the case pending, the court keep him in prison until a new order was issued.[30] Nonetheless, mention of these matters in the court records is most certainly evidence of their exceptionalism, so it can be judged that such forms of cooperation were very rare. From this perspective, room for greater independent judgement on the part of the royal magistrate within the local parlements would derive in part from the very weaknesses of a project of state consolidation.

This latitude also is tied to prevailing conceptions of crime. Among legal commentators (though not enshrined in legislation) there was general agreement on categories of crime. The public interest could be offended in four major ways:

through an attack on religion (including the crimes of lèse-majesté divine, blasphemy, sacrilege and heresy), an attack on the political order (including lèse-majesté humaine, rebellion, the carrying of arms, illicit gatherings and counterfeiting), crimes against the security of individuals (including various forms of homicide, rape, theft, injury, arson and insults), and finally crimes against general public moral standards (including adultery and polygamy).[31] The nature of the crime was determined by more than the act itself, but was also conditioned by both the specific qualities of the person committing the crime, as well as the particular circumstances in which it was committed. Jousse states that it is the ill will (the dol) and the knowledge of acting wrongly which is criminal and which merits the punishment, not the performance of the act itself.[32] A state of imbecility, sudden passion or even drunkenness on the part of the accused was enough to mitigate or excuse the offence. In contrast, certain external conditions, such as theft at night or in certain public places, or the nature of the person offended concerted to increase the severity of the crime. Because of this according to Fleury, the number of possible crimes was infinite.[33] For this reason Guyot recognises the importance for criminal magistrates to have more than integrity given that so much is left to their discretion in sentencing.[34]

While the written and customary sources in identifying crime were varied and often vague in prescribing punishments given these considerations, the procedure governing the stages of prosecution was in contrast minutely and precisely regulated by both legislative prescription (most significantly through the ordinances of 1498, 1539 and 1670) and professional norms.[35] The general steps of criminal investigation through standard inquisitorial procedure have been well documented, but it is important to note that in the case of an appeal, the procedure was not duplicated.[36] The findings of the first inquiries, the testimony of the witnesses and the results of the confrontation between the accused and the witnesses in the presence of the first judge, were sent in written form to the court. The final judgement was based in part on a reexamination of these records (la visite du procès) as summarised by the reporting judge, in conjunction with the

conclusions of the procurator-general and the results of a new interrogation of the accused with at least seven magistrates present. By expressed and repeated order of the crown, criminal trials and the resulting sentences, unless subject to automatic appeal, were to be resolved and executed promptly in order that they be perceived by the public as the necessary consequence of the criminal act.[37]

For cases in which the accused was tried in absentia (contumace), a motion in the court would take the form of a requisition to proceed to figurative execution of the sentence, with no need for a comprehensive report. This demand was generally accorded, unless the reporting judge acknowledged gross violations of existing law in the preceding judgement.[38] Figurative execution took the form of a painted effigy of the accused suffering the prescribed punishment, in the case of a death penalty, or, for the remaining cases, a descriptive account of the sentence pronounced. These paintings and tableaux were exhibited in the square in front of the parlement, or in a public space in the region where the presumed crime was committed.

However, alongside these official attempts to codify procedure and issue in a national uniform standard and pace of conviction, it has been recognised that the rigours tied to the formal prescriptions of assessing evidence in the official theory of legal proofs led to the introduction of new and largely informal principles of judgement by the end of the seventeenth century. The evolution was in part characterised by judgement on the basis of the judge's deep-seated intuitions as opposed to a required formal set of proofs.

To understand how this change was possible, it is necessary to understand the flaws of the theory of legal proofs which served as an official doctrine of criminal prosecution from the thirteenth to the seventeenth centuries. The formalised system of justice arose in France with the progressive abandon of trial by ordeal and combat (in which justice was deemed to be manifested by divine intervention directing the outcome).[39] The new system of legal proofs inspired in part by classical prescriptions of Roman law regulated the weight various forms of evidence were to have with the prescription that only a full proof could justify

conviction. In cases where this did not exist, the accused would be judged innocent and freed. For Langbein, the practical restrictiveness of this system with its consequent protection for the accused was designed to generate a form of certainty in conviction to replace that of divine providence.[40] Nonetheless, the need for a new form of certainty to be generated by legal reasoning over divine providence may itself need to be explained. A full explanation of the dynamic and success of this important transition in criminal prosecution would most certainly have to include the consideration that the introduction of this system of proofs also coincided with a series of political changes which concerted in various ways to reduce the role of parallel and competing powers for the state, i.e. the introduction of a system of judicial appeal and the gradual decline in seigneurial power.[41]

Within the system of legal proofs, a full proof amounting to either a confession from the accused or two reliable eye-witness accounts were the only bases on which conviction was possible. However, as most crimes were performed in secret and as unprovoked confessions were hardly to be expected, the doctrine was eventually bolstered by the introduction of methods of torture as a means to fulfil the confession requirement. Nonetheless, the use of torture was not indiscriminate. Given the lack of full proof in these cases, an alternative set of presumptive or circumstantial clues regulated when such recourse was justified.[42] For Langbein, it was this space, evolving from the ineffectiveness of the system of legal proofs, which gave rise to a new form of judicial reasoning and which would subsequently be harnessed by the judges to apply in the act of conviction itself. This coincided with the introduction of new forms of penalty short of death, such as the galleys and workhouses, and the decreased use of torture given a general consensus on its inefficiency for generating a reliable confession. These developments all contributed to the rise of new modes of judicial conviction based on the use of circumstantial evidence for a set of punishments less than death. For Langbein then acknowledged trends to relative moderation in sentencing in the eighteenth century were to be accompanied by higher rates of conviction and were

dictated not by the various Enlightenment tracts calling for reform, but by juridical reasons rooted in the weaknesses and inefficiencies of the Roman-canon law system itself.

It is a compelling argument and fits neatly into parallel accounts of the development of state policing capacities in the eighteenth and nineteenth centuries and the acknowledged shift from exemplary punishment to assured punishment as a most effective deterrent.[43] However, it can only account for a decline in the use of capital punishment and not for lesser sanctions in non-capital crimes. In addition, it fails to recognise the differing patterns of conviction, both between lower and higher jurisdictions, and for varying types of crime. Most substantially, it begs the question of why more convictions were needed. These questions will be addressed in greater detail at the end of the chapter.

Nonetheless, for the immediate concern at hand, it is clear that the evolution of the laws of proof also ushered in a new justification for forms of judicial autonomy given that judgements on the basis of intuition were less easily regulated by legislation. The novelty of such developments is mitigated, however, by the recognition that they were additions to an already long tradition of acknowledged interpretative licence in the areas of judging criminal responsibility and in sentencing, at least insofar as the higher courts were concerned. As Boyer has shown, the notion of equity (l'équité) had long been invoked to justify the parlementary judge's prerogative to circumvent legal prescription, and to use his judgement to rule as reasons demanded it.[44] It had always been considered as the privileged right of the parlements in opposition to the lower courts which were deemed to be more strictly held by the letter of the law.

In England, special equity courts had been established in the early modern period to promote in particular informal rights in property left unrecognised by traditional canons and practices of common law. Because of this institutional specialisation and of the particular silences in traditional legislation and patterns of judgement, equity law became a special sub-field of legal scholarship.[45] In contrast, in France, principles of equity were invoked indiscriminately by higher

court magistrates themselves with no need for special petitions or special courts. They did not constitute a separate field of legal study (supported by the survey of the field given in the chapter one), but were regarded as a licence for greater latitude and flexibility in judgement when it was judged that the facts of the case required it. It was a means for the courts on ultimate appeal to compensate for the crudeness of the legal text as an instrument of justice.[46] In general, as a form of legal reasoning, it led judges to consider in greater depth the wider purpose of the law and the intention of the legislators in adopting it, as well as the circumstances of the criminal act and of the persons involved. It was thought that these broader considerations would permit a more appropriate judicial response, but for a particular case, rather than for a class of cases. Although left undefined by written law, the informal rules of equity were acknowledged to be more attentive to the features of the criminal act which would allow for a mitigated sentence from that imposed by the lower courts. In addition, it was informed by the guiding principle of a need for proportion in punishments in relation to the crime.[47] Thus, evolving sentencing practices, attributed in part to new methods of proof, were readily assimilable to existing structures as they built on an already long tradition of parlementary equity. Nonetheless, whereas equity was invoked by parlementary magistrates most often in sentencing (i.e. fitting a punishment to suit the crime), circumstantial evidence created a wider space for legitimised discretion in judgement over criminal responsibility itself.

This section has shown that despite national codes of criminal procedure and a relatively uniform corpus of penal law, administrative, legislative and juridical factors all served to create opportunities for a specific parlementary tradition in the application of criminal law. However, before examining the features of the criminal jurisprudence of the Bordeaux court, it is important to provide a brief profile of the crimes and criminals which the magistrates, including Montesquieu, confronted in their work.

II. Profile of the accused.

Renewed study of the legal records of early-modern France has also brought consciousness of their limits as a social document. It is generally recognised that these records cannot provide an accurate reflection of the forms and patterns of criminal behaviour given that much of this behaviour was never challenged through the court system, but rather through informal and more traditional modes of dispute settlement.[48] In the case of the Bordeaux parlement, there is the added obstacle given that it was only a court of appeal. The knowledge that every sentence involving corporal punishment pronounced by the lower court would be automatically appealed to the parlement, coupled with the assumption that the most damaging and severe of crimes would be more likely to be brought before the official justice system, can still not allow one to claim that the parlementary records provide a selective guide to the criminal behaviour of the region. However, despite this, patterns of conviction, appeal and final response may reveal how the magistrates came to perceive their jurisdiction and hence their function, for their decisions were not only to be executed and deemed authoritative, they also were judged to be effective in some way.

Before studying patterns of conviction at the lower and higher levels, it may be helpful here to provide a short sketch of the types of crimes and cases appearing before the court. The cases cited have been chosen to provide evidence of both standard and strikingly exceptional examples of the work facing the magistrates of the criminal court in Bordeaux. It also provides an occasion to allude to those themes which would find an echo in Montesquieu's later work.

There were 495 decisions of the Bordeaux parlement from the years 1715 to 1724 for which the crime is identified.

Table 2: Crimes prosecuted by the Bordeaux magistrates.[49]

Crime	Frequency	Percent
lese-majesty	1	0.2
blasphemy	2	0.4
rebellion, carrying of arms, illicit assembly	4	0.8
counterfeiting	6	1.2
escape from prison or galleys, breaking exile	19	3.8
suicide	3	0.6
homicide- general	113	22.8
homicide of child	16	3.2
homicide of relation	12	2.4
premeditated assault	5	1.0
poisoning	1	0.2
rape	21	4.2
arson, property damage	9	1.8
monetary fraud	0	0.0
injury and insult	42	8.5
theft- general	94	20.0
theft from a church	8	1.6
theft on a public road	2	0.4

night theft	13	2.6
theft with break and enter	4	0.8
theft by a servant	13	2.6
theft and injury	1	0.2
theft of public goods	15	3.0
abortion	11	2.2
name change	1	0.2
counterfeit signature and false witness	3	0.6
other fraud	5	1.0
calumny	1	0.2
corruption of judges or of judicial officers	32	6.5
bohemianism	3	0.6
adultery	4	0.8
polygamy	2	0.4
incest	6	1.2
other crimes against morals	3	0.6
complicity in theft	1	0.2
complicity in homicide	3	0.6
other complicity	4	0.8

duel and homicide	1	0.2
theft and unpremeditated homicide	2	0.4
other multiple crimes	7	1.4
false bankruptcy	1	0.2
corruption of witnesses and testimony	1	0.2
Total	495	100.0

As we have noted, legal doctrine tended to classify crimes into those contravening the religious order (including divine lese-majesty, sacrilege and blasphemy), those offending the state and public authority (including human lese-majesty, and various forms of rebellion), those threatening public security (generally homicide and theft) and finally those offending public morality.[50] As this table shows, those cases involving some form of contravention of the religious order or offending state and public authority make up only a small percentage of the court's work. Only one case is identified as a crime of lese-majesty.[51] Other threats to public order included a large illicit gathering of Protestants in the vicinity of Clairac (where Montesquieu's wife, a reputed Calvinist, was born and where Montesquieu owned property).[52] In addition, this category of crime included escape from prisons or the galleys and the breaking of a sentence of banishment, brought to the court in nineteen cases. Among these, and as an echo of more turbulent times in the Périgord of the previous century (as recorded by Bercé), the court heard one request for the arrest of Jean Chabaneau, a priest of the town of Mauzac, who had been charged with inciting popular rebellion (with the ringing of the tocsin) but who had ignored the sentence of perpetual banishment from the jurisdiction of the court.[53]

Threats to public order also included charges of corruption, calumny or general incompetence laid against judges, lawyers, clerks or other officials involved in the judicial process. One case of the thirty-two identified involved the jailer of the prisons of Mont de Marsan, Pierre de St. Espée, (perhaps experiencing the same tension between social function and personal attraction that tormented Usbek's harem keeper in Lettres persanes) who in contravention of his duties as laid out in title 3 of the 1670 ordinance, had given in to feelings towards a female prisoner who had become pregnant by the time of her transfer to Bordeaux in January of 1719.

Nonetheless, in general one may conclude that while some threats to public and religious order existed, they were a far cry from the incidents of popular and aristocratic rebellion which had characterised the jurisdiction less than a century earlier. The mandate of the court had shifted almost exclusively to the promotion of public security.

Crimes against public security were deemed to be those involving direct physical and/or material harm for other citizens and constituted over two thirds of the court's workload. As the table shows, various forms of homicide were addressed in 33% of the known cases.[54] Of note for Montesquieu's reflections in Lettres persanes written during his time of service as a magistrate were two cases of suicide considered by the courts as a form of homicide. In the trial for this supposed crime, the accused would be represented in court by a designated caretaker.[55] Theft offenses amounted to roughly the same proportion as homicides at 30%.[56]

In this same category, charges of excessive violence and injury were raised forty-two times (8.5%). These included charges of rape brought by women against men both for reasons of violent assault and, in the cases of Marie Peraud and Marie Salgues, for delays or refusals by their supposed fiancés to enter into marriage after they found themselves pregnant.[57] Other cases of violence and injury included popular hostility to the campaign of the cagots of the region to escape their five centuries of effective communal subjection (a campaign which

would involve a ruling signed by Montesquieu and to be the subject of appendix one), a charge of wife battering brought by Mme Duval against her husband, Philibert Boyer, a président of the local Cour des Aides, and an unsuccessful appeal by Philip Dureau of a judgement ordering him to pay 100 livres in damages and other costs for contravening laws banning the throwing of snowballs in the streets of Bordeaux (August 1718). Cases of minor assault figure in proportionally smaller amounts in the records of the Tournelle. This can be attributed more to their frequency as they would more often be settled by informal dispute mechanisms or regulated by lesser penalties for which no appeal would be filed.

The last category of crime as offered by contemporary jurisconsults is that contravening laws of public morality. The table shows eighteen cases to be understood in this light. These included charges of general libertinage as in the parish of Vicq (in the sénéchaussée of Tartas) where Jeanne Sammanet, dite baronne, was said to have lived with someone out of wedlock, to have had several undeclared pregnancies, and to have inspired a general practice of concubinage throughout the community with the tacit consent of local officials.[58] Another dramatic case of adultery involved Marie Montrignac, the wife of the Seigneur de Graniers, who had fallen in love with a brandy distiller and domestic of the household and had become pregnant. The trial was conducted with both accused in absentia. Marie was sentenced to the traditional punishment for adultery, the so-called authentique, involving forced retreat into a convent (reversible only within two years on request of the husband to take his wife back). Her lover, having broken the sacred trust of domestic service, was sentenced to hang. It was one of four cases of adultery to come before the court in these years. In addition, the court was to see two cases of polygamy and six cases of incest. The case of Jean Coustard, convicted of making his sister-in-law pregnant and sentenced to serve ten years on the galley ships, was even reported in the Registres secrets, a rare occurrence for decisions of the criminal chamber. If nothing else, for some of the more reflective magistrates, acquaintance with the details of such cases

would be an occasion for more general meditation on general rules of social and sexual conduct.

While there is little significance in examining the changing patterns of crime in appealed convictions over the few years studied given the shortness of the period studied, this slice of judicial history can tell us something of the regional characteristics of the jurisdiction.[59] In particular, the diversity of patterns of social behaviour within south-west France can be explored by examining the incidence of charges across the jurisdiction.[60] Various forms of threat to state authority and public order rate highly in the Périgord accounting for over 11% of cases coming from this region. The highest numeric incidence comes from the Guyenne itself with nine cases of escape and rebellion. There is also a pattern of proportionally greater rates of homicide cases for more isolated and non-coastal regions, such as the Limousin, Périgord and the Bazadais (reaching in the first two to roughly 50% of the cases appealed to Bordeaux).[61] This can be contrasted with patterns of theft where the highest proportion of regional crime in theft is found in the Guyenne itself, the largest and most urbanised region of the jurisdiction (including the city of Bordeaux). While it may also be that cases of theft are more likely to come to the court when, in cases of unforced appeal, the travel costs are fewer, the frequent recourse to sentences involving forms of afflictive punishment in response to this crime, especially for aggravated theft, also works to lighten the significance of distance as a determining factor. Rather, the pattern seems to support general accounts of theft as more predominantly an urban phenomenon.[62]

It is important to examine the varying patterns of prosecuted crime by gender and status.[63] Of 741 cases where the individual accused can be identified by gender, 85% percent were male, and 15% female.[64] Where the alleged crimes also can be identified (436 cases), a pattern is evident.

Table 3: Prosecuted crime by gender. (from a total of 436 cases identified)

Crime	Percent of all male crime	Percent of all female crime
-Total homicide (including forms of aggravated homicide)	31 (114 cases)	45 (32 cases)
--Including a)general homicide	25.8 (84 cases)	6 (4 cases)
-- b)infanticide	.1 (3 cases)	32 (23 cases)
-Total theft	33 (120 cases)	28 (20 cases)
-Other	36	27
Total prosecutions	100 (364 cases)	100 (72 cases)

Homicides accounted for 31% of male crime and 45% of female crime. This last figure can be explained by a high incidence of infanticide for which 23 women were convicted by the lower courts in the years studied, accounting for one third of all female crime. While the numbers indicate that this gruesome popular practice was also fairly common, the high number of accusations may also be attributed to a legal presumption that a murder had been committed if the mother did not declare her pregnancy to her family or certain public officials before giving birth and that subsequently the child had been found dead.[65] This also shows that, in contrast to matters involving civil responsibility, in matters of public crime women were fully responsible for their actions and were not to be deemed to be under the tutelage of their husbands. As gruesome evidence of this point, in February of 1723 the court rejected the defence of Izabeau Fontange that it was only on the request of her husband that she had strangled two daughters found under her bed. In general, while criminal activity as represented by these records was predominantly male, the female crime which was recorded was more

highly concentrated in offenses of infanticide and unaggravated theft.

The records are also revealing with regards to the accused status. Of 215 known cases, 91 (42%) are identified of general roture status while 21 (10%) are identified as nobles. Other categories singled out include soldiers (13 cases), clerics (9 cases), vagabonds (8) and officers of justice (46 cases). The high incidence of administrative accusations suggests that part of the process of legitimising the state justice system involved building on its own failings, that is, using its weaknesses to ultimately establish itself as an authoritative presence.[66] The large number of soldiers involved in crime can be explained in part by the sometimes dubious methods of recruitment. The case of the named Nanotes shows that after having been sentenced to the galleys for life in 1684 at the age of nineteen on a rape conviction, he was then freed in 1707 on the condition that he serve in the Rouergue regiment. On subsequent desertion, he was again sentenced to the galleys in 1709, and again freed in 1710 to join the royal troops. On a new accusation of rape in 1717, given that Nanotes was both a recidivist and vagabond, his case was sent to the presidial court.[67]

The cleric was not immune from accusation, although the role was sometimes used to evade suspicion or seek impunity. In 1721, Pierre Bernadon,"le soy disant sous diacre" of the diocese of Rabues, was charged with entering into the episcopal manse of Saintes and the house of a presidial councillor dressed in ecclesiastical robes where he stole silver cutlery and silk coverings. He was condemned by the Bordeaux court to serve on the galleys for life. It was identified as a cas privilégié, that is where the severity of the offence required that the case be tried by the royal courts and by standard royal procedures, notwithstanding the status of the accused. It demonstrates an important contrasting feature with the practice in English courts of the time and the doctrine of the benefit of clergy which served as an avenue for a whole range of criminal immunities and moderated sentencing.[68]

Another tragic case showing how clerics were open to the full legal force of the state, centres on a charge of assault against Blaise Dudon, a Jesuit prefect

at the lycée de Guyenne in Bordeaux and brother to the avocat général of the Bordeaux parlement. The sac de procès shows testimony from various students and the father of Martial Dumas relating the events of May 31, 1717 when Father Dudon enticed the thirteen-year old student into his quarters with offers of a special treat, only to order the whipping and begin kicking the boy himself with such severity and inflicted humiliation that Martial almost lost his sight and was bedridden the next day. The medical examiner reported that even those sentenced to whipping by the courts were not subject to such physical abuse. In the ensuing case (Martial's father was also a lawyer for the sénechaussée of Guyenne), Father Dudon sought to invoke his status to have the case brought in front of an ecclesiastical court, given that the act was for him a simple matter of discipline, although no justified motive for the act was advanced. Given the families involved and the nature of the offense, the court ruled on June 25, 1717 that the parlement itself begin proceedings. The court in this case ruled that the clerical status of the accused had less relevance to the case than the severity of the accusation. However, as a final judgement is nowhere to be found in records, one can only assume that the matter in the end was settled out of court.

In this picture of the crimes and criminals in the legal records of the parlement, we find that the magistrates were confronted with a diversity of patterns within their jurisdiction. In terms of sentencing practice, it meant that universal solutions were less appropriate. The priority of the court was to assure public security, given that threats to public order were relatively rare in comparison to the past history of the jurisdiction. A relatively high incidence of administrative crime called for a careful response given that the courts would not want to weaken their own legitimacy in condemning such abuses. Particular trends of female crime posing less a threat to public security than being largely the result of particular codes of honour would also require its own calculated response. In general, therefore, patterns of crime within the jurisdiction of the parlement provide the foundation on which criminal judgement was exercised and from which its significance (if not its efficacy) can be judged.

III. Trends of conviction and punishment in the lower courts.

A standard set of punishments existed for all criminal tribunals within pre-revolutionary France. Except in the case of lese-majesty of the first degree, all punishments were to be personal, that is applying only to the guilty party as judged (although the ruling of civil death in the case of banishment would certainly have indirect effects on the family of the convicted).[69] Furthermore, all courts were governed by the general hierarchy of the most severe punishments as listed in the 1670 ordinance: the death sentence in its various forms, torture reserving the right to punish on the basis of presumptive evidence, galleys for life, banishment for life, torture with no reserved proofs, galleys for a term, whipping, public amends and banishment for a term.[70] However, while this hierarchy of punishments was accepted by courts of the realm, the application of these punishments relative to patterns of crime differed in many ways. To allow for comparison of the patterns of prosecution and punishment between the lower and higher courts of the jurisdiction of the parlement, I have identified punishments in the following categories: capital punishment, torture, service on the galleys (life or term), lesser corporal punishment (including whipping and branding), forms of banishment and incarceration (in a workhouse or hospital), shaming punishments (such as loss of office or title, admonition, shaving), monetary fines and the payment of civil damages and court fees.

While the selection of cases appealed to the parlement is not fully representative of all the judgements of the lower courts, it does serve as an accurate indicator of its sentencing practices for more severe criminal offenses, given that many of these were appealed automatically to the higher court.

Table 4: Pattern of lower court punishments (from 678 known appeals)

Prescribed punishment	Homicide (all forms)- number of cases	Theft- number of cases	Other crimes- number of cases	Crime unknown- number of cases	Percentage of all lower court judgements
Capital	51	24	15	21	16.4% (111 cases)
Torture	17	4	7	3	4.6% (31 cases)
Galleys	3	19	8	19	7.2% (49 cases)
Corporal	4	24	2	15	6.6% (45 cases)
Banishment, incarceration	8	28	7	21	9.4% (64 cases)
Shaming	9	5	11	7	4.7% (32 cases)

Table 4 shows that of 678 appealed cases before the Tournelle from 1715 to 1724, 16.4% (111 cases) are known to involve a death sentence pronounced by the lower courts, of which almost half were for crimes of homicide.[71] Torture, another judgement which was subject to automatic appeal was identified in 31 known cases (or 4.6% of the lower courts' judgements) only one of which was la question préalable to be administered along with a sentence of capital punishment to reveal the names of any of the criminal's accomplices.[72] Service on the galley ships was pronounced in 7.2% of the cases, half of these being life sentences and the rest largely split between service for one to five years and service for six to

ten years. From the table there emerges a certain pattern in that for the lower courts, the death sentence is often associated with the crime of homicide. In contrast, the punishment of service on the galleys (whether for life or for a limited period of time) was seemingly regarded as one standard penal response for crimes of theft.

Another general response to crimes of theft at the lower level was a sentence of whipping and banishment from the jurisdiction for periods of a year to life.[73] In the lower courts, sentences involving the whip accounted for 6.2% of the 678 cases (at least half of which were responses to crimes of theft) and sentences calling for banishment accounted for 8.8% of the judgements (for which again half can be identified as cases of theft). Banishment was generally ruled either for life (in which case it was accompanied by civil death, a form of legal incapacity) or for a period of one to five years. Thirty cases combined the punishments of whipping and banishment.

Punishments involving dishonour (l'infâme), apart from capital punishment, galley service, banishment and corporal sentences which also implied loss of honour, included the loss of noble title, the offering of a public apology, the wearing of a banner publicising the alleged crime committed and the shaving of the head for certain women criminals. These were pronounced in 4.7% of the cases appealed. While many were the compliment to other forms of punishment, the loss of honour was also involoved in the judgement of plus amplement informé, which left the accused in a state of accusatory limbo, general suspicion and often in prison for an undetermined length of time. This sentence was the subject of appeal on ten occasions (or 1.5% of the 678 cases). Fifteen cases involved the making of public amends, whether as an accompaniment to a sentence of capital punishment or as a redress for some form of insult. The latter is one indication how the pre-revolutionary justice system in France sought in limited ways to make punishments fit the crime, that is, using the public forums where honour was said to be lost, as the forum where it would also be regained. However, these would apply only in cases of limited criminal import and never

in crimes of great threat to general norms of moral behaviour.[74]

If a civil party agreed to be associated with the case from the time of the initial stage of information (in which witnesses would be first heard and the case built against the accused), while being responsible for court costs, the civil party could also apply to be awarded civil damages for any personal injury accrued as a result of the criminal act. In the 5% of cases where these civil damages are specified for judgements in the lower courts, they are awarded largely in response to crimes of homicide and lesser forms of violence and are aligned roughly, but not strictly, on the seeming ability of the accused to pay, with the highest amounts demanded from those of noble lineage.

IV. Trends of conviction and punishment in la Tournelle.

While an examination of these records shows clearly discernible trends, it is also evident that the higher court was not always willing to ratify these judgements, leaving room for an independent tradition of jurisprudence of its own. We have seen some of the administrative and doctrinal conditions for this relatively independent path, however, before examining how the parlement distinguished itself in judgement, it is first necessary to examine how the practice of the lower courts shaped the parlement's understanding of its role in criminal jurisprudence.

First, one may note those instances when the decisions made by the lower courts were clearly in violation of their prescribed powers. While not severe enough abuses to warrant separate motions, the court records show various forms of admonition handed down to the lower courts in the course of their regular judgements, documented in 30 (3.3%) of the 897 motions recorded. Half of these involve objections to the form of the lower court judgement, whether it be that the court left its decision unmotivated (it was only a privilege of the higher court to leave the reasons for their judgement unstated) as in the case of the judge of Beysebelle in his decision of August 23, 1720, or that it issued unauthorised

sentences or executed a sentence of banishment before the appeal had been heard.[75] Legally questionable sentencing decisions by the lower courts included a call for the transportation of Antoine Malhiver to serve in the French colonies for the rest of his life (a sentence changed to a whipping on appeal) and one sentence of nine year banishment from the country as a whole (for a crime of theft) pronounced by the sénéchaussée of Saint Sever. As a rule, the practice of transportation was only briefly a legally sanctioned punishment in the French courts (in contrast to England), and the lower courts were able to pronounce sentences of banishment only from their own limited jurisdictions. In the appeal to the latter decision, the magistrates of Bordeaux ruled the sentence out of order and changed it to galley service for ten years. Another sentence rejected by the court was that of the sénéchaussée of Périgueux which ruled that Toinete, the niece of the curé of Sarlat, was to serve on the galley ships for an unspecified period of time for having set fire to a barn. Such punishment was reserved for males, the female equivalent usually being service in a workhouse.

In addition to the contravening of established legal norms and practices, instances which could be attributed to a limited knowledge of the statutes governing the application of sentences, there were also more blatant instances of court corruption. The high number of references to various forms of corruption within the lower courts as found in the records of the Bordeaux parlement may have contributed to a heightened sense of wariness by the Bordeaux magistrates towards many of the conclusions of the courts of first instance.

In contrast to a current of judicial opinion in the eighteenth century to dismiss the seigneurial courts as centres of incompetence and corruption, the vast majority of charges and complaints before the Bordeaux parlement concern royal courts spread throughout the jurisdiction.[76] Of thirty-two cases of corruption, either as a standard case under appeal or raised in a requisition of the procurator-general, twenty-eight can be identified by region and court. The highest frequency occurs in the sénéchaussées of Agen and Saintes, with seven and four cases respectively. In August of 1718, Moize Capdeuille, the judge of the royal court

of Montflanquin, along with the court procurator and the court clerk, were convicted of an array of crimes including theft, extortion, usury and assault. Moize was banished from the jurisdiction of Agen and the Guyenne for five years, fined 500 livres and declared ineligible for any other public charge, while his subordinates were sentenced to lesser terms of banishment. Three years later a sergeant employed by the same court was arrested for charges of fraud.

Many of the charges of corruption were related to the exacting of exorbitant fees, such as in the case of Arselin, the judge of the court at Bruil, and Jean Lachese, clerk of the sénéchaussée of Agen. There were also seven orders for judges to return an excess of fees (épices) collected during the trial. In three cases, judges were themselves fined, in one case removed and in two cases declared to be perpetually incompetent. However, these were sometimes combined with much more serious charges. Labachelevie, judge of the presidial court of Brive who previously had been suspended from his charge for a year, was said to enter the courtroom with a cane with which he would perform various acts of violence, and he had one charge of assault against him still pending when new charges came before the parlement. In addition, he had falsely registered a variety of court judgements and had charged high fees for services which required no fee at all. The high court sent its own commissioner, councillor Dussault, to head an investigation of this official on site.[77] Some abuses derived from an accumulation of functions, such as in the case of Jean Drouet who was employed as tax farmer, sergeant, notary and procurator of the jurisdictions of Mortaigne and Corneille.[78]

This undercurrent of admonition and correction is only one more salient feature of a more general stance of veritable stewardship that characterised the disposition of the parlement vis-à-vis its jurisdiction. To recognise this is to cast doubt on those theses which would see the pre-revolutionary justice system in France as a monolithic enterprise, whose parts were all concerted and geared to identical methods of repression. Furthermore, it allows us to understand and explore the relative autonomy which characterises the practices and decisions of

the Bordeaux parlement in various domains, and most particularly in its own criminal judgements and sentencing practices.

Table 5: Rate of confirmation of lower court judgements (%age of 472 convictions appealed)

Motion	Conviction and punishment upheld	Conviction only upheld	Procedure ruled out of order, case thrown out of court	Procedures continued (at the lower level or in Bordeaux)
Conviction appealed*	21.4	54.2	17	7.2

*(convictions appealed constituted 67.9% of all motions coming before the court)

An examination of the general types of ruling in Bordeaux shows that of the 472 appeals of definitive lower court judgements recorded, 75.6% (356) involve the confirmation of a lower court conviction for which the accused is present.[79] However, as table 5 shows, the actual sentence was confirmed in less than one third of these cases and the number of procedures or charges thrown out of court account for 17% of responses to lower court judgements.[80] It shows a relatively elevated rate of exoneration, yet still greater tendency to confirm convictions while modifying the prescribed sentences.

Table 6: Crimes of homicide treated by the Tournelle (of 156 cases)

Tournelle ruling	Number	Percentage (of 156)
Confirm with punishment as prescribed by lower courts	16	10.3%
Confirm conviction only	62	39.7%
Procedure ruled out of order	6	3.8%
Case dismissed (hors de cours)	11	7.1%
Accept requisition for letters of remission, or figurative execution	51	32.7%
Procedures continued	4	2.5%
Unknown	6	3.8%

Table 7: Crimes of theft treated by the Tournelle (of 135 cases)

Tournelle ruling	Number	Percentage (of 135 cases)
Confirm with punishment as prescribed by lower courts	13	9.6%
Confirm conviction only	96	71%
Procedure ruled out of order	3	2.2%
Case dismissed (hors de cours)	12	8.9%
Procedures continued	6	4.4%
Unknown	5	3.7%

In examining the trends within different categories of crime in tables 6 and 7 it appears that in general, the rates of confirmation were constant throughout the crimes examined, although there did exist a certain tendency to drop criminal charges more often in cases of more serious offenses. As table 6 shows, of 105 charges of homicide, 21 were either thrown out of court or slated for further investigation, while 16 confirmed the actual sentences prescribed and 62 confirmed the conviction only (for an over 80% confirmation rate on conviction). The rates for crimes of theft are roughly similar with a confirmation rate of 80% for convictions in 135 cases, yet the confirmation of punishments is less at 13 cases as well as the number of charges dropped, at 15.

To support the point that the higher court's modification of lower court

judgements was in some ways related to their lack of confidence in the integrity of the officials involved, it was found that one of the regions with the highest incidence of charges of official corruption, the Saintonge, also had the highest rate of non-confirmation (with over one quarter of the charges from the courts of the area dropped on their examination by the Bordeaux parlement). High rates of non-confirmation were found also for the Périgord, the Limousin, and Labourd, all territorially peripheral in the jurisdiction of the court.

Table 8: Pattern of higher court judgements (from 678 appeals)

Prescribed punishment	Homicide (all forms)- number of cases	Theft- number of cases	Other crimes- number of cases	Crimes unknown- number of cases	Percentage of judgements on appeal
Capital	29	9	6	9	7.8% (53 cases)
Torture	3	1	0	0	0.6% (4 cases)
Galleys	22	24	12	15	10.8% (73 cases)
Corporal	15	49	2	25	13.4% (91 cases)
Banishment/ incarceration	24	64	14	38	20.6% (140 cases)
Shaming	17	7	20	9	7.8% (53 cases)

In order to highlight the significance of the results of table 8, it will be necessary to show how the results compare to the profile of judgments pronounced

both by lower courts in the jurisdiction as well as by other sovereign courts in the realm. This will be done by treating each form of punishment separately and showing how the frequency of each fits into other contemporary patterns. The most salient feature of sentencing practices of the early eighteenth century around which much recent scholarship has centred, including the work of John Langbein, is the use of alternative and lesser sentences than death for capital crimes. For Langbein this is based on the introduction of new methods of proof which allowed for convictions on capital crimes with less rigorous evidence requirements and lesser punitive terms. In table 8, it appears that of 678 cases (including appeals of definitive judgements, requisitions for figurative executions in cases of trials in absentia and demands for recognition of letters of remission), the death penalty was ruled in 7.8% of the sentences pronounced or 53 known cases, that is in less than half the total of those of the lower court (see table 4).[81] This in itself distinguished the Bordeaux court from the sovereign courts of Lorraine and Barrois which are reported to have confirmed the vast majority of death sentences pronounced at the lower levels.[82]

Nonetheless, while in proportion to population, capital punishment was less frequent in Bordeaux than in Paris, it still accounted for a slightly higher rate in the actual pronouncements of sentences in the court. In Bordeaux, pronouncements of the death penalty averaged roughly seven per year.[83] This compares to an average of 60 capital sentences per year pronounced by the Paris parlement (in a jurisdiction with five times the population) or, for the years 1710-12, 5.8% of sentences pronounced.[84]

As table 8 shows in part, of these sentences of capital punishment for which the crime can be identified, 29 involved cases of homicide (of which most severe forms of parricide would be punished by preliminary forms of corporal punishment and subsequent exposure on the wheel), nine for cases of theft (including certain cases of domestic theft and sacrilege), two for violations of norms of public morality and one for fraudulent bankruptcy (tried in absentia and effected as a figurative execution). In certain contrast with the pattern of the

lower court, it shows that at the higher level the death penalty was considered more exclusively a response to crimes of homicide. It also shows certain divergence from the terms of various statutes which rule for the death penalty in all cases of sacrilege, rape, theft on royal roads, and other forms of aggravated theft, as well as for judicial fraud.[85]

While one must be careful in assuming that only that which is expressed in the final rulings of the legal records is a fully accurate representation of the court's practices, it seems evident that the application of torture was rare in the Bordeaux court, even though all interlocutory judgements calling for torture were automatically appealed to the court by the terms of the 1670 ordinance. Of the 678 judgements studied, only four (.6%) included expressed recourse to torture , two of which accompanied a death sentence (the so-called question préalable).[86] This is in contrast to the records of the sixteenth century in Bordeaux which show that torture was applied in almost one quarter of those cases under appeal.[87] As such, it provides support for Langbein's assertion that the practice of torture was becoming increasingly anachronistic by the beginning of the eighteenth century. Furthermore, as Langbein and others have argued, it would be difficult to argue that such a decline can be attributed mainly to a rise in humanitarian sentiment. In February 1723 a case of a man sentenced to torture came before the Grand'Chambre as the magistrates and medical examiners felt that he risked death if the sentence was carried out. After discussing the possibility of applying alternative methods (the use of broquedins was the standard practice of the Bordeaux parlement), it was decided to proceed in the usual manner, but with greater circumspection "pour eviter les accidens". In this case where it was felt that juridical logic required the application of these methods, it was not overruled for reasons of alleviating the prisoner's suffering.

As a punishment, service on the galley ships dates from the fifteenth century, although it was not invoked in Bordeaux until 1525 and was in general rarely pronounced until Colbert's campaign to restore the war fleet in the 1660's.[88] It was a prescribed punishment in relatively few legislative texts (most

notably, the 1724 declaration regarding sacrilege -i.e. theft in a church-, the 1687 declaration regulating punishments for the breaking of a sentence of banishment and the 1682 declaration regarding the crime of vagabondage). It was also a uniquely male punishment, the female equivalent being committal to a workhouse or hospital.

From 1715 to 1724, galley service was pronounced in Bordeaux in 11% of the appealed judgements.[89] These figures show the favoured use of this sentence for the higher court vis-à-vis the lower court (which invoked the galleys in only 7% of recorded sentences). Part of this trend is explained by 29 death sentences (of a total of 117 at the lower level) which were commuted into galley service by the Bordeaux parlement (19 for life, four for six to ten years and three for one to five years). For certain jurists, the practice of mitigating capital sentences by introducing forms of forced labour on convicts was justified by an argument from Roman law which gave the state the power to use the authority over the life and death over an individual to institute a regime of slavery.[90] However, the practice of the Bordeaux parlement can not be fully explained by this logic as, during the years studied, there is also a high rate of commuting galley sentences into alternative forms of punishment such as banishment or whipping.[91]

This feature is not explained fully either by a consideration of the crimes and legislation involved. In Bordeaux, the galley sentence for life (67% of all galley sentences) was pronounced for a wide variety of crimes including incest, the theft of two horses in the case of Jean Jouat (a case calling for the death penalty in legislation), night theft (for "le nommé le Basque" in absentia and Jean Lachair), poisoning and various cases of parricide and homicide. Term sentences to the galleys were reserved largely for crimes of theft.

The whip was the major form of corporal, non-capital, punishment. In law it was prescribed for such crimes as night theft (a 1624 declaration), and simple theft on a first offence (declaration of 1724). In practice, for cases of theft, it was often accompanied with a branding (until 1724 a sign of the fleur de lys) and

usually a term of banishment. In administering the sentence of the whip, it was the custom to prescribe that a certain number of lashes be given in various public spaces of the town (the most common being the place du palais, the place St. Projet, the grande marché, in front of city hall and the porte des Salinières by the river) and sometimes in front of the very site where the crime had been committed. In the case of Pierre Touquet, an apprentice druggist, convicted for theft on January 14, 1716, twelve lashes were to be administered in front of the house of Sauguiner and Quessac, merchants of the Chartrons quarter against whom the theft was committed, with the remaining twelve in the place du Palais. He was also banished for life from the outskirts and city of Bordeaux. Pierre Duprat was to be given his full 24 lashes in front of the cabaret Darblet of the parish of St. Jean de Marssac where he stole a horse.[92] Again, Philippe Galoupeau, a sailor, was convicted on April 16, 1720 of stealing grain and given 18 lashes, six to be given in front of the parlement, six at city hall and six on the banks of the Gironde in front of the Manufacture where the crime had been committed. These cases illustrate the point that the punishment was not just conceived as a public and exemplary act, but one whose very nature would be seen as a natural and appropriate response to the crime in question. Part of the parlementary doctrine of proportionality in sentencing, therefore, implied attention to the circumstances of the crime not just to judge its gravity, but also to help determine the very modes of punishment.

As table 8 shows, sentences of corporal punishment account for 13.4% of the final judgements of the Bordeaux parlement.[93] Continuing a tradition of judgement in the Bordeaux parlement dating back to the sixteenth century, whipping was the privileged public response to crimes of both simple and aggravated theft in the jurisdiction accounting for just under 75% of corporal sentences in the years 1715-24 (49 of 66 corporal sentences for which the crime is identified).[94]

However, there were also ten sentences of whipping, accompanied by terms of banishment, for crimes of homicide. Many of these involved cases of

undeclared pregnancies and the death of young babies, for which the women accused were condemned to death by the courts of the lower level. The standard response of the Bordeaux court in such cases was to commute the sentence into a whipping of 24 or 30 lashes (six lashes in four or five public squares in the city of Bordeaux) and banishment of ten years from the sénéchaussée where the crime was committed as well as from the sénéchaussée of Guyenne. This was a constant response throughout the years studied applying (for example) to Antoinette Brugé of Puy Normand in August 1716, Marie Lagrandie in April 1723 and Marie Valade in June of the same year, all of whom had been previously condemned to death. Such a trend might be considered a manifestation of clemency as the rulings of the lower courts were more in line with the prescriptions of an edict of 1556 calling for the death penalty in such cases.

Restraints on freedom including banishment, transportation, the carcan, pillory, perpetual prison and other forms of internment were pronounced more often than whipping (although they often accompanied each other) being meted out in 140 cases, or 20.6% of the 678 judgements under appeal.[95] This compares to only 9% at the lower level. By law, banishment was the prescribed punishment for theft of grain and the pillory was prescribed for the crime of polygamy and certain forms of blasphemy.[96] In practice, in Bordeaux, of 102 identifiable cases, roughly one quarter of punishments involving restraints on freedom were pronounced for crimes of homicide, and two thirds for crimes of theft. The use of the carcan was rare being invoked only three times, once on its own for a case of theft and twice with terms of banishment for theft and for blasphemy.[97]

The more frequent invocation of punishments restraining freedom at the appeal level can be explained in part with the recognition that there are 21 cases where a first judgement of death is noted as being commuted into this form, with ten of these involving banishment or internment for life. As we have seen, some of these can be accounted for by the cases of infanticide. In addition, a sentence to service on the galleys at the lower levels was often commuted into banishment for a term equal or lesser than the prescribed term of service.

V. Conclusion.

Recent scholarship has noted that it is not the distinction between accusatorial and inquisitorial methods of criminal prosecution that determines within a judicial framework the relative protection for an accused; rather, the important factors in regulating facility of conviction are the rules of evidence and proof. This offers a challenge to any student of the parlements of pre-revolutionary France as the legal records of the higher courts of this time do not explicitly reveal the primary basis of conviction (the result of legally recognised parlementary privilege). Nonetheless, this silence can in part be overcome in that different logics of conviction will lead to different patterns of judgement which themselves can be verified.

In recent commentary, two competing renditions of the theoretical frameworks informing parlementary criminal judgements have been offered. First is that of Langbein who argues that new modes of deciding criminal responsibility based on the admission of circumstantial evidence allowed for new patterns of more moderate sentencing.[98] While Langbein does not explicitly refer to any split between lower and higher court trends of judgement in his work, his thesis of the decreased recourse to capital punishment and torture in the courts prior to movements of penal reform (and the abolition of the question préparatoire in 1780) with the rise of conviction on circumstantial evidence is easily assimilated to general recognition of the seeming greater modesty of punishments in the higher courts. In addition, the (few) empirical studies referred to in his work are drawn from studies of the jurisprudence of the parlements.

An alternate understanding has been offered by Mer. In his understanding, the principles informing the sentencing practices of the higher criminal courts remained the detailed and strict rules of legal doctrine which had informed legal practice in France since the Renaissance.[99] He extrapolates from his study of the trends of decision in the parlement of Britanny of the eighteenth century to argue that the continued use by all parlementary magistrates of a strict set of legal proofs

led them to dismiss or alter many of the lower court judgements. In addition, he argues that the theory of legal proofs offered a more effective protection of the rights of the accused than the system of judgement on the basis of a judge's intuition which was the accepted practice in England of the same period.

In terms of the patterns of judgement for the final court of appeal, Langbein's argument would translate into higher rates of conviction vis-à-vis the lower court along with less frequent recourse to torture and forms of the death penalty and greater use of alternative punishments, such as the galley ships and transportation. Mer's argument would, in contrast, translate into a high rate of the actual reversal of lower court judgements, absolving those who had been convicted originally solely on forms of presumptive evidence. We have seen that while a certain number of the judgements of the lower courts were overturned and dismissed outright from the court, by far the most common pattern was to accept the judgement of conviction, but to modify, and in most cases moderate the punishment as prescribed by the lower courts.

These features raise important questions for the validity of the theses of both Mer and Langbein. According to Mer's argument, continued and reliable application of the traditional theory of legal proofs would leave no room for a general moderation of punishments, but would result in a larger number of cases being thrown out of court for lack of complete proof and strict adherence to forms of punishment as prescribed in the the legislative texts in cases where guilt could be determined. As we have seen, while there was a fairly high incidence of cases rejected, there was also little inclination to follow closely the patterns of sentencing as they were sometimes prescribed by law. His thesis does little to help us understand the major trends in judgement of the Tournelle of Bordeaux.

Langbein's argument provides grounds for explaining greater use of alternative modes of sentencing to that of the death penalty, as a means to convict on less than full legal proof. One particular case provides added support for his thesis. In February 1716 the case of a man accused of theft whose identity was unknown as he refused to speak (un muet volontaire) was brought before la

Tournelle on appeal from the seigneurial court of Tonners of Agenais region which had sentenced him to death. The parlement upheld his conviction, but commuted his sentence to a whipping of 24 lashes and banishment for life from the jurisdiction of the court, with a 20 livres fine. The sentence shows that the higher court was willing to convict an accused in the final instance, about whom little was known, on less than a confession, without ruling for torture, but with a mitigated sentence.

However, Langbein's position cannot account for the large number galley and afflictive sentences which themselves were commuted on appeal. In other words, Langbein's thesis can apply only to those infringements originally designated as capital crimes and for which, for lack of complete legal proof, the death penalty could not legally be applied. He can not explain why even for some lesser crimes the higher court consistently played a moderating influence on the types of sentences being passed by the lower courts.[100]

It may be that the patterns of judgement in the Bordeaux court can not be explained by one overriding principle, but rather by a multiplicity of considerations pertaining to various features of the jurisdiction and evolving methods of proof. We have seen that in particular types of crime, such as that of infanticide by women, the moderation of the court is highly marked and consistent. It is possible that in such instances the crime could be considered to be less a threat to public security than other forms of homicide, thereby justifying a more mitigated response. In addition, certain forms of aggravated theft, mostly domestic theft and sacrilege, led the court to be severe in its judgements invoking the death penalty in several cases. Here, it could be a consideration of the nature of the association involved in both domestic service and religious worship, which made such violations of trust so heinous to the magistrates.

While the introduction of conviction on forms of circumstantial evidence helps to explain the decline in the use of torture and certain decline in recourse to the death penalty, it cannot on its own account for this differential treatment by crime. In so far as it also was harnessed to a doctrine of equity in judgement

which could and did either moderate or aggravate sentences according to their perceived offence beyond the letter of the law, a more clear understanding of some of the specific judgements is possible. However, equity was perceived to work on a case by case basis and therefore would not be helpful in explaining clear patterns by types of crime. Established patterns of decision for certain classes of crime irrespective of legislative pronouncements is of a slightly different dynamic than that which would emerge from considerations of equity alone.

Nonetheless, features of Langbein's argument, beyond his explanation for the moderation of solely capital punishments, may provide a clue for an understanding of this broader phenomena. To develop Langbein's argument, it is important to re-examine the shifting set of proofs and to acknowledge the changing suppositions within them. The preamble to the 1670 ordinance recognised the greater importance of criminal legislation over other matters in that it not only served to protect the property of individuals, but also to guarantee public security by regulating through fear, the actions of those who did not feel bound by duty. This shows the double motivation behind the system of criminal justice: namely, a consequential rationality of deterrence regulating the spectacle of punishment (the fear), combined with a moral justification for the act of punishment itself (a collective response to an acknowledged repudiation of duty). As we have seen, the jurisprudence is agreed on the fact that the object of punishment was the ill will (malevolence) informing the act. As such, it harboured a particular theory of criminal agency. The type of external evidence that could reveal this moral state was necessarily restrictive for it went beyond having to prove the existence of the act by having to prove real criminal intent.[101] In this light, it is understandable why forms of circumstantial evidence could be used to justify methods to extract a confession, but not to form the basis of conviction itself.

While not remarked by Langbein, it is evident that the shift to conviction on circumstantial evidence is not a continuum but offers an alternative understanding of criminal agency. Here the circumstances are used not as opaque

signs to reveal an inner crime and a set of moral qualities or the disposition of the sometimes enigmatic figure of the will, but as factors accounting for the act as part of a chain of interlocking events. The proof of criminal behaviour thus comes to double as an explanation of the criminal motivation.[102] Circumstances become important not only for what they reveal about the nature of the crime, but also for what they more readily can be presumed to reveal about the accused themselves. Introduction of a new understanding of personal and circumstantial association thus can be seen to be an important feature of modified trends of conviction.

Nonetheless, it is not of a logic foreign to other practices of the court. As we have seen in the previous chapter, the political discourse of the parlement was shaped by close attention to the forms of association within its jurisdiction and the rules and values informing them. Given that most magistrates served only a very short term in the Tournelle, it would not be surprising that the principles of one sphere of work of the court were carried into another. It may be that this consciousness of certain classes of crime and their relative threat or harm to such values as public security within the jurisdiction independent of legislative texts was in part a complement to this wider adherence to 'associational discourse'.

This also might have an impact on conceptions of the functions of sentencing practices. With the development of a broader outlook demanding increased relevance of personal history, associations and chains of events in judging and prosecuting criminal behaviour, it is not difficult to see how the magistrate could perceive a modified view of his own role. Although the introduction of objectives of personal reform in sentencing were a product of a later century, these trends of conviction did open a space in which punishments could be considered as having a more formative influence on patterns of criminal behaviour than strict deterrence through fear and a call to duty through fear. In this perspective, the judge not only uses prudence to apply the law to particular individuals and situations as an appropriate and requisite response, but also with the consideration of motives other than fear which could lead to or aggravate

criminal behaviour. It would lead to a growing awareness of a hidden potential of penal policy in its various instruments as a more sophisticated tool of social control. What served on the one hand to defend local privileges and a tradition of certain regional autonomy, may have also contributed to differential forms of sentencing and the forging of theoretical tools for higher rates of conviction to complement the developing state tools for policing.

This chapter has explored the patterns of criminal judgement and sentencing in the chamber of la Tournelle of the parlement of Bordeaux during the years Montesquieu served as a magistrate. It has shown that the court had a distinct tradition of judgement, both in relation to the lower courts of its jurisdiction and to other parlements of the realm (based on what little published evidence there is available for comparative studies). In particular, it has shown how the Bordeaux parlement took a consistently more moderate stand on sentencing practices throughout this period. It has been argued that while the thesis of John Langbein can provide some basis for understanding this feature, it is also insufficient in failing to account for specific features of the Bordeaux pattern. On a more general level, it is clear that a purely juridical explanation of these patterns (as Langbein seeks to provide) is inadequate for it does not pay adequate attention to the attitudes and reasons for jurists accepting and applying new conceptions. It does not show us why more convictions were needed nor the new conceptions of criminal agency hidden beneath the adoption of new forms of circumstantial evidence.

This chapter has tried to make up for these inadequacies in part by arguing that the trends of criminal judgement can be read in the context of a wider ideological turn in the practice of the court, namely the acceptance of associational language and thinking. This would help to explain varying degrees of moderation in sentencing (depending on the nature of the social relation involved) as well as provide a justification for a penal practice that began to look to a variety of measures that played on popular emotions apart from fear as a more effective exercise of its stewardship role in the jurisdiction.

With this judgement, the exposition of the details of the working of the Bordeaux parlement form 1714 to 1724 is complete. The next chapters deal with how Montesquieu both reacted to and built on this tradition of argument which was the legacy of his professional legal training. Chapter four shows how Montesquieu developed a more profound reflection on this parlementary tradition through several of his early works. This provides a background to the analysis of L'Esprit des lois in chapter five. Finally, chapters six and seven examine how this parlementary experience and tradition, in conjunction with Montesquieu's own development of associational language, led him to offer an important contribution to calls for legal reform in the area of criminal justice. While it is often argued that the Enlightenment calls for the reform of criminal justice were lagging behind the real patterns in the courts, the study will show the importance of Montesquieu's contribution, not only for offering an articulation of these trends, but by providing a moral framework by which they could be justified.

Endnotes

1. For confirmation of this widely acknowledged point see for example: Shennan, The Parlement of Paris, 153; Numa Denis Fustel de Coulanges, "L'Organisation de la Justice dans l'antiquité et les temps modernes." Revue des deux mondes 95(1871), 570-601; and Lebigre, La Justice du Roi, chap. 1.

2. In 1560 before the meeting of the Estates General, chancellor Michel de l'Hospital declared: "Les rois ont été élus premièrement pour faire la justice et n'est acte tant royal faire la guerre que faire la justice...Aussi dedans le sceau de France n'est pas empreinte la figure du roi armé et à cheval comme en d'autres parties [pays] mais siégeant en son trône royal et faisant la justice...". Cited in François Olivier-Martin, Histoire du droit français des origines à la révolution (Paris: Domat Montchrestien, 1948 and 1984), 519. Also see Loyseau, Cinq Livres des offices.

While ultimate authority to resolve disputes was seen to rest with the king, it did not mean that the state had an effective monopoly over the exercise of justice, for as recognised by Berman, the Western legal system is unique for its pluralism allowing, for example, the long-term coexistence of systems of royal justice, ecclesiastical justice and municipal justice. See Harold Berman, Law and Revolution. The Formation of the Western Legal Tradition (Cambridge, Massachusetts and London, England: Harvard University Press, 1983).

3. In placing the study in the context of wider social trends and political developments, the study consciously draws on a body of literature which repudiates an earlier tendency to make general conclusions about the practice of criminal justice in pre-revolutionary France from a collection of legislative texts and notorious miscarriages or excessive and unrepresentative acts of justice. This tendency had been shared alike by both traditional liberal historians such as Adhémar Esmein (despite his tremendous contribution in the study of procedure) and modern critical historians like Foucault. See Louis-Bernard Mer, "La Procédure criminelle au XVIIIe siècle: l'enseignement des archives bretonnes." Revue historique 274(1985), 10; and Nicole Castan, Justice et répression en Languedoc à l'époque des lumières (Paris: Flammarion, 1980), chap. 1.

4. Philip Petit and John Braithwaite, Not Just Deserts. A Republican Theory of Criminal Justice (Oxford: Oxford University Press, 1990). In fact, the authors claim to have Montesquieu as an inspiration for their own theory, although they make no move to spell out their reading of Montesquieu in detail, nor do they indicate where this has ever been done.

5. M. de Salviat, La Jurisprudence du Parlement de Bordeaux (Paris: Arthus Bertrand, 1824), p. v. See also Bernard Automne and Pierre Dupin, Commentaire sur les coutumes generales de la ville de Bordeaux et pays bourdelois (Bordeaux:

Pierre-Sejoune, 1737) and Abraham Lapeyrere, Décisions sommaires du palais (Bordeaux: Jean-Baptiste Lacornée, 1749). These works, from the point of view of this particular study, also suffer from inordinate attention to the rules of civil law and great silences in the field of criminal jurisprudence.

6. By the eighteenth century, the division of spheres of justice into royal, seigneurial, ecclesiastical and municipal fields had become largely anachronistic as the realm of royal justice had managed to subsume the others through a network of appeal procedures and attribution to itself of crimes most threatening to the political order (the famous cas royaux as listed in Title I, article 11 of the 1670 ordinance). Royal justice itself was generally divided into two types: ordinary justice, comprised of the lower royal prévôtés or châtelaines (abolished 1749), the middle bailliages or sénéchaussées (the latter term used largely, but not universally in the south), the presidial courts (established 1552) to receive appeals and lighten the burden on the parlements for certain minor cases and to judge cas prévôtaux without appeal and the parlements; and extraordinary justice, including the prévôtés of the maréchaussée (in its origin a military tribunal), the king's council, and the various tribunals attached to administrative bodies such as those created by the ordinances of the latter 17th century. In addition, jurists note the continued exercise of la justice retenue, that is, the exercise of the king's prerogative to intervene directly in the judicial process through the granting of pardon, the issuing of lettres de cachet and the establishment of special commissions (such as the administrative courts of the chambres de justice).

The most notorious exception to the right of parlementary appeal throughout France were cases under the jurisdiction of the prévôt des maréchaussées, established to police the military and to round up deserters and extended to provide summary justice for vagrants and vagabonds as well as for crimes committed on public highways. On the justice of the prevotal courts see Nicole Castan, "Summary justice" In Deviants and the Abandoned in French Society, ed. Robert Forster and Orest Ranum (Baltimore: The John Hopkins University Press, 1978) and Iain Cameron, Crime and Repression in the Auvergne and the Guyenne 1720-1790 (Cambridge: Cambridge University Press, 1981). In this work, Cameron upholds the general thesis of Castan that eighteenth century justice is characterised by a basic tension between a will to greater public control and administrative incapacity to realise these pretensions. As a practical compromise, the force was selective specialising in the policing of theft offenses.

7. While the boundaries of the jurisdictions of the various courts were often disputed, I have used the work of Armand Brette as a guideline to the jurisdictions of the senéchaussée courts under the Bordeaux parlement. These are Bordeaux, Libourne, Castelmoron (all of the Guyenne region); Tartas and Dax (of the Landes); Bazas, Casteljaloux, Mont de Marsan and St. Sever (of the Bazadais); Agen, Nerac, Condom (of the Agenais); Saintes, Pons, Cognac, Saint-Jean d'Angely and Rochefort (in Saintonge); Taillebourg, Perigueux, Bergerac, Brive

and Martel (in Périgord); Limoges, Uzerche, Tulle and St. Yrieux (in the region of Limousin); Sarlat (in Quercy); and Bayonne and Ustaritz (in the pays basque). See Armand Brette, Atlas des bailliages ou juridictions assimilées ayant formé unité électorale en 1789, dressé d'après les Actes de la convocation conservés aux Archives nationales (Paris: Imprimerie nationale, 1904). See also Alexandre Nicolai, Histoire de l'organisation judiciaire à Bordeaux et en Guyenne et du barreau de Bordeaux du XIIIe au XIXe siècle (Bordeaux: G. Gounouilhon, 1892), 48. For an overview of the rather complex judicial organisation of pre-revolutionary France see Esmein, Cours élémentaire d'histoire du droit français and Julius Ruff, Crime, Justice and Public Order in Old Regime France (London: Croom Helm, 1984).

8. Please note that due to rounding off, percentages may not always add up to precisely 100%.

9. The possibility of appealing interlocutory judgements, such as orders for arrest, and decrees for the application of extraordinary procedure, was an important feature of French criminal procedure and distinguished it from Roman law which only allowed for appeals of definitive judgements. While in theory it offered more potential for the defence of the accused, in practice it served generally only to lengthen proceedings and to increase legal costs.

10. Article 6 of Title 26 of the 1670 criminal ordinance reads: "Si la sentence rendue par le juge des lieux porte condamnation de peine corporelle, de galères, de bannissement à perpétuité, ou d'amende honorable, soit qu'il y en ait appel ou non, l'accusé et son procès seront envoyés ensemble, et sûrement en nos cours." Article 7 of Title 19 rules that all sentences for the application of torture are also to be appealed automatically to the highest court. While these prescriptions were introduced for the first time in law in 1670, the practice of ready appeal in these cases dates back earlier. See Claude Joseph Prévost and Jean Meslé, De la Manière de poursuivre les crimes dans les differens tribunaux du royaume avec les loix criminelles depuis 1256 jusqu'à présent (Paris: Mouchet, 1739), chap. 25, al. 6.

11. Shennan, The Parlement of Paris, 40-41. See also Guyot, Répertoire universel et raisonné de jurisprudence civile, criminelle, canonique et bénéficiale (Paris: Visse, 1784-85), vol. 17, article "Tournelle criminelle". The Tournelle of Bordeaux was created four years later.

12. The two councillors from the Enquêtes were to be replaced every three months, the eight councillors from the Grand'Chambre were to remain for six months, and the presidents one year. Shennan, The Parlement of Paris, 41.

13. A.D.G., fonds du parlement, I B 23, fol, 107, le 29 février, 1634.

14. While an edict of September 1690 had ruled that only four presidents and sixteen councillors were to serve on the Tournelle (eight from the Grand'Chambre and four from each of the Enquêtes), the problems resulting from the extra burdens placed upon certain councillors due to illness or other legitimate causes for absence, as well as voting restrictions on some for reasons of kinship, led the parlement to establish the practice of appointing twenty councillors, a policy which was finally confirmed by a royal edict of October 1732.

15. It was article 143 of the Blois Ordinance (1507) which first ruled that the distribution of responsibilities for reports on criminal trials was the job of the highest presiding officer of the chamber where the trial was to be judged.

16. The most busy year was 1723 with 129 appeals and requisitions, followed by 1719 (125), 1716 (114) and 1721 (113). The least busy years were 1717 (96) and 1722 (94).

17. The Registre des arrets rendus par Raport a la chambre de la Tournelle commanceé en janvier 1710 et finy le mois de decembre 1762, A. D. G., fonds du parlement de Bordeaux, served as a general index to all the cases decided in the Tournelle over the years considered (given that the actual rulings are mixed in with other rulings of the Grand'Chambre and placed in chronological order). In this manuscript, most cases on appeal are identified by the name of the reporting judge and the names of the parties involved (despite the fact that the public prosecutor was involved in every criminal case, he is listed as a party here only when no civil party was involved). Given the absence of the names of the presiding judges in this official register, it is not clear how much of an honour this task was perceived to be. This may soften Dalat's assertion that Montesquieu's incapacity to preside, given his young age, was a source of great professional frustration. (In Montesquieu magistrat, 117-18)

18. The most active councillors were, in descending order: Vincens (45 cases), de Pichon (40 cases), Sallegourde (40 cases), Constantin (34 cases), Dussaut (35 cases), Baritault (32 cases), Marbotin (30 cases), Mathieu (25 cases) and Combabessouse (25 cases). While twenty-four councillors were never noted as being assigned a case to report, thirty-five other councillors were responsible for less than ten cases.

19. Dalat, Montesquieu magistrat.

20. For example, for those cases for which the relevant information could be found, councillor Borie was reporting judge for thirteen cases of theft, three homicide, one excessive violence and one fraud, while councillor Dussaut was reporting judge for twelve homicide cases and no cases of theft. There is no indication of any trend of regional specialisation within the jurisdiction among the magistrates.

21. See Grenaud, Montesquieu, 53; and Cadilhon, Montesquieu parlementaire, académicien, grand propriétaire bordelais.

22. According to Tarneau, the author of a written tract on the basic practices of the court, the Tournelle held audiences twice a week, Tuesday afternoon and Saturday morning.Jean Tarneau, Stile et usage observé au parlement de Bordeaux touchant l'exercice de la justice (Bordeaux: De la Court, s.d.), 75. However, a study of the pattern of judgements pronounced over the period studied shows no consistent timetable other than the lack of judgements on Sundays. In addition, it has been recognised that the daily business of the court was often interrupted by special summons to assemble all the chambers to discuss legislation for registration or other matters relating to the dignity, honour and responsibilities of the institution as a whole. In Doyle, The Parlement of Bordeaux and the End of the Old Regime, 37-38. Nonetheless, it was the rule, as articulated in the 1670 ordinance, that all sentences involving afflictive punishments were to be pronounced in the morning.

23. See for example Guyot, Répertoire universel et raisonné de jurisprudence civile, criminelle, canonique et bénéficiale, vol. 5, art. "crime" and Claude Fleury, Institution au droit français, ed. Edouard Laboulaye (Paris: Auguste Durand, 1858, manuscrit de c. 1665), 442.

24. In this, French practice differed significantly from the tenets of Roman law which associated different procedures and possible punishments for public and private crimes. André Langui, Histoire du droit pénal (Paris: Presses Universitaires de France, 1985), chap. 3.

25. This argument is presented most recently in Steven G. Reinhardt, Justice in the Sarladais 1770-1790 (Baton Rouge and London: Louisiana State University Press, 1991). There is also the more general point to be made in opposition to such a thesis that the functioning of the market does not dictate, but presupposes a formal legal structure. See also Bruce Lenman and Geoffrey Parker, "The State, the Community and the Criminal Law in Early Modern Europe." In Crime and the Law: the Social History of Crime in Western Europe since 1500, eds. V.A.C. Gatrell et al. (London: Europa Publications, 1980), 11-48; and Nicole Castan, Justice et répression en Languedoc à l'époque des Lumières.

26. Nicolai lists seven separate bodies of customary law recognised officially by the court, namely: the customs of Bordeaux; Saint-Jean-d'Angely; the region of Labour; the regions of Marsan, Tursan and Gabardan; the city of Dax; and the city and jurisdiction of Bayonne. He also recognises those of Agen and Limoges though they were not normally held to be authoritative. See Histoire de l'organisation judiciaire à Bordeaux et en Guyenne et du barreau de Bordeaux du XIIIe au XIXe siècle, 49.

27. Langui, Histoire de droit pénal, 65-66. See also Jean-Marie Carbasse, Introduction historique au droit pénal (Paris: Presses Universitaires de France, 1990), 178.

28. Another version of the argument holds that the state and popular justice systems were opposed in principle and drew on different sources, the popular from ancient Germanic traditions which were restitutive and state justice from Roman law which was essentially punitive in its aims. See Lenman and Parker, "The State, the Community and the Criminal Law in Early Modern Europe." This explanation builds on a already existing line of scholarship which posits a great divide between early-modern popular culture and the systems of control imposed on these indigenous traditions in the process of state-building. See for example, Yves-Marie Bercé, History of Peasant Revolts, (Ithaca: Cornell University Press, 1990); Robert Muchembled, Culture populaire et culture des élites dans la France moderne (XVe-XVIIIe siècles); and Castan, Justice et répression en Languedoc à l'époque des Lumières. While suffering at times from a lack of adequate critical perspective on the possible pitfalls and injustices of popular systems of control, this position also neglects the ways in which the state system in seeking to assign a new set of criminal priorities, formalising procedures and monopolising the act of punishment also in part drew on popular emotions to implement them.

29. On the reorganised maréchaussée as the precursor to a national police force see Iain Cameron's Crime and Repression in the Auvergne and the Guyenne 1720-1790.

30. Noted in the Registres secrets for June 8, 1721.

31. For a general inventory of possible crimes see for example Fleury, Institution au droit français, 4e partie; Carbasse, Introduction historique au droit pénal, 251ff.; and Guyot, Répertoire de jurisprudence, vol. 5, article "crime", vol. 10, "lèse-majesté", and the entries for various categories of crime.

32. Daniel Jousse, Nouveau commentaire sur l'ordonnance criminelle (Paris: Debure, 1763), xxv. Guyot also states: "le dol en matière criminelle est l'effet de la mauvaise intention qu'a celui qui commet un crime ou un délit. La punition du crime ou du délit est la punition même du dol." In Répertoire universel et raisonné de jurisprudence civile, criminelle, canonique et bénéficiale, vol. 6, art. "dol".

33. Institution au droit français, vol. 1, 457.

34. Guyot, Répertoire universel et raisonné de jurisprudence civile, criminelle, canonique et bénéficiale, vol. 7, art. "équité".

35. John Langbein in Prosecuting Crime in the Renaissance (Cambridge, Massachusetts: Harvard University Press, 1974) notes the terse and specialised tone of the text of the 1539 ordinance, compared with the German Carolina laws of roughly the same period. He argues that the French ordinance was written not to introduce a new standard of prosecution (as it was in Germany) but only to address certain abuses in a basic set of practices which were long established and which had engendered a strong degree of official specialisation and legal sophistication.

36. The general steps of extraordinary procedure, invoked for most criminal trials in the first instance are as follows:

1)the inquest (information préparatoire)- This would be initiated by denunciation or formal complaint by private or public parties. At this stage, witness and expert testimony was recorded to verify the reality of the crime. It was on the basis of the conclusions of this preliminary investigation that orders for the detention or arrest of suspected guilty parties were pronounced.

2)the interrogation of the accused- This would be conducted by the judge alone with the accused who had no rights of counsel and generally no knowledge of the content of the formal charge. If the case required it, the judge would then move for formal declaration of extraordinary procedure, calling for the verification of witness accounts and the possibility of torture for the accused.

3)formal verification of witness testimony and confrontation with the accused (le récollement et la confrontation)- Each witness would be requested to confirm his or her testimony before the judge and then confronted with the accused who was able to raise objections to the witness' credibility and testimony. Only now would the accused be made aware of the formal charges.

4)torture (la question)- This would be applied only if the presumptive evidence was damaging and if the crime itself merited a form of capital punishment (death, galleys for life, or banishment for life).

5)the final visit- Here the conclusions of the public prosecutor would be studied, along with the records of the previous stages of the trial, to arrive at a final judgement.

For further discussion of these procedures see, for example, Carbasse, Introduction historique au droit pénal, Jousse, Nouveau Commentaire sur l'ordonnance criminelle, and Esmein, A History of Continental Criminal Procedure with Special Reference to France (New York: Augustus M. Kelley, 1968).

37. Article 1 of Title XXV of the 1670 ordinance reads: "Enjoignons à tous juges, même à nos cours, de travailler à l'expédition des affaires criminelles, par préférence à toutes autres." In addition, article 21 of the same Title reads: "Les jugements seront exécutés le même jour qu'ils auront été prononcés." However, it is doubtful that most courts were able to meet such strict rules, especially in the case of executing sentences given the uncertainty that the funds necessary to do so would be forwarded by the parties involved in the prosecution.

A justification for this policy is offered in a letter from the Regent to the parlement of Bordeaux regarding a criminal matter, which states: "Il est du bien public de proceder avec celerité dans ces sortes de rencontres afin que la punition des coupables fasse encore plus d'effet sur l'esprit des peuples, ce qui arrive toujours quand elle suit la crime..." (Registres secrets, 23 juillet, 1716).

38. "Les Accart par la sentence du lieutenant criminel avoient esté condamnée à mort par contumace, la partie instigante fit porter la procedure dans la chambre de la Tournelle et demanda conformement à l'usage l'Execution figurative de cette condamnation, il ny a dans les affaires de cette matiere ny delay à essuyer n'y procedure à Instruire n'y distribution à faire, une seule requeste suffit pour nantir un rapporteur et s'il ne se trouve aucune nullité d'ordonnance dans l'Instruction criminelle ces sortes de condamnation sont toujours confirmés et l'on en ordonne l'execution figurative..." In Registres secrets, le 9 aoust, 1715. This distinction of procedure explains the differing rates of the confirmation of lower court sentences between cases of accused in absentia (or contumacy) and as prisoners or under subpoena.

39. For Jousse, the formalities involved in criminal prosecution in France, though largely in secret, played the same function as the public witnessing of trials during the Roman republic. See, Nouveau commentaire sur l'ordonnance criminelle, vii.

40. John Langbein, Torture and the Law of Proof (Chicago and London: University of Chicago Press, 1976), chap. 1.

41. The beginnings of an appeal system is often attributed to the reforms of Louis IX, borrowing from the example of imperial Rome. At this time in the thirteenth century, it served a triple function: one of surveillance over the practices of the lowest jurisdictions, one of confirmation to help to generate certainty in the legal proofs, and one of consolidation to bolster sovereign authority through a descending theory of justice. While the possibility for appeal was a significant feature distinguishing official forms of justice from various forms of popular justice which were practised throughout the early-modern period, it was not without its ambiguities. At one level, it is certain that in the case of a false application of the law or judicial fraud, the possibility of appeal served to protect the integrity of the system. However, it also served as a recognition that the system of rational proofs was not sufficient in itself to generate the certainty sought.

From the sixteenth century, the possibilities for appeal stretched beyond definitive judgements (as the sole class of judgements in Roman law subject to appeal), to a wide range of interlocutory and preliminary rulings. On the process of appeal generally see André Langui and Arlette Lebigre, Histoire du droit pénal. II. La Procédure criminelle (Paris: Cujas, 1979), 106-08 and Esmein, A History of Continental Criminal Procedure with Special Reference to France, 161. As we have seen, in criminal matters, the formalities necessary for obtaining an appeal

were waived in the case of sentences for afflictive punishment. See Ordonnance criminelle, août 1670, Titre XIX, article 7 and Titre XXVI, articles 1 and 6, In Receuil, ed. Isambert et al., vol. 18, no. 622.

42. While in the late middle ages, the use of torture was barely regulated, by 1670 it was ordered that it could only be applied in cases where there was considerable proof against the accused in a capital crime, but not enough for a full conviction. In addition, all sentences calling for torture had to be confirmed by the parlements. Ordonnance criminelle 1670, Titre XIX, In Recueil ed. Isambert et al., vol. 18, n. 623.

43. See for example Cameron, Crime and Repression in the Auvergne and the Guyenne 1720-1790.

44. Georges Boyer, "La notion d'équité et son rôle dans la jurisprudence des Parlements," In Mélanges d'histoire du droit occidental (Paris: Sirey, 1962), vol. 1, 210-35. Also see Guyot, Répertoire universel et raisonné de jurisprudence civile, criminellec canonique et bénéficiale, vol. 7, art. "équité".

45. For a discussion of equity in British law see William Geldart, Elements of English Law, 7th ed. (Oxford: Oxford University Press, 1966), chap. 2.

46. Boyer, "La notion d'équité et son rôle dnas la jurisprudence des Parlements," 211-12.

47. See Carbasse, Introduction historique au droit pénal, 177, and Jousse, Nouveau commentaire sur l'ordonnance criminelle, p. xxxvii and Guyot, Répertoire de jurisprudence, vol. 7, article "équité".

It also served, in certain circumstances, to mitigate the stark division between public vengeance and private reparation and to satisfy popular demands for justice in cases when other legal rules would lead to impunity. Boyer cites the example of bourgeois and nobles who would be granted letters of pardon for crimes of murder, and for which the parlements, held to accept these letters unless they were granted on fraudulent grounds, would compensate with the imposition of large fines as civil damages which would often serve to ruin the pardoned party. See Boyer, "La notion d'équité et son rôle dans la jurisprudence des Parlements", 233-34.

48. See for example Castan, Justice et répression en Languedoc à l'époque des lumières and Reinhardt, Justice in the Sarladais 1770-1790.

49. The crimes listed in this table are taken from Guyot's Répertoire universel et raisonné de jurisprudence civile, criminelle, canonique et bénéficiale.

50. See for example Fleury, Institution au droit français, 442ff.

51. In December of 1718, the procurator general reported that at Reaux in Saintonge, Pascaut and Renaudet, dit Bellebrine, identified as religionnaires or Protestants, had fired shots during a procession of the holy sacrament wounding several. Irregularities in procedure at the sénéchaussée of Saintes regarding this affair led the procurator to request that a parlementary commissioner be sent to the region to try the case himself, a request which was granted by the court.

52. In 1716 this important case of illicit assembly came before the Grand'Chambre. The court sent a special commissioner to investigate the case. After various struggles of legal competence with both the local lieutenant criminel and the intendant of the Guyenne, M. de Courson, the Regent supported the parlement's claim to have sole authority to rule in the matter. Of the more than 21 persons initially charged, Jean Martin, a beer-maker convicted of organising a meeting of Protestants on June 22, and Jean Miller, a merchant convicted of being a reader at several meetings, were sentenced to offer public amends in front of the St. André cathedral in Bordeaux and to serve on the galleys for life. For having welcomed a reader to his home, Jean Bergues, a sergeant, was sentenced to the carcan and banishment for life from the jurisdiction of the court. Marie Fabre, in whose home a service had been held on June 25, 1716, was to be shaved and interned for life in the hôpital de la Manufacture of Bordeaux. In addition, her house in the town of Quittemon was to be demolished with no possibility of rebuilding on the site except by royal permission. The punishments were selective, but exemplary, and were a reminder of the harsh treatment the parlement had meted out to local Protestants from the time of the Reformation. Details of the case were gathered from entries in the Registres secrets for the months of June to August 1716, as well as from the various court rulings of the same year.

53. See Yves-Marie Bercé, History of Peasant Revolts, and especially pp. 40-41 on the use of bells in popular revolts.

A case involving both illicit assembly and forms of blasphemy was also brought before the court in January 1724. It involved unidentified masked men of Limoges who met at night, one disguised as a hermit distributing rosaries in a spirit of religious mockery.

54. Apart from unqualified homicide (113 cases), these also included forms of aggravated homicide such as parricide (12 cases), the homicide of a child or cessation of pregnancy (27 cases) poisoning (1 case) and suicide (3 cases).

55. If the accused was found guilty, the Bordeaux court ruled for the traditional form of punishment such as that suffered by the corpse of Marie Dupon which on April 20, 1720 was ordered to be dragged on a hurdle on the streets of Macau (where the alleged crime was committed). Her memory was suppressed in perpetuity.

This was one form of aggravated homicide which also included parricide, infanticide and the intent to poison. This last was governed by the 1682 edict

following the Affaire des poisons. The suspicions such events raised are illustrated by the case of Jean Courselle, a soldier of the guard of the maréchal of Montreuil, who was charged with various crimes of theft, violence and extortion in June of 1717. On his arrest, the procurator-general made a general request to the court that various powders found in his possession be examined to ascertain their possible uses.

56. Those identified just as theft offenses account for 109 motions (22%), and forms of aggravated theft include night theft (13 cases), theft by a domestic (13 cases), theft of public goods (15 cases), theft on public roads (2 cases) and theft and murder (2 cases).

57. In the latter cases, a prompt marriage ceremony in the chapel of the Palais de l'Ombrière would serve to absolve the accused of the charges and save the honour of the women concerned.

58. The requisition of the procurator-general regarding this community is dated June 12, 1719.

59. The breakdown by year of homicide and theft cases is as follows:

Date (of judgement before appeal)	Number of identified homicides	Number of identified thefts
1716	18	17
1717	15	9
1718	9	9
1719	21	9
1720	11	10
1721	8	15
1722	8	4
1723	13	9
Total	103	82

60. See endnote seven for a breakdown of the court jurisdiction by region.

61. The numbers are as follows: Guyenne- 23 homicides reported accounting for 19% of reported crime in the region (and 25% of all homicides); Landes- 5 homicides accounting for 28% of regional crime; Bazadais- 9 homicides accounting for 36% of regional crime; Saintonge- 12 homicides accounting for

40% of regional crime: Périgord- 16 homicides accounting for 47% of regional crime (and 17% of all homicides); Limousin- 9 homicides accounting for 50% of regional crime; Agenais- 13 homicides accounting for 34% of regional crime.

62. Apart from the sénéchaussée of Sarlat, the sole lower court in the region of Quercy under the jurisdiction of the Bordeaux parlement, where theft was involved in three of a total of five cases emanating from the court over the years studied, the region of the Guyenne reports the highest incidence with fifty cases, or 42% of all regional crime, and 54% of all cases of theft (and 16% of all reported crimes). The incidence is also relatively high in the Agenais, a second more densely populated region, with thirteen cases or 34% of all regional crime. In contrast, appealed cases involving theft account for only two of thirty-four cases sent to Bordeaux from the Périgord (6%).

63. The general categories of crime used here and carried over in much of the following analysis is as follows: forms of lese-majesty (including blasphemy, rebellion, illicit assembly, counterfeiting, escape from prison or the galleys, the breaking of a sentence of banishment), homicide (including suicide, homicide of a child, homicide of a relation other than a child, premeditated murder, poisoning), general violence (including rape, seduction, arson, injury), theft (including sacrilege, theft on public roads, night theft, breaking and entering, domestic theft, theft of public goods, theft with violence), fraud (including name change, false witness, calumny, corruption of judicial officials, misuse of public funds), and crimes against public morality (including adultery, polygamy, and incest).

Nonetheless, some of these forms have been collapsed together or classified as 'other' if not relevant to the analysis or if the numbers do not allow for any more significant breakdown of the figures than as presented.

64. In this calculation, I have left out those cases where the accused is identified as a group of individuals.

65. Guyot, Répertoire de jurisprudence, article "homicide d'enfant". Montesquieu refers to this law in XXVI, iii: "La loi de Henri II, qui condamne à mort une fille dont l'enfant a péri, au cas qu'elle n'ait point déclaré au magistrat sa grossesse, n'est pas moins contraire à la défense naturelle. Il suffisait de l'obliger d'en instruire une de ses plus proches parents, qui veillât à la conservation de l'enfant.

Quel autre aveu pourrait-elle faire dans ce supplice de la pudeur naturelle? L'éducation a augmenté en elle l'idée de la conservation de cette pudeur; et à peine, dans ces moments, est-il resté en elle une idée de la perte de la vie.".

66. However, this judgement also must be qualified with the recognition that the status of the accused in such offenses will be more readily identified in these cases in the judicial records.

67. This requisition of the procurator-general is dated August 13, 1717.

68. On the benefit of clergy in England see Blackstone, Commentaries on the Laws of England, 17th edition (London: Thomas Tegg, 1839), Book IV, chap. 28. Of course, by this time in the eighteenth century in England, the initial spirit of this legal device to protect clergy had been significantly transformed. The prescription that the cleric was immune to punishment was in practice extended to all those who could read (or memorise a standard Biblical passage). By the early eighteenth century the reading requirement was dropped and it was held that all those convicted on a first offence could serve terms lesser than those assigned in law.

69. Doctrine divided punishments into four major categories. Capital punishments, depriving the convicted criminal of life or liberty included the death penalty, life service on the galley ships, perpetual banishment from the kingdom or perpetual prison. All these sentences also implied civil death, involving a confiscation of property and general contractual incapacity. Next followed afflictive punishments including a term sentence on the galleys, the whip, branding and the carcan and pillory. The third category involved punishments which brought dishonour (peines infamantes) including the offering of a public apology, banishment for a term, blame and a fine in criminal matters. Finally, certain punishments were deemed to be neither afflictive nor ignominious, including simple admonitions, and fines for charitable causes. See Guyot, Répertoire de jurisprudence, vol. 13, article "peine". Not all jurists agreed on the distribution in exact terms. For Jousse, the carcan was not an afflictive punishment but only an ignominious one. See Nouveau commentaire sur l'ordonnance criminelle, xxxv.

70. See Title XXV, article 13 of the 1670 ordinance.

71. In addition to 51 for crimes of homicide, 24 were declared for theft, six for other forms of violence and eight for crimes against public morality.

72. Again, half of these involved crimes of homicide (17 cases), three for various forms of lese-majesty and four for theft.

73. This sentence was general accompanied by the practice of branding the convicted thief with a fleur de lys (changed in 1724 to the letter V).

74. Forms of pecuniary punishment at the lower level were more rarely specified in the higher court records (57 cases) and gave rise to no clear pattern.

75. The admonition to the lower courts for issuing unmotivated judgements takes the form of a chastisement for their use of the phrase "pour les cas resultants du proces", a phrase reserved for the judgements of the higher courts. The Bordeaux ruling referred to was issued on September 7, 1720.

76. See for example M. de Salviat, La Jurisprudence du parlement de Bordeaux, vol. 2, article "juges des seigneurs". As Mackrell notes, such criticisms would tend to draw on the earlier criticisms of Dumoulin and Loyseau. However, Mackrell also recognises that such criticisms were becoming increasingly rare among French jurists as the century progressed. See his "Criticism of seigniorial justice in eighteen-century France." In French Government and Society 1500-1850, ed. J.F. Bosher (London: The Athlone Press, 1973), 123-44.

77. This requisition is dated July 29, 1723.

78. From a requisition dated January 7, 1724.

79. Demands for figurative execution in cases of trials in absentia numbered at 61. However, as the demands for figurative execution were generally ratified without a judicial report or the stage of la visite (if captured, the accused would be given another trial anyway), it would not necessarily serve to measure the degree of confidence the Bordeaux court had in the judgements of the lower jurisdictions.

80. This number involves both the judgement of "procédure cassée" and "hors de cour", the latter not being a full absolution for the accused.

81. For these figures we include the motions for figurative execution and letters of remission, not only for more accurate comparison with figures of the lower court (in some cases the absence of the accused only became a factor on appeal due to an escape), but also for more accurate comparison with studies of the trends of judgement of other sovereign courts which do not make the distinction between these various types of motion.

82. Aline Logette, "La Peine capitale devant la cour souveraine de Lorraine et Barrois à la fin du règne de Louis XIV." XVIIe siècle 126(1980), 7-19. Thus, in this jurisdiction of eastern France in the years 1708-10, 72 capital convictions at the lower level compared with 70 pronounced on appeal. Of the initial 72, 14 were mitigated (largely as sentences for perpetual banishment) while 12 accused judged with non-capital convictions at the lower level were given more severe sentences on appeal and condemned to death.

This has also been remarked as the general trend in appeals from the Châtelet to the parlement of Paris in the latter eighteenth century. See Gérard Aubry, La Jurisprudence criminelle du Châtelet de Paris sous le règne de Louis XVI (Paris: Librairie générale de droit et de jurisprudence, 1971), 35.

For another point of comparison, capital punishment (as hanging, decapitation and the wheel) was ruled in 6.6% of all criminal sentences in French Canada from 1712-48 (of 38 of 569 sentences). This is recorded in André Lachance, La Justice criminelle du roi au Canada au XVIIIe siècle (Québec: Presses de l'Université Laval, 1978), 130.

83. The highest incidence by far is found in 1723 with 14 death sentences, followed by 10 in 1719. The same trend towards a slight increase is found at the lower court level, however, here death sentences averaged over 11 per year with the highest figure in 1721 (19 convictions) followed by 1717 and 1719 (both with 15).

84. The figure of 60 is offered by John McManners in his Death and the Enlightenment, 370. Unfortunately, he does not cite his source which would need to be qualified given that most studies recognise the decline in rates of capital punishment by the end of the century. With this in mind, it is probable to assume that during the years studied this number was in fact higher. Dominique Muller, in "Magistrats français et peine de mort au 18e siècle," Dix-huitième siècle 4(1972), 79-107, presents the percentage of 5.8% for the years 1710-12, 5% for 1735-37, 8.7% for 1760-62 and 4% for 1785-89.

85. The edict regulating the punishment of sacrilege calling for the death penalty dates from 1682. It was modified in 1724 calling for the punishment of service on the galleys for men and enclosure in a work house for women. The other statutes alluded to include: the Blois ordinance (article 112) regulating the punishment for rape, a 1534 edict pronouncing the death penalty for theft on public roads, declarations of 1532, 1558 and 1724 regarding domestic theft, and a 1531 ordinance and 1680 edict regulating punishments for crimes of fraud.

86. Three of these judgements involved crimes of homicide and the fourth, theft.

87. Bernard Schnapper, "La Répression pénale au XVIe siècle- l'exemple du Parlement de Bordeaux (1510-1565)," In Voies nouvelles en histoire du droit (Paris: Presses universitaires de France, 1991), 76. It can also be compared to the figure of 11 for the roughly 6,000 accusations (.2%) coming before the parlement of Britanny from 1750 to 1780.

88. By far, the most comprehensive study of the galleys in France is André Zysberg's Les Galériens. See also his "Galley Rowers in the Mid-Eighteenth Century," In Deviants and the Abandoned in French Society, ed. Robert Forster and Orest Ranum (Baltimore: The John Hopkins University Press, 1978). The date of its adoption as a punishment in Bordeaux is offered by Bernard Schnapper in "La Répression pénale au XVIe siècle- l'exemple du Parlement de Bordeaux (1510-1565)," 84.

89. Of these 11%, or 73 cases, 47 (more than half) were life sentences, 11 for six to 10 years, and 14 for one to five year.

90. The explicit parallel between the Roman use of the punishment of work in the mines and the galleys is drawn by Claude Joseph de Ferrière in his Dictionnaire de droit et de pratique (Paris: Bauche, 1771), article "esclaves de peine". It was

a long tradition in theory and practice and can be seen as an important precedent for Beccaria's arguments voiced with much acclaim in 1764. See Cesare Beccaria, On Crimes and Punishments (Indianopolis: Bobbs-Merrill, 1963).

91. While the galley sentence was pronounced in 51 cases at the lower level, these were confirmed in only 19 cases on appeal, and even among these, four were given lesser terms.

92. The sentence was pronounced on May 10, 1723. He was also banished for ten years from the sénéchaussées of Guyenne and Tartas and ordered to pay a 20 livres fine, as well as costs.

93. Of these 13.4% or 91, 33 involve the whip and branding, 53 whipping alone and the rest various afflictions accompanying capital punishment.

94. Schnapper, "La Répression pénale au XVIe siècle- l'exemple du Parlement de Bordeaux (1510-1565)," 102.

95. Of these, 41 involve banishment for life and 90 for a term, sometimes from the jurisdiction as a whole and other times from only parts of the jurisdiction.

96. This latter offence is regulated by the ordinances of 1510, 1651 and 1666.

97. In addition, Martin Girouin, convicted of blasphemy on April 15, 1723 was ordered to pay 50 livres to the king, 30 livres to the church, and was required to offer a public excuse while carrying a tablet which identified him as "blasphemateur execrable du Saint nom de Dieu et impie". He was to remain in the carcan in the public square in front of the parlement from eight in the morning to one in the afternoon, after which he was to be banished for five years. Furthermore, it was ordered that the ruling be read publicly three consecutive Sundays at the end of mass and at the sound of a trumpet and posted in front of the church of St. Martin de la Coudre.

98. Langbein, Torture and the Law of Proof.

99. Mer, "La Procédure criminelle au XVIIIe siècle: l'enseignement des archives bretonnes."

100. Another explanation for a general trend of moderated sentencing in eighteenth century England has been offered by Douglas Hay. In a highly influential article he argued that the exercise of clemency by the higher courts in conjunction with legislative severity in England served as an added instrument of elite hegemony given greater threats to property in the early-modern period. He argued that the exercise of moderation in sentencing would help instill a sense of gratitude in the condemned and poorer classes generally and thereby in the end help to consolidate elite authority.

Apart from debates as to the appropriateness of this account for eighteenth century England, as a principle for explaining trends in Bordeaux, it suffers from having little grounds to account for varying patterns of moderation according to varying types of crime with little relation to property ownership, that is the extent to which a crime could be considered to be class-related.

See Douglas Hay, "Property, Authority and the Criminal Law," In Albion's Fatal Tree, eds. Douglas Hay et al. (London: Allen Lane, 1975).

101. On the concept of dol in pre-revolutionary jurisprudence, see André Langui, La Responsabilité pénale dans l'ancien droit (XVIe- XVIIIe siècle) (Paris: Librairie générale de droit et de jurisprudence, 1970), 27-46.

102. In this configuration, both guilt and victimisation become more common currency, as well as two sides of the same phenomenon.

CHAPTER FOUR
TOWARDS A SYNTHESIS.

We have seen in the previous chapters that legal science as it was understood in France of the early eighteenth century as well as the principles which informed the exercise of judicial and policing powers of the parlement of Bordeaux, both raised particular sets of questions, and fostered certain sensitivities around which these might be resolved. They also (and more fundamentally) appear as strategies around the same need for a reliable criterion of legal judgement. As shown in chapter one, the traditional reflex of learned jurisprudence in France was to seek a resolution of legal problems in the universal precepts of Roman civil law. The challenge of a changing political reality, in the form of growing national consolidation alongside a tradition of regional diversity, where both levels harboured their own particular and unique legal needs, was met in part by traditional legal theorists by grafting those novel prescriptions of national and local laws and customs onto a form borrowed from the canonical texts of Roman law. It served on the one hand to bolster the legitimacy of those prescriptions, however, it also deferred the underlying tension of how a legal code deemed to be reason itself could be allied with the political consciousness of a particular national project amidst a diversity of states. While perhaps suitable for a form of universal monarchy, the pretensions embedded in traditional Roman law reasoning were fundamentally at odds with a new state system premised on a balance of power, however much this was accommodated in practice.

In contrast, the practice of the parlement of Bordeaux in the early eighteenth century was characterised in its major political pronouncements by an alternate strategy. While seeking both to protect their traditional jurisdictional prerogative and manage popular feeling, the magistrates were developing a new approach to the problem of legal judgement by exploring the qualities indigenous to the jurisdiction and its varying forms of association as a means to guide the dispositions and application of law. However, the court's pronouncements provide

no clear guideline for a consistent application of this general intuition. In particular, the approach raises the question of what forms of association are to be recognised, as well as the priorities guiding adjudication among them in cases of conflict. In addition, while it may have served at times as an effective instrument or strategy of political persuasion vis-à-vis the central government, it harboured no developed moral argument by which it could be justified. As such, then, the position could be readily assimilable to other subtle and manipulative forms of power politics emerging on the European political arena, forms which, as Montesquieu himself recognised, were replacing direct recourse to military force.[1]

In the face of this relative hiatus between an academic tradition whose authority was largely unquestioned despite its rather difficult theoretical accommodation with political realities, and an alternative tradition of local political argument which lacked substantive moral grounding, Montesquieu embarked on a series of projects in his early years as a theorist to work out his own solution to the question of the moral basis of legal and political judgement. In this chapter we examine three of Montesquieu's early attempts to provide such a grounding. His 1717 essay Eloge de la sincérité looks to friendship and the cultivation of private virtues as a model and prerequisite for good political conduct. Alternately, the notes of the aborted work Traité des devoirs show Montesquieu working through the legacy of traditional humanism and the modern natural law tradition, only to demonstrate the latter's inadequacy as a comprehensive model of political reasoning. Thirdly, his 1734 work Considérations sur les causes de la grandeur des Romains et de leur décadence was written to explore the possibilities of politics in both the ancient and modern era. Through these various projects and encounters, Montesquieu can be seen to forge his own particular path, one which will abandon the search for universal prescriptions and models, while still recognising that politics has limited capacities to promote and achieve desirable collective ends. As such, then, the study of these early attempts provides an important background for an understanding of his formulations in L'Esprit des lois.

I. Eloge de la sincérité.

In his 1717 essay Eloge de la sincérité, Montesquieu, in opposition to an introspective Stoicism, recognises the importance of social interaction as an instrument of moral education.[2] He begins the essay by arguing that the Stoic precept of the central importance of self-knowledge was rarely practised effectively because the school mistakenly believed that such knowledge could be generated exclusively from self-analysis.

> ...ils voulaient qu'on s'examinât sans cesse, comme si on pouvait se connaître en s'examinant.[3]

The major obstacle to self-knowledge through introspection, for Montesquieu, is self-love, making humans unreliable judges of themselves. Instead, he looks to social interaction as a means to self-knowledge and moral development. The dynamic works in three ways, cemented by the virtue and duty to be sincere. Social life regulates and guides others by providing visible standards of right conduct, as well as offering the external spectacle of those qualities and faults which are hidden to oneself from within. In addition, fellowship and exchanges in sincere confidence in friendship provide a natural means of moral education. Once one becomes aware of one's faults through the example and confidence of others, one will be led to the good, in Montesquieu's eyes, both by a wish to avoid self-contradiction by bringing one's conduct more in line with the dictates of a good conscience, as well as through a wish to avoid social scorn once one's faults have become apparent to all. His vision is based on a conception of human nature which is fundamentally equivocal, plagued by extreme forms of self-love which cloud moral judgement, but open to forms of moral development in association with others. Sincerity provides the key, both in relation to ourselves in applying the lessons learned by examining the conduct of others, and in our relations with others, in particular with those whom we call friends.

This quick sketch of a model of an informal yet socially grounded path to moral development leads Montesquieu, in the second half of his essay, to use it

as a standard from which to deprecate the practice of what he calls "false politeness" which, he argues, governed in large part the social and political practices of his day. These considerations in turn lead to a recognition of the inadequacies of this first formulation.

He refers to his time as one of corruption where the practice of virtue also requires great individual strength and courage. The major vice of his time is seen to be the pervasiveness of an ethic of servitude and complacency which frowns upon the individual exercise of moral judgement and dissolves truth in the apparent sweetness of flattery. Its social type is the courtesan. In such a climate, the voice of sincerity is proscribed, even within the institution of friendship itself. Friendships come to be regarded as means to bolster self-love through constant exchanges of false praise, rather than as occasions for personal growth. They become simply a charade guided by the sole end of self-satisfaction.

> En effet, ôter la sincérité de l'amitié, c'est en faire une vertu de théâtre; c'est défigurer cette reine des coeurs; c'est rendre chimérique l'union des âmes; c'est mettre l'artifice dans ce qu'il y a de plus saint, et la gêne dans ce qu'il y a de plus libre.[4]

It is the lack of sincerity in personal relations which in turn for Montesquieu breeds a form of political complacency. He notes that a prince among flatterers is as poorly served as if he was among his enemies.

Thus, the cultivation of private virtue through association, guided by the rule of sincerity, serves as both a general method of public education and a means to promote those practices which are essential in the organisation and conduct of politics. However, by grounding these political virtues of sincerity in private forms of association as he does in this essay, Montesquieu ends in an impasse. In fact, he is suggesting that those forms of private association which are to provide a grounding for the cultivation of all forms of virtue themselves can be corrupted by the political structures they are meant to serve. In the end, not only does this theory of an essentially private grounding for legal and political judgement lack a satisfactory explanation of the dynamic of the corruption of

social mores, its neglect of the political factors which shape social practices also makes it incapable of finding a way out of the dilemma.

II. Traité des devoirs.

Roughly eight years later, on the first of May 1725, Montesquieu read notes from a work in progress to an annual public session of the Académie of Bordeaux. The work, to be called the Traité des devoirs, was to be a development of the classical reflection of Cicero and of the modern scholarship of Pufendorf on the theme of duty. While the text of this reading has been lost, notes and thoughts to be integrated into this work can be found in his Pensées. In addition, an outline of the projected plan as outlined in Montesquieu's lecture can be found in a subsequent analysis which was published the next year in the Histoire littéraire de la France.[5] In examining these various sources, it is important not only to specify Montesquieu's arguments in relation to his predecessors and literary models on the same theme, it is also necessary to ask why the treatise was abandoned and whether there was a factor internal to the work itself which may have motivated this choice.

While Montesquieu himself acknowledged his debt to Cicero's work De officiis, he most certainly found added inspiration in the work of Pufendorf, Les Devoirs de l'homme et du citoyen, as suggested by Shackleton.[6] As a means to situate better Montesquieu in relation to these canonical texts of traditional Ciceronian humanism and modern natural law, a comparison of their main arguments follows here. This will not only serve as a background for an understanding of Montesquieu's early aborted text, it also will contribute to a better adjudication of the arguments put forward in the first book of L'Esprit des lois (some of which were directly transposed from this earlier project), as well as indirectly contributing to the more general discussion of the reception (or non-reception) of modern natural law theory in eighteenth century France.

While Cicero and Pufendorf are writing ostensibly within the same genre,

traced back at least to the unfinished treatise of the Stoic Panaetius On Duties, the structure and guiding presuppositions of the works differ.[7] Three points of comparison- the founding principles of human duties, their structure and content, and finally, the relation between the performance of duty and the state- will reveal the major differences between the two and will provide a map on which to help situate Montesquieu's enterprise.

Both Cicero and Pufendorf seek to ground their conception of duty in natural principles of association to avoid the positing of an essentially artificial understanding of justice, as argued, respectively, by Epicureans and Hobbists. In doing so, they both have recourse to the principle of sociality (socialitas), understood differently. For Cicero, sociality is grounded in human nature and is allied with uniquely moral reasons for human association, that is, a need to develop our faculties of interpretation and reason which will naturally dispose humans to justice. He argues that the basis of community cannot be the fulfilment of material requirements, firstly, because these are needs which we share with animals and which therefore cannot serve as a distinguishing feature of human nature; and secondly, because experience itself reveals our moral need for community independent of material benefits. He contends that if (by a not so short leap of the imagination) we were able to satisfy our material requirements while remaining isolated in our homes for purposes of reflection, ultimately we would not choose to live indefinitely in this manner through both loneliness and recognition of a need to develop our rational faculties in conversation.[8] For Cicero, then, the moral reasons for human association are independent and sufficient. It is because we are social beings by our very nature, and we understand ourselves as such, that we come to recognise the centrality of the virtues in human fellowship. The moral force of the virtues derives directly from their role to protect and sustain the social end which is dictated by our natural dispositions. Thus, for Cicero, we are inclined to justice by our nature because we are social beings, and it is beneficial to us to act according to these inclinations.

Pufendorf, in contrast, writes in the wake of concerted opposition to the traditional Aristotelian and Thomistic conception of nature as purposeful.[9] He adopts, therefore, an initial Epicurean inspired conception of the foundation of human association. He argues that humans distinguish themselves from animals mainly in their weakness by not being able alone to fulfil their material needs necessary for self-preservation.[10] The material motivations for association, however, give rise to a corresponding collective understanding of a need for cooperation for the purposes of preservation. Sociality, as a common understanding, is thus grounded in utility arising from a series of individual calculations of interest, but serves subsequently to modify the initial forms of utility calculation, by a sense of long-term interest.[11] The fundamental precept of natural law is that each must work to promote and sustain the good of human society in general, with the subsequent maxims flowing from this general rule.[12] However, the obligation to obey this law does not flow from the authority of nature, but from the status of this law as a divine command.[13] Thus, Pufendorf modifies the initial Ciceronian portrait by arguing that we naturally seek our benefit, and this is to be found by understanding ourselves as sociable beings from which we will be led to act justly, reinforced by the recognition of divine command.

Cicero's distinguishes the virtues of honestum (wisdom, justice, fortitude and temperance) by the quality of action they govern, although he recognises the supremacy of justice as a guiding principle in preserving the priority of fellowship.[14] In grounding this conception of justice in an understanding of ourselves as naturally social beings Cicero argues that it not only involves the duty to avoid inflicting injury, but also the duty to deflect injury and actively promote fellowship.

> There are also some who, whether through devotion to preserving their personal wealth or through some kind of dislike of mankind, claim to be attending to their own business, and appear to do no one any injustice. But though they are free from one type of

> injustice, they run into another: such men abandon the fellowship of life, because they contribute to it nothing of their devotion, nothing of their effort, nothing of their means.[15]

As Atkins argues, this notion of injustice of omission (more recently revived by Judith Shklar), illustrates Cicero's sense of the priority of society; however, contrary to Atkins, it does not illustrate that justice is necessarily instrumental.[16] It is precisely because the development of virtue is only possible in community and conversation that the lone individual with the just soul cannot for long remain just. The pursuit of justice even where one is not directly concerned is motivated by a need to sustain the general conditions in which justice can flourish, and is thus also for the sake of justice itself.

Because Pufendorf grounds the principle of sociality in an initial consideration of utility (and thereafter transformed), he can avoid from the start the Ciceronian discussion of the compatibility of the honourable and the beneficial, which serves to structure On Duties. Pufendorf distinguishes duties by their object, namely those due to God, those due to oneself and those due to others.[17] It is the latter which derive directly from the principle of sociality. His list of the latter in turn derive from the rules of justice as spelled out in the canonical texts of Roman law (compiled roughly five centuries after Cicero), namely, to hurt no one, to treat others as equal and to be useful to others.[18] Here, there is no rule of injustice by omission. Instead, in recognising the limits to popular feeling of social devotion, Pufendorf recognises the need for explicit conventions which regulate and provide certain security for those who engage in an exchange of services on the basis of duty.[19] However, even these formalities are not sufficient. For Pufendorf, the political context, regulated ultimately by a motive of fear, is a necessary cementing factor for social order which cannot be maintained on the basis of individual calculations alone, given the fundamental faults of human nature. Thus, the very weaknesses which for Pufendorf make life in society so necessary and desirable for all, also contribute to the very fragility of this calculation and lead him in the end to a defence of absolutism.

Cicero treats the exercise of power directly in the second book of his treatise which is devoted to a discussion of what is beneficial. He argues that the desired ends of sustained power and glory are to be furthered by means compatible with the virtue of justice, including the cultivation of love rather than fear, and the pursuit of popular goodwill, faith and admiration.[20] It is important to be both just and to have the reputation of being just.[21] Earlier in the treatise he argued that for the citizen, the republic had the highest claim to one's allegiance, given that it served as the community where justice and fulfilment might be most effectively pursued.[22] This, however, does not rule out a sense of duty to those outside the republic.[23] It shows that political allegiance, for Cicero, is essentially part of a continuum of general social loyalties. The priority of the republic is grounded only in its suitableness for the ends of association in general.

In contrast, for Pufendorf, political allegiance is of a qualitatively different status than that of other social obligations. Firstly, the political community, while emanating from the general principles of sociality which govern all forms of duty, also serves an added role to ensure the enforcement of those conventions of social life which cannot be sustained by popular goodwill alone. Thus, in an effective abandoning of the Ciceronian tradition, Pufendorf asserts that a general principle of political community must be fear:

> ...quelque grand que soit le nombre des Conféderez, si chacun suivoit son Jugement particulier dans la manière de travailler à la défense commune, on n'avanceroit rien...Une simple convention ne l'entretiendroit pas non plus long-tems. Il faut, outre cela, quelque frein puissant, capable de retenir toute sorte d'Esprits; et ce frein commun ne peut être qu'une crainte assez forte pour domter le désir que chacun des Membres pourroit avoir, d'agir, pour son intérêt particulier, d'une manière opposée au Bien Public.[24]

This understanding carries over into his conception of law as a command backed up by force, differing again from the Ciceronian conception of law as the precepts of universal reason. For Pufendorf, then, the state as the locus of sovereignty and

with a monopoly of legislative power, is given the special role both to enforce and interpret the dictates of sociality. From this flows the opposing political prescriptions found in their respective works. For Cicero, the dictates of sociality require the active participation of all in the exercise of justice and defence of the republic. However, the recognised fragility of the Ciceronian project (the treatise itself was written in a state of political crisis), combined with an abandoning of moral realism and a recognition of the diversity and potential waywardness of human life leads Pufendorf to transform the traditional humanist genre. As an ultimate irony, in this attempt ostensibly to perfect the Ciceronian enterprise, Pufendorf opts for the very political solution Cicero's work was principally designed to oppose.

Montesquieu borrows elements from both these approaches, however, the end result is something quite unique. The first chapter of Traité des devoirs was to be devoted to duties in general. Here he recognises that while God is the general object of our duties, our duties to God are of a distinct nature from those to other human beings in that the latter are reciprocal.[25] From this assertion, he is able to argue that our duties to other human beings are of two sorts, each with their own grounding principle and with sources and forms of obligation independent of, though not severed from, God. Thus, like other modern natural law theorists, he builds his theory of duty on a broad theocentric framework, while seeking nonetheless to discern the means by which his principles could be binding independently given a recognised diversity of beliefs universally.

The division of duties (alongside those due to God) into self-regarding and other-regarding would seem on the surface to follow that of Pufendorf structured by the object of duty. However, in the course of Montesquieu's notes it becomes clear that the major point of distinction between the two is substantively distinct from that of Pufendorf. Duties which are fundamentally other-regarding are regarded as guided by the principle of justice and justice itself is seen as being grounded on the existence and sociality of reasonable beings (distinct from their particular dispositions or individual wills). As a reply to Hobbism, he argues for

the desirability of a belief in an innate attachment to justice in human nature, while shying away from a direct proof that such teleological suppositions are true.[26] While his sympathies may lie with the classical accounts, his modern intuitions prevent him from espousing a traditional teleological framework (in contrast to his contemporaries Shaftesbury and Leibniz). Instead, he embarks on a reconsideration of the dynamics of the state of nature, and in particular of the psychology of original human association. Not only, as had been argued before, would the first families live in peace; even in the case of two humans meeting for the first time, preliminary sentiments of fear would not lead to combat.[27] The novelty of Montesquieu's argument here is to stress the importance of the intersubjective dimension of this first form of association. An initial fear (and by this he adopts a Hobbesian starting point), when recognised by both parties as a mutually shared fear would in fact bring the two together. The motivation to live in association would be reinforced by the desire to escape the loneliness and unhappiness of a fully independent existence, rather than an immediate wish to better satisfy basic material needs. For Montesquieu, then, the principle of justice which structures this first form of human association is not to be conceived as flowing from an innate disposition for a natural love of humanity. It is not so much the pleasure of being with others as the wish to escape one's own misery that leads these first humans to establish society.[28] Thus, first forms of human contact in a context where needs are relatively few, have their particular intersubjective dynamic which lead all to recognise their mutual vulnerability and dictate a form of initial peaceful coexistence.

Thus, Montesquieu shares Pufendorf's intuition to ground natural sociality on principles distinct from classical teleology, but he shows that utility calculations based on material needs are not fully adequate for this task. In fact, the Hobbesian calculation of utility (which served as a basis for Pufendorf's argument, only to be extended to police all forms of anti-social behaviour) is recognised by Montesquieu to be a later development. This form of reasoning is itself dependent on a context of peace and relative abundance and as such presupposes the very

social institutions it is trying to explain.[29] However, while this new argument focusing on human intersubjectivity may assure Montesquieu that society was originally founded in a spirit of justice, he also concedes that forms of enmity and injustice are in no way foreign to its development.

While in the extant notes Montesquieu does not discuss in detail the specific duties which flow from this principle of justice based on sociality, he implies that they entail a general devotion to the community in which one is living and an obligation to perform those acts which will contribute to the common good. It is on this basis that he embarks on a celebration of the social precepts of Stoic ethics (and by implication, those of the Middle Stoa).[30] He recognises the importance of reason in leading us to recognise our duties, and in contrast to modern natural law theory, he distinguishes this use from that which is restricted to finding the best means of self-preservation.[31] In fact, he argues that reason is a defective instrument for ensuring self-preservation showing both that animals who lack reason are better at preserving themselves and that our reason gives rise to destructive passions which act counter to our interests of self-preservation.[32] These arguments ultimately attack the basic axiom on which most modern natural law reasoning of his day was based, namely that the primary function of reason was as a form of calculation in the service of self-preservation. Nonetheless, the recognition that reason is often a fallible instrument for this task was not foreign to natural law reasoning. It was precisely because of this that Pufendorf saw the need for a sovereign who would enforce through fear those obligations which would not be honoured on the basis of reasoning alone.

The fallibility of reason also led Montesquieu to seek another means to ensure that one's duties would not be neglected. However, instead of a motivation through fear by a sovereign, in this work Montesquieu looks to the power of habit and convention.[33] While the exercise of reason may allow one to discover the maxims of justice, he argues that it is only by acting justly that one can become truly just.[34] In fact, habit is so formative in our moral development that it is only through a habit of justice that our thoughts themselves can be consistently

just. This coincides with his earlier assertion that with the establishment of political society, convention itself became as strong as ("aussi fort que") natural law.[35] Through this compact devotion to one's country and laws became as important as devotion to one's family.

> ...il a fallu aimer sa patrie comme on aimait sa famille, il a fallu chérir les lois comme on chérissait la volonté de ses pères.[36]

The spirit of the citizen is characterised by a wish to see order in the state and to take pleasure in public tranquillity through a scrupulous administration of justice, the protection of the magistrates, the respect of law as well as the promotion of the general stability of the regime, whether a monarchy or republic.[37] Montesquieu's vision of citizenship, while ostensibly open to both monarchical and republican forms of government, more clearly ressembles the relative passivity of a Pufendorfian subject than the active, engaging public citizen envisioned in the message of Cicero. However, Montesquieu's vision is not fully void of certain participatory implications. It is possible through a broadening of the conception of government.

> L'esprit du citoyen est d'exercer avec zèle, avec plaisir, avec satisfaction, cette espèce de magistrature qui, dans le corps politique, est confiée à chacun: car il n'y a personne qui ne participe au gouvernement, soit dans son emploi, soit dans sa famille, soit dans l'administration de ses biens.[38]

For Montesquieu, then, it is in one's local associations and through the exercise of one's private magistracy in business, employment and family that the active features of public virtue can be pursued. Nonetheless, because justice itself is still a general relation ("un rapport général"), particular and local duties are recognised as being of no authority when they are seen to conflict with the duties of humanity.[39]

However, the importance of convention in affirming and enforcing natural principles of justice also leads to the possibility of their distortion. For this reason, Montesquieu embarks in a new direction for traditional discussions of the

theme of duty by coming to grips with the reality of injustice and a consideration of the dynamic of the violation of these duties.[40] In particular, he examines the conduct of the Spanish in America, comparing their exploits with other examples of conquest in history. The conduct of the Greek warriors in the Persian war was defensible in Montesquieu's eyes because they were driven by devotion for their homeland and were defending it against those who wished to overrun it. The Spanish conquistadores, while also driven by a certain sense of patriotism, combined it with an extreme avarice and used it to justify a massive attack on essentially peaceful nations which posed no threat to Spain. Montesquieu expresses his particular dismay of how theological arguments were consistently invoked to legitimise such cruelty. It is significant to note that in this identification of the violation of the duties of humankind, Montesquieu (mirroring Pufendorf), does not allude to any possibility of injustice by omission on the part of those Spanish citizens or other nations who offered no vocal criticism of the policy of slaughter.

From this comparison of the Greek warriors and Spanish conquistadores, Montesquieu is led to recognise that love of the homeland, while ostensibly derived from natural principles of justice, is in practice ambiguous and can lead to the most glorious of actions as well as to the greatest of crimes.[41] The key consideration is that this virtue must never be used to override obligations to humankind in general. He goes on to lament that such virtue is largely absent from the avaricious and ambitious motivations of citizens of his own era.[42]

From this discussion of other-regarding duties based on sociality and natural justice, Montesquieu then examines his second category of duties. They are essentially self-regarding and are seen to be motivated by the principle of decorum or propriety (bienséance).[43] Their object is to render society more agreeable (as opposed to just). They are self-referential in the sense that we are brought to perform these duties by the consideration that we will treat others as we ourselves wish to be treated. However, they also serve to soften the dictates of the maxims of an exact justice and lead us to develop our particular affections,

sensitivities and make us willing to be of service to others and perform special favours.

With this characterisation Montesquieu again distinguished himself from both Pufendorf and Cicero, for while Cicero (like Montesquieu and in contrast to Pufendorf) saw the category of the beneficial having grounds independent from that of strict justice, he argued in the end for their unmitigated compatibility. The benefits alluded to by Montesquieu are no longer the Roman ends of power, honour and individual glory, but rather the more mundane ends of a pleasant, agreeable existence characterised by an individual exchange of services and the pleasures of friendship and familiarity. Even so, Montesquieu recognises that for these modified ends, the formal rules of justice are still partly compromised. He notes, from within the Stoic tradition, that the purely virtuous person would be self-sufficient needing no special personal ties.[44] Nonetheless, he rejects this vision as highly unrealistic. In fact, he recognises that the isolating effects of modern political structures only serve to foster a narrow sense of self-interest, one which it is necessary to resist by an active cultivation of friendships and personal associations. Thus, while these duties may compromise the vision of absolute justice, given modern conditions, they provide the occasion for a more limited exercise. In addition, they allow one to develop the skills necessary for putting an inclination to virtue into practice, for as Montesquieu recognises, the most virtuous individual, if of an essentially austere and misanthropic nature, will be effectively incapable of exercising it.

The model for these duties cannot be of an equal exchange of services, for no one would perform them if they were always contingent on a prior service. Instead, their performance is seen as beneficial in that they modify the quality of the social climate by contributing to a softening of morals and enhancing general feelings of self-esteem. By grounding the exercise of virtue in a broader and deeper understanding of the links between humanity's social nature and justice, Montesquieu can also be more favourable to the formalities of civility and politeness than he was in his earlier essay on sincerity.[45] For now Montesquieu

can recognise that it is not so much on particular social practices that virtue depends, as on an understanding of the general rules or maxims which flow from the recognition of ourselves as social beings (despite no innate disposition to love society for its own sake). What becomes crucial for Montesquieu, then, in this light, is not to institute a particular form of social or political practice, but to convey to all a sense of those deeper understandings which now provide the key for virtuous action in society. It is significant that the only overt criticism of Cicero that Montesquieu offers in this work (after a youthful essay in which he proclaimed Cicero to be his primary role model, an essay which he in general still valued in his later years), is of Cicero's praise of the active political life over the intellectual one.[46] Montesquieu defends the utility of learning and suggests that it is the pursuit of knowledge which is the only factor responsible for modern Europe's escape from a state of barbarism.[47]

However, the treatise in the end was aborted and it is important to ask why. Certainly the treatise as it stands in its draft notes and second-hand summary is rather piece-meal and its argumentation does not in general stand up to the rigour of his predecessor Pufendorf. However, we have also seen that despite this, Montesquieu was offering certain new insights into the standard treatment of the state of nature in modern natural law theory. Montesquieu also thought highly enough of various sections of this work that he integrated them into L'Esprit des lois.

It can be argued that one reason for the abandoning of the work lay in Montesquieu's attempts in the last chapters (thirteen and fourteen) to provide an argument against la politique, or reason of state thinking. A close examination of the drafts of these chapters shows that in them he is close to betraying all that went before. As such, it shows not only that the work, if continued, would be fraught with an internal tension, more importantly, it attests to a shift in Montesquieu's own thinking which led him to recognise the need for a different approach to the issues with which he was grappling.

At the beginning of his notes for these chapters Montesquieu suggests three

possible strategies of argumentation against proponents of la politique. The first is to show how it contravenes general maxims of morality, reason and justice. Given the nature of the treatise up to this point, one would be expecting Montesquieu to embark on this course to provide a radical moral critique of such forms of political behaviour. However, he quickly moves to dismiss this approach which he argues would be of no practical effect.

> ...la politique subsistera toujours pendant qu'il y aura des passions indépendantes du joug des lois.[48]

Instead, he opts for two different forms of argumentation: to show its limited utility (in terms of the ends prescribed by the proponents of la politique themselves), and to show that those who have acquired a certain reputation by these means, have in the end abused the nation as a whole.

The limited utility of la politique is supported by a recognition of the essential unpredictability of events which make any attempts at manipulation often susceptible to unintended and even contradictory consequences. He cites as an example the English Reformation which beyond all expectations served in the end to weaken the monarchy and not to strengthen it. His second point is that political predictions themselves change the unfolding of events. "...toute révolution prévue n'arrivera jamais."[49]

His second strategy of argument against la politique involves firstly a critique of contemporary judgements of certain key historical political figures. He shows that those commonly regarded as the most successful politicians of their day (namely Louis XI, Sforca, Sixte-Quint and Philip the Second), in fact met with great failures and misfortunes.[50] He asserts that those rulers who are considered as politiques in fact do not have an adequate understanding of human beings, for they believe that all humans reason like themselves.[51] They are unwilling to recognise that in fact most humans act by capriciousness or passion or even for the sake of acting itself. He points out that while these rulers may try to do all things possible to win renown for themselves, this is ultimately short-lived because they are too concerned with the show of political means, rather than the true glory

of brilliant ends, ends which are advanced rather in more subtle ways ("par des routes obscures").[52]

The major point of his second line of argument, however, focuses on the rather limited importance of political strategies. It may seen at first paradoxical that Montesquieu uses such an argument, for an acceptance of its truth might lead one to be indifferent to the forms of strategy, rather than singling one out as a particular intellectual adversary. However, on closer study the argument in no way denies the importance of politics itself; rather it rejects a certain vision of politics as controlled exclusively by the actions and decisions of individual rulers. Here Montesquieu offers his first formulation of the theory of l'esprit général. After making the rather extraordinary claim that the Regency period of France would have ended as happily no matter who was in power and no matter what decisions were made, he embarks on a more general consideration of a common character which forms in all societies. He asserts that this form of common soul is the result of a long chain of causes embedded deep in history. At a particular juncture this common character or union d'esprit becomes a strong political force itself and all political action must bear some relation to it.

> Dès que le ton est donné et reçu, c'est lui seul que gouverne, et tout ce que les souverains, les magistrats, les peuples peuvent faire ou imaginer, soit qu'ils paraissent choquer ce ton, ou le suivre, s'y rapporte toujours, et il domine jusques à la totale destruction.[53]

He then refers back to French politics in particular and argues that a general spirit of obedience or citizen acquiescence predominates in the country, a spirit which makes it less necessary (if not less important) for the political leaders to be highly competent. The argumentative structure of this point has an importance beyond the treatise itself, for it shows that Montesquieu's notion of l'esprit général was already being formed by 1725 (near the end of his career as a magistrate and prior to his travels in Europe) and that it was originally a product of his particular reflections of the dynamics of French politics.

In addition, this new line of development in his thinking harbours implications that will lead to the progressive abandoning of the natural law approach. Modern natural law theorists shared the premise that legal authority flowed ultimately from a political act of consent which transfered (conditionally or not) a right to liberty shared by all people in the original state of nature to an established sovereign. The approach thereby rested on the premise that a form of political allegiance was both prior to and served as a key factor in shaping resulting forms of legal and social authority. In contrast, through his argument in opposition to la politique, Montesquieu implies that political institutions in certain contexts can be relatively impotent and secondary because of the independent power of certain social conventions and institutions. It points towards a decoupling of political and social authority.

As suggested in chapter one, such a move is perhaps not very surprising for a pre-revolutionary French political theorist to make, given the history of national consolidation in France where, from the middle ages on, legal authority had primarily a regional grounding and was only latterly bolstered by central political institutions. The point is not that the French theorists could not identify their own political history in the accounts of the modern theorists of natural law, for the latter were clear on the point that their discussion of the origins of government was not meant as political history. However, the basic principles advanced by such an account, namely that an act of consent underpinned political authority and that it was essentially from this that all forms of legislative legitimacy flowed, would conflict with the principles revealed in the course of French history. It may be that the institutional history of France (more than its Catholicism) was its greatest barrier to an unconditional acceptance of modern natural law theory.[54]

Another implication of this last section of the work, considering Montesquieu's focus on la politique itself, is that while a theory of natural justice may give us better reasons to obey and to perform social duties, general social and political phenomena cannot be adequately understood on the basis of these

considerations alone, for they do not take into account those determinants of political action which may be indifferent to or removed from questions of virtue and vice. An understanding of ourselves as social beings is necessary for a proper sense of our duties and leads to the recognition of the importance of politics; however, a full understanding of the possibilities and limits in politics itself also requires a recognition of diverse forms of motivation and action. His earlier treatment of the violation of the duties of humankind was a first indication of this developing sensibility. Thus, Montesquieu's project, Traité des devoirs, ultimately suffered from an internal tension which became apparent in the last draft chapters of the work, a tension which may have been one reason for its eventual abandon. The tension was that between the wish to explore the independent grounds for moral judgement in politics, and the growing awareness that politics cannot be adequately understood (and hence judged) from this perspective alone.[55] This derives in part from the recognition that the practice of politics shapes the very conventions through which our understanding of ourselves as social beings with consequent duties take form (given that within the moral framework the state already serves as an object of allegiance). If, as Montesquieu argues, convention becomes as strong as natural law, then an independent understanding of this law will not be adequate to come to a full understanding of our duties. This assertion also threatens to implode the natural law approach which sought to identify those duties and rights which could be deemed to be universal, precisely to overcome a form a scepticism which had flowed from radical humanist thinking. In addition, this tension is fostered by the consideration that politics encompasses the actions and rule of those who remain unswayed by such reasoning.

In this last section of the Traité, Montesquieu slides to the position that politics is to be studied more for what it may reveal about human life than for what it can teach us about a discipline of politics, as an active strategy of governing. For if events are to be essentially unpredictable, and general social inclinations in the end subject to their own dynamic, it is futile to look to politics as an instrument of direct and specifically moral reform. Instead, one must pose

the issue in the terms, given the principles which govern the general flow of collective life in the modern world, does this, or could this, come to coincide with what on other grounds may come to be regarded as proper conditions for the development of virtue?

III. Considérations.

In 1734, after his travels around Europe, Montesquieu embarked on a study of the Roman Empire. The study of Roman history had been central in his education with the Oratorians at Juilly and it was an interest which continued into his first scholarly work with essays on his admiration for Cicero and on the Roman use of religion in consolidating political rule.[56] However, the Considérations sur les causes de la grandeur des Romains et de leur décadence was more than the development of his historical pursuits.[57] Given the difficulties he had confronted in his project to construct a theory of natural justice and social duties to be reconciled with the political practices which he observed in his own day, the Considérations was to approach the question from a different angle. From the study of a regime commonly regarded as achieving a form of political greatness, Montesquieu comes to ask what are the goods that politics can procure. It is a treatise on the qualities of grandeur itself, as well as an enquiry into the conditions which sustained and undermined it. In doing so, he explicitly rejects historical explanation based on the primacy of fortune, offering instead a theory of causes, both general and particular, which condition the contexts and occasions of historical actions.[58]

In the course of the work, therefore, he will consider what were the features of the greatness of Rome as well as both the immediate means by which this was attained and the deeper causes which shaped them. As an enquiry into the possibilities of politics, it will also lead him to the conclusion that the characteristics of Rome's greatness were linked to specific features of the ancient world, and as such, provide little insight into viable political aims and possibilities

in the modern world.

On the surface, it may seem that there is a certain ambiguity in Montesquieu's treatment of the theme of grandeur of the Roman Empire. Some passages imply that it is the achievement of empire itself as the extension of power and influence which characterised Rome's greatness. He speaks of those practices which allowed the Romans to become "les maîtres du monde" and discusses in detail their conception of the art of war and the conditions which gave them such strong and spirited soldiers.[59] In addition, he speaks of this greatness as spanning both the republican and early imperial periods, so that it was not the fall of the Republic itself or the loss of political liberty which directly constituted the downfall.

> Voici, en un mot l'histoire des Romains. Ils vainquirent tous les peuples par leurs maximes: mais, lorsqu'ils y furent parvenus, leur république ne put subsister, il fallut changer de gouvernement: et des maximes contraires aux premières, employées dans ce gouvernement nouveau, firent tomber leur grandeur.[60]

However, this passage also shows that the practices of the new imperial government were a central cause in the fall of greatness. While for Montesquieu republican liberty did not constitute Roman grandeur, it certainly helped to sustain it.

This greatness first manifested itself in the public buildings of the city and was furthered by the public display of booty brought back to Rome in raids on the surrounding tribes.[61] It thus included the progressive spread of power and influence, but also the public recognition of this power by others, and the Romans celebration of their position. In addition, it encompassed a consideration of the means by which the empire was gained. The rules of war and pillage were regulated by tight military discipline, and all citizens were to benefit in the fruits of victory. The virtues of constancy and valour were combined with love of self, love of family and love of country.[62] It thus becomes clear that Montesquieu in this work adopts a concept of greatness which is akin to common understandings

of the rules of political conduct in the classical world of the republican period (but applied to the regime as a whole); namely, the achievement of glory and extended power and influence through virtuous conduct, including keeping faith, the performance of courageous acts and an underlying concern for the common good.[63] This is further enforced by a consideration of Montesquieu's discussion of the Gauls and Carthaginians in chapter four. While the Gauls cultivated the proper disposition and virtues for the achievement of glory, they lacked the technical knowledge and skills to make them effective. In contrast, while the Carthaginians had the military skills, material wealth, limited empire and a vision of greatness, they lacked the proper virtues, including a pure sense of public service and justice in conquest. Ultimately, it was the injustice of their means which brought about their failure.[64] Greatness thus required a vision of greatness, the knowledge and skills to achieve greatness and a just and virtuous application of these means.

> Les Romains parvinrent à commander à tous les peuples, non seulement par l'art de la guerre, mais aussi par leur prudence, leur sagesse, leur constance, leur amour pour la gloire et pour la patrie. Lorsque, sous les empereurs, toutes ces vertus s'évanouirent, l'art militaire leur resta, avec lequel malgré la faiblesse et la tyrannie de leurs princes, ils conservèrent ce qu'ils avaient acquis; mais, lorsque la corruption se mit dans la milice même, ils devinrent la proie de tous les peuples.[65]

The greatness of Rome extended into the period of the imperial constitution with the continued exercise of military virtue, however, the cumulative effect of imperial corruption was to sap the roots of valour and precipitate the fall, involving a loss of influence abroad, increasingly tyrannical rule at home (first brutal, then manipulative) and progressive political quietism on the part of the citizens.

While laying out the constituent features of the greatness of Rome, which did not diverge from traditional conceptions of Roman commentators themselves, Montesquieu also embarked on a deeper reflection of both its particular and

general causes. At the outset, Montesquieu's approach distinguishes itself from that of Machiavelli who praised the great acts of great men in their contributions to the glory of Rome. For Montesquieu, while the actions of powerful personalities may be instrumental in staging the occasion for an historical turning-point, in the end, deeper structures and reasons shape the flow of events. It is this outlook which allows Montesquieu to argue that even if Ceasar and Pompey had had the virtues of Cato, the republic still would have perished, for others driven by the same strong ambitions would have attempted similar things.[66]

The more immediate, or particular, reasons for the success of the Roman paradigm included the people's flexibility or willingness to adopt better methods, a collective sense of devotion to the cause of Rome which harnessed all forms of personal ambition and private loyalties, the policy of continued conquest which distracted the people from internal divisions and brought prosperity, an imperial strategy which promoted divisions among the conquered nations, and finally, a political practice which corrected abuses. All these are particular practices which can be traced to individual and collective decisions and dispositions.

However, for Montesquieu, these in turn are seen to be shaped by deeper causes which shape the context in which decisions were made or in which those dispositions made sense. These encompass social factors, relating to the historical development and nature of the Roman people, institutional factors which shaped the configuration and effects of popular sentiments, and finally, material factors (loosely understood) including the standard and quality of life, the pattern of occupations and forms of amusement.

The flexibility and adaptability of the Romans is seen to be rooted in part in their origins as a mixture of peoples and tribes.[67] In addition, the relatively small, homogeneous and cohesive nature of the society helped to sustain a continuum of private loyalties and public devotion. This is advanced most directly by Montesquieu in his assertion that it was the size of the empire and new diversity within the city (after the extension of citizenship to the Italian allies and eventually to the Empire itself) which weakened strong common ties and the love

of the country which had sustained the greatness of Rome up to that point.[68]

Similarly, the harnessing of ambition to the service of the republic was made possible through a variety of institutions: annual elected consulships, no traffic in offices as in Carthage where avarice ruled political service, and the equal distribution of the booty of war among the soldiers (non-mercenary in the early years of the Empire) giving them a direct economic stake in the outcome of battle.[69] Political leaders also cultivated within the plebeian ranks a strong sense of freedom as a means to consolidate patrician control in the wake of the overthrow of the monarchy. This helped to sustain a popular sense of mission and devotion to the public good, although it also in the end worked against the patricians themselves as popular leaders demanded more and more influence in political decisions.[70] In addition, the republican constitution was regarded as both flexible in adapting to the new imperial stature of Rome and accomodating internal divisions, yet rigid enough to correct any abuses of power. Montesquieu, in contrast to certain republican theorists, does not see the internal divisions as the cause of Rome's decline; however, in contrast to Machiavelli, he does not see them as the major cause of Rome's freedom and greatness. Instead, he recognises the inevitability of fierce domestic conflict given the cultivation of warrior virtues among the people. The institutions are themselves to praise for providing a series of checks prohibiting the exclusive rule of one faction.

> Le gouvernement de Rome fut admirable en ce que, depuis sa naissance, sa constitution se trouva telle, soit par l'esprit du peuple, la force du sénat, ou l'autorité de certains magistrats, que tout abus du pouvoir y pût toujours être corrigé....
>
> En un mot, un gouvernement libre, c'est-à-dire toujours agité, ne saurait se maintenir, s'il n'est, par ses propres lois, capable de correction.[71]

Here it is not a consideration of the relatively equal popular strength and influence of the various factions concerned which Montesquieu praises, but the institutional structure which allowed for their expression and modification in interaction with others.

Finally, Montesquieu also discusses the material factors which contributed to the greatness of Rome. The identification of war and conquest as a means to prosperity was shaped by a context in which the manufacture of goods and the productive arts (the basis for a commercial republic) were generally frowned upon, leaving more citizens both available and disposed to war.[72] The art of farming was compatible with military virtues, while the arts of manufacturing were apt to soften manners and make citizens less eager and able soldiers. The harshness of their manners and ferocity of disposition was in turn sustained by their amusements, such as gladiatorial combat.[73] In addition, the equal distribution of land in the early years of the empire gave all citizens and soldiers a sense of an equal stake in winning their battles and nourished a sense of solidarity.

These reflections on the deeper causes which sustained the Roman vision and achievement of greatness also lead Montesquieu to the recognition that this traditional vision is no longer viable in the contemporary era. The Roman example, therefore, serves Montesquieu in discerning the possibilities and limits of politics in his own time and by doing so, illustrates the more general point that not just the means but also the ends of politics must be modified in a changed context, despite the identity of human passions and emotions everywhere.

His argument on this level is spread across several passages of the work, and there are relatively few observations. However, their number belies their importance in the context of his previous reflections on the grounds for political and legal judgement. Montesquieu remarks on changes in general social and material conditions in the modern era which would make such a republican vision unsustainable. His explanation of the loss of a strong sense of citizenship with the diversity of peoples in Rome implies that the less homogeneous societies of the modern era could not effectively maintain a warrior republic. In addition, he speaks of the softer manners of the modern world which has repudiated the general ferocity of the Roman people and adopted the virtue of humanity. The disavowal of cruelty is thus perceived as a distinguishing feature of the modern world and its politics. However, in the face of changing sensibilities, Montesquieu

also recognises continuities. In a chapter on the eastern Empire, he reflects on the development of the Church, the growing power of the clergy in politics as well as the attempts by the emperors to impose principles of religious doctrine.[74] The failure of these latter allows Montesquieu to speculate that no human authority can be fully and effectively despotic in all aspects.

> C'est une erreur de croire qu'il y ait dans le monde une autorité humaine à tous les égards despotique; il n'y en a jamais eu, et il n'y en aura jamais; le pouvoir le plus immense est toujours borné par quelque coin...Il y a dans chaque nation un esprit général, sur lequel la puissance même est fondée; quand elle choque cet esprit, elle se choque elle-même, et elle s'arrête nécessairement.[75]

Here he draws on the doctrine of the general spirit, which had been introduced in the Traité des devoirs as a means to argue against the assumptions of the proponents of la politique that there are no potential limits to the bounds of authority. However, its description in this instance goes further by suggesting that political authority itself is founded on the general spirit. In the context of this chapter, furthermore, it is used to argue against both the attempts of Roman emperors to legislate religion and the earlier attempts of the clergy to effectively usurp political rule. Thus, its main thrust here is not to shed light on the shared values and practices which are prior to the functioning of a viable political community, but to support the assertion of a transhistorical need for a separation of church and state. It stands here as a limit on the effective jurisdiction of politics, one on which, he argues, the tranquillity of nations depends. Montesquieu goes on to remark that this distinction is respected in his own time, just as it was by the Romans themselves. The notion of the general spirit thus in its origins serves as a necessary complement to the argument for a form of limited government. In addition, it is a rule which all governments must respect.

Along with these various social features, there are a set of material factors which will also shape what will be implied as the possible ends of politics in the modern era. Montesquieu remarks that the modern era has reduced the disparities

of wealth from the time of Imperial Rome and by a shared condition of a relative mediocrity of fortune each finds that their goods are more secure, particularly from usurpation by the political elite.[76] In addition, commerce makes the prospect of greatness much more fleeting given the nature of economic competition and the ease by which one trading centre can overtake another.[77] The commercial power, therefore, finds longevity not in domination, but in a more middling condition. Furthermore, the development of various new techniques and practices, such as the printing press, a postal service and improved communications, signifies, for Montesquieu, that great political and in particular military projects are much more difficult to stage in the modern era, because secrecy is no longer guaranteed.[78] These new techniques contribute to greater publicity in public matters and the speed at which information can travel. In addition, the dependency of the state on private financiers creates an additional party who in its own interests, seeks by all means to penetrate state secrets.

All these factors point to the need to abandon the Roman ideal of greatness in domination. The goods towards which politics must aim in the modern world are more limited, but perhaps in the long run more secure. In chapter four he remarks that a wise republic will aspire to the sole good of perpetuity and will not risk actions that would expose it to good or bad fortune. Perhaps this also serves here as his ultimate prescription for modern politics.

IV. Conclusion.

The three early projects of Montesquieu which have been studied in this chapter are united in their character as responses to the question of appropriate grounds for political and legal judgement. The first essay on sincerity looked to personal forms of social interaction as a means to a recognition of a political and social good. This attempt, however, was unsatisfactory as it was soon recognised that these actual relations are easily corrupted themselves by broader social practices and that some forms of association can be debilitating. The second piece

studied borrowed in part from the modern natural law tradition seeking a criterion in the reconstruction of the basic principles which structure our social ties. Here the concept of sociality, based on a consideration of the peaceful intentions and motivations for association resulting from the intersubjective dynamic of mutual fear, was used as a grounding for a theory of natural justice. However, the weakness of this approach became clear to Montesquieu as he came to recognise that it was inadequate, firstly, in denying the strong claims of convention on our practices and duties, and secondly, by providing too narrow a view of individual motivation yet too powerful a vision of politics. His third attempt then asks what goods can a proper conduct of politics bring and, most significantly, what conditions can bring this about. He reveals in his analysis of the rise and fall of Rome that classical standards of the ends of politics are not suitable in the modern era; rather, he suggests that his contemporaries would be better off adopting the lesser goals of stability, longevity and limited prosperity. While the means of politics are more public in the modern era (in that state secrets are much more difficult to keep), their orientation is private. Montesquieu in this last essay points to the consideration that modern politics is to be considered primarily in an instrumental manner, aiming to serve the needs and reflect the general values of its citizenry, rather than be guided by an independent vision of national glory and extended influence. In doing so, Montesquieu is not fully denying the import of his earlier reflections. A consideration of the possible virtues in association and the intersubjective grounding for sociality and justice enter in when it is possible to recognise politics as instrumental in establishing the conditions in which these dynamics can be more effective. Through the intellectual trajectory, then, a general principle emerges. It is the acknowledgment that politics should also serve to promote proper forms of social association, that is, forms which will independently generate moral goods and a sense of justice.

Endnotes

1. "De la Politique," In Oeuvres complètes, p. 174.

2. This essay can be found in Oeuvres complètes, ed. Daniel Oster, 43-45. According to Oster, this piece was written for an essay competition which may have been sponsored by the Académie of Bordeaux itself. However, this last supposition is doubtful as this topic is nowhere to be found in a list of essay competitions sponsored by the Académie. The topics on this list relate exclusively to questions of biology, physics and metereology. (See Académie des sciences, belles-lettres et arts de Bordeaux, Table historique et méthodique (1712-1875); Documents historiques (1711-1713); Catalogue des manuscrits de l'ancienne Académie (1712-1793), 361ff.)

3. Eloge de la sincérité, 43.

4. Eloge de la sincerité, 44.

5. The Analyse du Traité des devoirs can be found in Oeuvres complètes, ed. D. Oster, 181-82. The pensées relevant to this work (according to the Desgraves edition in which the thoughts are numbered in the order in which they are found in the manuscript) are 220-224, 1251-1261, 1263, 1265-1280. In addition to these notes, I include his essay, "De la Politique", intended as the groundwork for his final chapters (in Oeuvres complètes, ed. D. Oster, 172-75).

6. Robert Shackleton, "La Genèse de L'Esprit des lois," In Essays on Montesquieu and on the Enlightenment, eds. David Gilson and Martin Smith (Oxford: The Voltaire Foundation, 1988), 49-63 (The claim is made on pp. 57-58). This article was originally published in the Revue d'histoire littéraire de la France 52(1952), 425-38.

7. Cicero, On Duties, eds. M.T. Griffin and E.M. Atkins (Cambridge: Cambridge University Press, 1991); Samuel Pufendorf, Les Devoirs de l'homme et du citoyen, tels qu'ils lui sont prescrits par la Loi naturelle, trans. Jean Barbeyrac (Amsterdam: la Veuve de Pierre de Coupet Gerard Kuyper, 1735, 5e edition).

For my understanding of Pufendorf, I draw heavily on James Tully's "Introduction" to Pufendorf's On the Duty of Man and Citizen According to Natural Law (Cambridge: Cambridge University Press, 1991).

8. Cicero, On Duties, I, 58 and 153.

9. See Tully, "Introduction", xvi-xvii.

10. Pufendorf, Les Devoirs de l'homme et du citoyen, I, iii, al. 3.

11. "L'Homme étant donc...un Animal très affectionné à sa propre conservation, pauvre néanmoins et indigent de lui-même , hors d'état de se conserver sans le secours de ses semblables, très-capable de leur faire du bien et d'en recevoir, mais d'autre côté, malicieux, insolent, facile à irriter, promt à nuire et armé pour cet effet de forces suffisantes: il ne sauroit subsister, ni jouir des biens qui conviennent à l'état où il se trouve, s'il n'est sociable, c'est-à-dire, s'il ne veut vivre en bonne union avec ses semblables, et se conduire envers eux de telle manière, qu'il ne leur donne aucun sujet plausible de penser à lui faire du mal, mais plutôt qu'il les engage à maintenir ou à avancer même ses intérêts." Pufendorf, Les Devoirs de l'homme et du citoyen, I, iii, al. 7.

12. Ibid., I, iii, al. 9.

13. Ibid., I, iii, al. 11.

14. Cicero, On Duties, I, 155 and III, 28.

15. Ibid., I, 29.

16. E.M. Atkins, "Domina et Regina Virtutum: Justice and Societas in De Officiis," Phronesis 35(1990), 258-89; Judith Shklar, The Faces of Injustice (New Haven and London: Yale University Press, 1990).

17. Pufendorf, Les Devoirs de l'homme et du citoyen, I, iii.

18. Ibid., I, vi- viii.

19. Ibid., I, xix, al. 2.

20. Cicero, On Duties, II, 23-24, 31-37.

21. Ibid., II, 43.

22. Ibid., I, 51.

23. Ibid., III, 28.

24. Ibid., II, vi.

25. "...nos devoirs envers Dieu sont d'autant plus indispensables qu'ils ne sont pas réciproques..." This is from a quote of Montesquieu's text read to the Bordeaux Academy and cited subsequently in Analyse du Traité des devoirs, 181.

26. "...un autre...m'avertit de me défier généralement de tous les hommes, et non seulement de tous les hommes, mais aussi de tous les êtres qui sont supérieurs au mien: car il me dit que la justice n'est rien en elle-même, qu'elle n'est autre

chose que ce que les lois des empires ordonnent ou défendent. J'en suis fâché: car, étant obligé de vivre avec les hommes, j'aurais été très aise qu'il y eût dans leur coeur un principe intérieur que me rassurât contre eux, et, n'étant pas sûr qu'il n'y ait dans la nature d'autres êtres plus puissants que moi, j'aurais bien voulu qu'ils eussent eu une règle de justice qui les empêchât de me nuire." Pensées, n. 1266. It is because of this and the argument which follows that I cannot agree with Paul Dimoff in his "Cicéron, Hobbes et Montesquieu," Annales Universitatis Saraviensis 1(1952), 19-47, that Montesquieu adopted without question or modification the Ciceronian position that a love of humanity was a natural innate principle common to all. Montesquieu's portrayal of sociality is couched more in negative terms (as a wish to avoid or escape loneliness or misery) than as a positive love of society for its own sake. Shaftesbury, a contemporary more clearly associated with an unadulterated Ciceronian humanism, was described by Montesquieu in his Pensées (n. 1092) as one of four great "poets".

27. In a discussion of the first families he argues against the unlimited conception of paternal power: "Ce que l'on dit n'est pas juste, sur le pouvoir sans bornes des pères: il ne l'est pas, et il n'y en a pas de tel. Les pères ont la conservation pour objet, comme les autres puissances, et encore plus que les autres puissances.

La nature elle-même a borné la puissance paternelle en augmentant, d'un côté, la raison des enfants et, de l'autre, la faiblesse des pères; en diminuant, d'un côté les besoins des enfants, et augmentant, de l'autre, les besoins des pères.

Les familles se sont divisées; les pères étant morts ont laissé les collatéraux indépendants. Il a fallu s'unir par des conventions et faire, par le moyen des lois civiles, ce que le droit naturel avait fait d'abord." Pensées, n. 1267.

See also Pensées, n. 1266.

28. "L'ennui d'être seul et le plaisir que tout animal sent à l'approche d'un animal de même espèce, les porteraient à s'unir, et plus ils seraient misérables, plus ils y seraient déterminés." Pensées, n. 1266.

29. "Ce n'est que lorsque la Société est formée, que les particuliers, dnas l'abondance et la paix, ayant à tous les instants occasion de sentir la supériorité de leur esprit ou de leurs talents, cherchent à tourner en leur faveur les principaux avantages de cette société." Pensées, n. 1266. This argument against Hobbes' reasoning will also be taken up by Rousseau.

30. "Si je pouvais un moment...cesser de penser que je suis chrétien, je ne pourrais m'empêcher de mettre la destruction de la secte de Zénon au nombre des malheurs du genre humain; elle n'outrait que les choses dans lesquelles il n'y a que de la grandeur: le mépris des plaisirs et de la douleur." Analyse du Traité des devoirs, 182.

31. At least this is true as far as traditional accounts of modern natural law theory have gone, and in particular in the work of Richard Tuck. However, new accounts of the writings of Grotius and others will be emerging emphasising the importance of the distinction between reason (as pursuance of any means to preserve oneself) and right reason (which is not incompatible with the principle of self-preservation but which also must take into account the ongoing priority of the common good). See in particular Ravi Chimni's "Grotius, Hobbes and Pufendorf: surveying the fragments of our juridical landscape," Ph.D thesis, McGill University, 1994.

32. "Ce serait abaisser cette raison que de dire qu'elle ne nous a été donnée que pour la conservation de notre être: car les bêtes conservent le leur, tout comme nous. Souvent même, elles le conservent mieux: l'instinct, qui leur laisse toutes les passions nécessaires pour la conservation de leur vie, les privant presque toujours de celles qui pourraient la détruire. Au lieu que notre raison ne nous donne pas seulement des passions destructives, mais même nous fait faire souvent un très mauvais usage des conservatrices." Analyse du traité des devoirs, 182.

33. Chapters seven and eight of his treatise were to be called, "Habitude de justice". Pensées, n. 220.

34. "Le moyen d'acquérir la justice parfaite, c'est de s'en faire une telle habitude au'on l'observe dans les plus petites choses, et qu'on y plie jusqu'à la manière de penser..." Pensées, n. 220.

35. Pensées, n. 1267.

36. Pensées, n. 1267.

37. Pensées, n. 1269.

38. Pensées, n. 1269.

39. "...le devoir du citoyen est un crime lorsqu'il fait oublier le devoir de l'homme. L'impossibilité de ranger l'univers sous une même société a rendu les hommes étrangers à des hommes, mais cet arrangement n'a point prescrit contre les premiers devoirs, et l'homme, partout raisonnable, n'est ni Romain, ni Barbare." Analyse du Traité des devoirs, p. 182.

40. Pensées, n. 1268. According to Shackleton, this was to constitute the eleventh chapter of his treatise.

41. "Mais, s'il est vrai que l'amour de la patrie ait été, de tout temps, la source des plus grands crimes, parce que l'on a sacrifié à cette vertu particulière des vertus plus générales, il n'est pas moins vrai que, lorsqu'elle est une fois bien rectifiée, elle est capable d'honorer toute une nation." Pensées, n. 1268.

42. "C'est cette vertu qui, lorsqu'elle est moins outrée, donne aux histoires grecques et romaines cette noblesse que les nôtres n'ont pas: elle y est le ressort continuel de toutes les actions, et on sent du plaisir à la trouver partout, cette vertu chère à tous ceux qui ont un coeur.

Quand je pense à la petitesse de nos motifs, à la bassesse de nos moyens, à l'avarice avec laquelle nous recherchons de viles récompenses, à cette ambition si différente de l'amour de la gloire, on est étonné de la différence des spectacles, et il semble que, depuis que ces deux grands peuples ne sont plus, les hommes se sont raccoucis d'une coudée." Pensées, n. 1268.

43. Pensées, n. 1270.

44. "Nous ne pouvons nous attacher à tous nos concitoyens. Nous en choisissons un petit nombre, auquel nous nous bornons. Nous passons une espèce de contrat pour notre utilité commune, qui n'est qu'un retranchement de celui que nous avons passé avec la société entière, et semble même, en un certain sens, lui être préjudiciable.

En effet, un homme véritablement vertueux devrait être porté à secourir l'homme le plus inconnu comme son ami propre; il a, dans son coeur, un engagement qui n'a besoin d'être confirmé par des paroles, des serments, ni des témoignages extérieurs, et le borner à un certain nombre d'amis, c'est détourner son coeur de tous les autres hommes; c'est le séparer du tronc et l'attacher aux branches." Pensées, n. 1253.

45. In fact, he argues, in contrast to his earlier position, that the amount of polite ceremony in France had noticeably declined. He explains this development by the changing attitude of women who no longer wished to be taken in by practices which subjected them while formally catering to them. See Pensées, n. 1271.

46. In his youth Montesquieu composed a "Discours sur Cicéron" which began with the words: "Cicéron est, de tous les anciens, celui qui a eu le plus de mérite personnel, et à qui j'aimerais mieux ressembler..." In a later comment on the essay, Montesquieu remarked that it could serve as the basis of a good piece if he added more literary and historical analysis and if the panegyric tone was removed. (See Oeuvres complètes, 34-36.)

47. Pensées, n. 1263.

48. "De la Politique," In Oeuvres complètes, 172.

49. "De la Politique," 172.

50. "De la Politique," 173.

51. "De la Politique," 173.

52. "De la Politique," 175.

53. "De la Politique," 173.

54. This argument is made by both Richard Tuck in "The Modern Theory of Natural Law," and by his student Timothy Hochstrasser in "Conscience and reason: the natural law theory of Jean Barbeyrac," The Historical Journal 38(1993), 289-308.

55. Paul Dimoff hints at this when he states: "...à mesure qu'il examinait un plus grand nombre de lois politiques et civiles, qu'il les comparait avec plus d'attention, et qu'ainsi il se trouvait amené à passer du terrain des théories à celui des réalités, il constatait l'impossibilité de saisir le moindre rapport logique entre beaucoup de ces lois et les notions fondamentales du droit naturel, voire même l'opposition absolue qui existait entre les unes et les autres; il était donc contraint de reconnaître que le droit naturel était impuissant à expliquer à lui seul l'ensemble incohérent et contradictoire des législations des divers peuples..." In "Cicéron, Hobbes et Montesquieu," 43. However, for Dimoff, the tension was not seen to be internal to the treatise but one of the original design of the work and the subsequent focus of L'Esprit des lois. As such, it does not serve as an adequate explanation for why the treatise was abandoned for it begs the question of why Montesquieu switched from the terrain of "theories to that of realities", and why the intensity of his efforts to refute Hobbesian principles (as Dimoff shows) waned in his later work.

56. See "Discours sur Cicéron" and "Dissertation sur la politique des Romains dans la religion", in Oeuvres complètes, 34-36, 39-43. On Montesquieu's education at Juilly see Shackleton, Montesquieu; Iris Cox, Montesquieu and the History of French Laws (Oxford: The Voltaire Foundation, 1983); and H. Roddier, "De la Composition de L'Esprit des lois: Montesquieu et les Oratoriens de l'Académie de Juilly," Revue d'histoire littéraire de la France 52(1952), 439-50.

57. Considérations sur les causes de la grandeur des Romains et de leur décadence, In Oeuvres complètes, 435-85.

58. Chapter xviii discusses the concept of fortune: "Ce n'est pas la fortune qui domine le monde: on peut le demander aux Romains, qui eurent une suite continuelle de prospérités quand ils se gouvernèrent sur un certain plan, et une suite non interrompu de revers lorsqu'ils se conduisirent un autre. Il y a des causes générales, soit morales, soit physiques, qui agissent dans chaque monarchie, l'élèvent, la maintiennent, ou la précipitent; tous les accidents sont soumis à ces causes; et, si le hasard d'une bataille, c'est-à-dire une cause particulière, a ruiné un Etat, il y avait une cause générale qui faisait que cet Etat devait périr par une seule bataille: en un mot, l'allure principale entraîne avec elle tous les accidents

particuliers." It seems that the important point that Montesquieu is making here is not the division of causes into physical and moral (as many commentators have seen in this passage as even a foreshadowing of the plan of L'Esprit des lois) so much as the division between general and particular causes, the latter governing the immediate occasion and the former the background which shapes how this occasion will be met. In turn, it would seem, these general causes can be seen to encompass those that are rooted in particular dispositions and more immediate circumstances, and those deeper causes which helped to form those dispositions and circumstances.

59. See chapters i, ii and iii.

60. Considérations, ch. xviii.

61. Considérations, ch. i.

62. Considérations, ch. i.

63. For a discussion of this paradigm, see Donald C. Earl, The Moral and Political Tradition of Rome (Ithaca: Cornell University Press, 1967), chap. 1.

64. "Le gouvernement des Carthaginois était très dur: ils avaient si fort tourmenté les peuples d'Espagne, que, lorsque les Romains y arrivèrent, ils furent regardés comme des libérateurs; et, si l'on fait attention aux sommes immenses qu'il leur en coûta pour soutenir une guerre où ils succombèrent, on verra bien que l'injustice est mauvaise ménagère, et qu'elle ne remplit pas même ses vues." Considérations, chap. iv, 441-42.

65. Considérations, chap. xviii, 473.

66. Considérations, chap. xi, 457.

67. "Rome accrut beaucoup ses forces par son union avec les Sabins, peuples durs et belliqueux, comme les Lacédémoniens dont ils étaient descendus. Romulus prit leur bouclier qui était large, au lieu du petit bouclier argien dont il s'était servi jusqu'alors. Et on doit remarquer que ce qui a le plus contribué à rendre les Romains les maîtres du monde, c'est qu'ayant combattu successivement contre tous les peuples, ils ont toujours renoncé à leurs usages, sitôt qu'ils en ont trouvé de meilleurs." Considérations, chap. i, 435-36.

68. Considérations, chap. ix, 452-53.

69. For these points, see Considérations, chaps. i, iii, and iv, 436, 439-40.

70. Considérations, chap. viii, 450.

71. Considérations, chap. viii, 452.

72. Considérations, chap. iii, 439-40.

73. Considérations, chap. xv, 463.

74. Considérations, chap. xxii.

75. Considérations, chap. xxii, 483.

76. Considérations, chap. xv, 464.

77. Considérations, chap. iv, 442.

78. Considérations, chap. xxi, 479.

CHAPTER FIVE

INTERPRETING L'ESPRIT DES LOIS.

L'Esprit des lois, according to Montesquieu's supposed primary intentions, traditionally has been read as a tract for the indictment of despotic government.[1] Defenders of this interpretation draw on critical remarks in Lettres persanes on the Sun King's policies of expansion through warfare, domestication of the nobility, and administrative centralism. With the added assertion that these policies had unambiguously corruptive effects, the same critics see no difficulty in drawing parallels between them and Montesquieu's representation (however distorted) of the practices of the Ottoman sultans and other rulers he regards as despotic.[2] Montesquieu's portrayal of despotism in L'Esprit des lois is regarded as an extension of the traits of "le gouvernement absolu".

While this interpretation is standard, and while Montesquieu provides no flattering portrait of despotism, when brought to bear against the historical reality of the institutions of pre-revolutionary France, it generates a circular argument. This is evident in Derathé's commentary which inadvertently uncovers the weakness of this account.[3] After asserting that Montesquieu's view of monarchy was inspired by French institutions prior to the reign of Louis the XIVth, and his view of despotism partly inspired by Louis the XIVth absolutism, he then criticises Montesquieu because his portrayal of despotism does not correspond accurately to the realities of Louis the XIVth's policies. This is noted in particular with regards to the despotic practices of appointing a vizir to rule (Louis the XIVth was his own first minister effectively after 1661), of providing no stable guarantee of property rights (an important precondition for the rise in trade and commerce, encouraged by the policies of Colbert) and of generating a general climate of economic decline.

In addition, as a depiction of the main purpose of the work this traditional account leaves it as an enterprise to waver between the banal and the futile. If this assumed main intent was accompanied with any realistic sense of efficacy, the

work would be written in the tradition of the mirror of princes literature, an established genre of the time, practised most notably by Fénelon, one of Montesquieu's most favoured authors.[4] However, as is clear in the preface, the work is not addressed to princes at all, but to a much wider audience. More importantly, this same account belies the underlying complexity of the work and leaves much of it unaccounted for. The final chapters in legal history are the clearest victims of this line of interpretation (although the challenge of their specialised and close argumentation offers an additional incentive to neglect them), as well as much of Montesquieu's discussion on the issues of commerce, religion, and population. Finally, while it is clear that the work does offer some criticism of the policies of Louis XIV, on the whole the work may be said more to reflect and uphold the political reality of eighteenth century France, living in the legacy of that rule, than to undermine it.

A complement and flip-side to this first traditional interpretation of L'Esprit des lois is that which reads it as a tract working out a system of liberty for modern politics. This system has been regarded in various ways, whether as a mix of institutional and constitutional measures, concern for the quality of popular manners, a recasting of the interests of state in a modern context, or some combination of the three.[5] While it cannot be denied that Montesquieu was concerned with the problem and need to preserve political liberty, all of these studies take it for granted that Montesquieu's work is best understood within a tradition of political theorising which looks in the end to some form of new political model, or ideal regime, as a universal solution to problems of politics. Again this approach tends to read the work selectively. More significantly, it fails to recognise some important themes in the work. It may be that Montesquieu's study of the failure of the English republican experiment in Book Three is more indicative of his political sensibilities than the later reflections on the dynamics of institutional design.[6] Certainly his attention to the limited efficacy of institutional mechanisms and his pervasive sensitivity to the inevitability of political decline and corruption throughout L'Esprit des lois pose important challenges for those

who adopt a strictly constitutionalist reading of his thought.[7] In this light, this chapter seeks to resurrect a sense of the primary importance of Montesquieu's intention in offering new understandings of the law and politics in L'Esprit des lois, as well as to explore their meaning and implications.[8] This is not to deny a polemical purpose in the work, but to show that it is intricately caught up with and subordinate to its philosophical and historical objectives.[9] In particular, it will show the practical significance of developing an understanding of politics centred on the dynamics of human association. This argument implies that it is only with an understanding of this wider framework within which Montesquieu was working that it is possible to provide a meaningful account of his theories of public order and freedom.

This chapter is divided into four main parts. Part one provides a brief account of Montesquieu's own statements of intent in writing L'Esprit des lois. Part two examines his conception of the principles of association as outlined for the most part in the first book of L'Esprit des lois. It will be shown how Montesquieu draws on his strategy first used in his Traité des devoirs, using the idiom of natural law theory to forge a new and distinct understanding of the principles of association, including an account of the goods to be procured in association and of the origin of positive law. Part three studies the dynamics of Montesquieu's theory of the principles of government- virtue, honour and fear- examining the forms of community they shape autonomously and their relation to the institutional structure of government. Finally, part four focuses on Montesquieu's conception of the forms of association which cut across the classification of regimes, namely domestic, religious, commercial as well as interstate forms of association. The purpose of the chapter is to argue firstly that the first Book of the work is central to an understanding the project as a whole, and secondly, to show how this preliminary exposition of the principles of association serves as the basis on which Montesquieu can embark on a study of the diversity of forms of association while avoiding a relativist stance. This position allows him to be aware of the ambiguities hidden in these forms, as a

basis from which to judge their relative merits for the development of a life in common.

I. Intents and purposes.

Montesquieu himself gives two indications of his intentions in writing L'Esprit des lois. Firstly, in the preface he tells the reader that his purpose is to be found in the design of the work, "Si l'on veut chercher le dessein de l'auteur, on ne le peut bien découvrir que dans le dessein de l'ouvrage." What the reader construes as his intention, thus, must have a comprehensive significance and must not relate merely to selected chapters and passages. This is supported further by the general recognition that Montesquieu himself felt that the work hinged on certain principles which he had discerned twenty years before the work was published (hence, just after selling his parlementary charge) and which directed his whole plan of research.[10]

A second, more clear, expression of intent is offered in his "Défense de L'Esprit des lois". Here he states that the object of his work was a study of the laws, customs and practices of all peoples. He implies further that the purpose is first taxonomical, that is to provide some structure by which the meanings of these diverse practices can be discerned and ordered, and second, evaluative by assessing the various merits and disadvantages of those same practices. He recognises that in the latter purpose, his conclusions would be more prone to certain ambivalence, given the natural ambiguity in human affairs.

> ...de deux pratiques pernicieuses, il cherche celle qui l'est plus et celle qui l'est moins; qu'il y discute celles qui peuvent avoir de bons effets à un certain égard, et de mauvais dans un autre. Il a cru ses recherches utiles, parce que le bon sens consiste beaucoup à connaître les nuances des choses.[11]

By being comprehensive in his examples and by exploring various relations in his analysis, he implies here that a theory of politics is acceptable only insofar as it

is able to make sense of and account for the manifest richness of social reality itself.

The statement also shows that Montesquieu's project was of a different tradition of political thinking than that centred on the notion of the best or most suitable regime. The latter rests on the presumption that there could be a set of institutions, somehow objectively determined, whose establishment, if possible, would also be unambiguously beneficial for the human community at large. Its rather clear-cut vision of the possibilities and options of political practice is impoverished. Montesquieu recognised that such categorical judgements would betray the process by which people can come to understand themselves and their social context more deeply.

Nonetheless, by his recognition that certain measures will have both good and bad effects and that some pernicious practices may be a relative good, Montesquieu was not a relativist. Instead, he was placing himself in a tradition of reflection stemming back to Le Roy which recognised that the meaning of human actions could be discerned only through a broad account of the various relations (convenance) they bore to other actions and features of collective life. In particular, Montesquieu was exploring how the meaning of laws could be established from a study of the social conditions which they were to govern. This form of strong contextualism would also be more prone to scepticism about the potential of politics.

Beyond Montesquieu's expressed intent, by developing a theory of laws that would be more sensitive to the social conditions in which they were embedded, Montesquieu was responding to more general issues emanating from his intellectual context and personal development. First, by allowing for various forms of reasoned legal response to the problems of association, responses which in the past had been thought to be purely arbitrary (as modern natural law theorists had done), Montesquieu can be seen to be responding to the crisis in contemporary jurisprudence and the consequent need to bring legal reflection more in line with two central features of European legal evolution: namely, increased diversity of

legal and political systems within Europe along with greater legal homogeneity within France (reflected and encouraged by the 1679 edict). A theory of the rational basis for diversity would give these various legal regimes a greater legitimacy. Secondly, the idea (worked through in the Considérations) that in the modern world politics would have limited social objectives, rather than those of collective power, domination and glory was an implied foundation for a legal theory addressed specifically to social needs. As shown at the end of chapter four of this thesis, this in turn would provide a basis for Montesquieu to develop a theory of the political conditions conducive to more advantageous forms of human association. Finally, Montesquieu can also be seen as responding to certain inadequacies of contemporary understandings of citizenship. While rejecting the principles of classical political practice which drew a direct link between civil freedom and direct political participation, Montesquieu also sought to avoid the relative indifference and withdrawal which characterised contemporary conceptions of citizenship.[12] A theory exploring the direct links between the quality of social life, and the political factors responding to and shaping civil association would open a space for a public more aware of the impact of policy on their quality of life and therefore more civicly minded without generating an unrealistic demand for direct political participation.

II. Fundamentals of association.

It could be argued that for Montesquieu the major fault of the modern school of natural law is in fact that feature which it tends to share with its traditional counterpart, namely, starting from a conception of individual nature as a basis for social theory. Whether that nature be understood in a teleological sense in terms of an asserted moral end, or as a set of inherited characteristics and needs which generate a basic motivation for social life and peaceful coexistence, the structure of the argument leads necessarily to a justification of moral action on the basis of interest (however conceived), and leaves our moral intuitions (the starting

point of our practical moral reasoning), as the objects of justification.[13] Once we dispense with this methodological prescription of how we come to understand our moral life, we can recognise that to start from what we know (i.e. our intuitions or accepted social truths) also modifies the role moral theory plays. In particular, it will serve to clarify and help us to make better sense of those truths, rather than develop a novel grounding or logic for the practices we engage in. As a corollary, a conscious recognition of the prior need for a community harbouring a certain degree of social cooperation and moral consensus to allow for any meaningful reflection on moral questions, renders a theorist's claim to fully novel and independent moral speculation largely chimerical.

In his Lettres persanes (1721), Montesquieu had argued, through the voice of Usbek, that justice did not depend at all on human convention.[14] However, in the same work he also recognised that to discuss principles of politics based on pre-social existence was absurd.[15] In his later reflection, Montesquieu came to recognise the artificial nature of reasoning about social rules on the basis of individual motivation and independent speculation alone, for he deemed that social existence itself was a necessary and not secondary feature of the moral life and moral reasoning. The attempt to justify social rules and collective morals on the basis of individual nature and needs alone was seen not only as unrealistic and artificial, but also misleading insofar as those characteristics attributed to individual nature and need were products of social life. While this position harboured potential for moral relativism, this was only possible if it was to be assumed further that all forms of human association were themselves arbitrary. Montesquieu's contribution to moral reflection of his day was to uncover a set of principles governing the forms of human association, principles which would provide a ground from which to judge the quality of varying forms of collective life. In the opening passages of L'Esprit des lois, he was studying those features of a life in common which were more fundamental to human beings, rather than treating social existence as something to be justified from the point of view of the individual.[16]

To show more clearly how this comes about in his work, it is necessary to examine in detail the first book of his work and the dynamic of association which is illustrated through it. Prior to this, however, it is necessary to have a clearer idea of the status of the first book in relation to the rest of the work.

It has been argued by some critics that the first book of Montesquieu's major work is in essence a false façade which is only meant to pay lip-service to an intellectual tradition, and only momentarily diverting him from his main task which was to explain and understand the seeming diversity of positive law.[17] This interpretation raises the question of why Montesquieu would deem it necessary to pay such a hommage when the modern school of natural law (as we have argued previously) was largely bypassed or reinterpreted in French intellectual circles. In addition, it was a theoretical identification which was more likely to draw ecclesiastical criticism to his work, a charge which in other matters, Montesquieu was anxious to avoid.

In the first chapter of Book One, Montesquieu asserts that equity exists prior to law. Equity relates directly to collective life and includes the precepts of conforming to law, gratitude, retribution, as well as dependance on God. He speaks of these precepts as applying to humanity as a unity, "le monde intelligent" and he speaks of the human being, as both a physical and intelligent being, as made to live in society.[18] Nonetheless, he recognises that human beings also will act in ways which threaten the contravene the dictates of equity.

It is from this dichotomy of prescription and behaviour that derive expressions of and justifications for moral philosophy and positive law. In opposition to a traditional approach which conceives of the role of moral philosophy and law as seeking to justify the foundations or groundwork and basic rules of social order, Montesquieu gives them a restorative role. Here they are conceived as articulating the values of social order in an effort to reinstitute a state of social peace and revive a general awareness of the forms of social duty arising from the conditions of association itself.[19]

In this perspective, if moral philosophy is to adopt a foundational stance,

this is only deemed to be a means to articulate pre-existing forms of social duty, and not as a new theoretical grounding for duty. In the same manner, political and civil laws take their most fundamental reason from the need to reinforce among humans a sense of their basic civic duties, duties which derive from the nature of association, but which are also forgotten and contravened in time.

It might seem at first that a recognition of law as an expression of more basic social duties is the origin of a certain contradiction within Montesquieu's work, for if this forms the ground for civic duty, why does Montesquieu not advocate a universal code or repudiate legal diversity? However, such questions are only apt if it is also asserted that 1) it is the sole purpose of civil law, 2) the same duty is to take the same exact prescription in all circumstances and that law must articulate the most general and universal formulation of the rule possible, 3) moral authority rests in the law itself as opposed to the communities which it is to govern. The latter point is particularly important for it must be recognised that for Montesquieu, the ends of association are not regarded as issuing separately from the experience of association itself. If one regards the moral basis of community life as issuing directly from the forms of association themselves and the principles immanent in them, the diversity of law is no longer direct fodder for a moral scepticism, as it was for example for Montaigne. As separate forms of association will have different prescribed ends and challenges in meeting the demands and duties of life in common, the remedies as expressed in positive law will themselves take different forms. The law then is never meant to articulate fully the grounds and rules of social life, but only to give expression to those rules of which the community concerned is in need of a reminder. The diversity of law then is only an expression of a diversity of faults and failings, rather than a challenge to the possibility of moral truths governing collective life.[20]

The basic principles of association are explored in the second chapter of Book One. Montesquieu's picture of the state of nature shows the relative inhumanity of the individual in this hypothetical state. In contrast to the major thinkers of the modern school of natural law, Montesquieu's pre-social being has

no conception of a God and of obligations towards him (therefore in a stroke ruling out the Lockean and Pufendorfian scenarios), no knowledge (only a cognitive faculty), a strong sense of weakness, and a sense of personal material need. The grounding of social life in this picture can not be derived from an individual calculation of their own interests, for the individual in this state does not have the developed skills of reasoning to permit such a calculation. Instead, as in his earlier Traité des devoirs, social existence, as a sudden fact of life, is accepted peacefully given the recognition of a shared and mutual fear among individuals.

The four natural laws identified by Montesquieu in this chapter, apart from the second law to seek the means of subsistence, are derivative of the dynamics of association, namely, the presumption in favour of peace, the attraction of the two sexes and the desire to live in society. The fourth law mentioned here is significant in that it shows that the human faculty for knowledge not only requires a form of social existence for its own development, but that this development in turn deepens the need for social existence. Thus, Montesquieu's conception of the grounds of sociality is not derived primarily from a vision of a generalised wish by all individuals for the advantages procured by social life (what Hobbes calls 'commodious living'), for these could never be conceived by the pre-social being (it is because of this that Montesquieu foreshadows Rousseau); rather it is based retrospectively on the recognition from within social life of its advantages in helping to meet our needs and providing the conditions for the development of our faculty of knowledge. It is the specific knowledge of these benefits that forms the basis of sociality itself. This knowledge of the benefits gained in association becomes in turn, the grounding for both a deeper attachment to social life and the acknowledgement of the duties necessary to preserve it. It is this particular feature of social life, that is consciousness of the benefits of association and deeper emotional attachment because of it, which for Montesquieu most distinguishes the human community from those of animals.[21]

Through this dynamic, the calculations of the traditional subject of the

modern natural law tradition are transformed, firstly by the necessarily retrospective character of the calculation (having passed through a state of a shared sense of vulnerability), and secondly with the further acknowledgement that social life is already a necessary condition for its possibility. In this vision society cannot be viewed in a fully instrumental way for it is prior to all else.[22] By doing so, it also abandons the notion that social and political life is grounded on collective acts of will. His understanding of the associational bonds of collective life is one generated by a reflection back on those ends and on the interpersonal dynamic by which a community sustains itself. The practice of political theory is not to bind individuals to an irrevocable historical act of alienation, but to generate reflection on the ends and gains of social life as they may experience them.

In the same manner, the formal establishment of political society, as traced by Montesquieu in chapter three, is driven by the need both to protect the gains of common association and to reinforce a sense of them. Montesquieu adopts the Hobbesian (and Aristotelian) point that the establishment of political society, informed by the basic need for social order and peaceful coexistence, is a necessary precondition for other forms of social and moral life. However, this is not because a moral life could not even be conceived outside political society, but because it could not effectively be realised under such conditions. As Montesquieu responds to Hobbes, it would not be possible to consider establishing political society for the sake of instituting a just order if the notion of justice remained incomprehensible to those engaged in such actions.[23] For Montesquieu, the need for political order is derived from the impossibility for humans to sustain general acknowledgement of the principles needed to sustain a peaceful order, in a context of growing inequality.[24] In this sense, social life harbours a certain ambiguity as a form of existence which is unavoidable and necessary for the development of human capacities, but which also carries the seeds of its partial dissolution breeding enmity as well as peace. Thus, while all share in fundamental features of human sociality, this in itself is insufficient to guarantee peaceful and fruitful

forms of association. Positive law in its origin is perceived as a remedy to offset the most destructive features of this dynamic. This helps to explain why law will be necessarily linked to the disposition of the people for whom it is established, for it will be tailored to remedy the negative effects of collective life as it may appear in various conditions and situations. Nonetheless, by responding to these effects and playing a restorative role, the law will also be expressive both of the fundamental and universal goods of human association, namely the essential need for order and peace, prosperity and the desirability of freedom, as well as any particular social goods a community may have established for itself.

In this manner, his theory of law is bound to his consideration of both the goods and failings of various forms of human association. In this perspective, it is easier to combine what have often been regarded as two distinct interpretations of Montesquieu's position, namely that which emphasises the primary importance of the regime in structuring social life (assimilating Montesquieu to classical Aristotelianism, as Barker has done) and that which in turn stresses the primacy of social forces in his work.[25] If one recognises that the political institutions (what Montesquieu terms the nature of a regime) are providing a link between collective imperfections and aspirations, that is, if the law as promulgated is seen as a remedy linking it to both pathology and a vision of healthy community life, then it is evident that the dichotomy is false. For in one sense, insofar as the material and social conditions are the subjects and material for legislative action, it is true that these conditions are in certain ways determining. However, because the legislator is also acting in response to these conditions in order to promote a certain understanding of collective life which is not fully grounded in those conditions, it is also true that the legislator will have, in Montesquieu's eyes, relative autonomy in his actions. In this understanding of law, it is neither fully determined nor fully independent because law is a mix of two elements by which social conditions will be both reflected and adressed (and reflected because addressed).

The law, then, is both the relation (rapport) between social conditions and

collective ideals and the positive dictate of the legislator. Montesquieu's notion of positive law, therefore, does not fully repudiate the positivist definition of law as a command backed up by certain force. However, his notion of positive law also shares in the broader understanding of the law as a relation by its subject matter which will both reflect the forms and values of the association governed, as well as the goods of association which are to be reiterated and promoted by such a law. In this manner, it serves as a link between the goods aspired to by the community, and the defective realities in that same community.

I have tried to show here that this first book of L'Esprit des lois offers a framework within which the remainder of the text has meaning. While it provides no clear picture of how leaders might generate and preserve the goods of particular and diverse modes of association and how these relate to more general goods as sketched in chapter two, it does offer a story from which a diversity of legislative codes would be possible and plausible. In addition, it allows for a conception of certain autonomy for the political forces drafting the law. By doing so, it also is open to the possibility that associations can be corrupted by the political forces themselves. In this manner, it also allows one to recognise that all forms of association may not be deemed equal.

III. Political association: reconsidering the principle.

Perhaps the most significant contribution of Montesquieu to jurisprudence of his day is that while in contrast to those theorists of the society of orders, such as Loyseau and Domat, he generalises the principles of political association to apply to whole regimes rather than particular social orders within those regimes, he also, in contrast to modern theorists of natural law, recognises a diversity of basic principles of association among regimes.[26] By invoking these forms of association as a basis for law, Montesquieu is adopting a structure of argument outlined in chapter two, as developed by the magistrates of the parlement of Bordeaux. However, rather than as primarily a defense of local needs and

particularities (or of constituencies within the jurisdiction), Montesquieu uses it to construct a vision of national uniformity and homogeneity and formalised in the notion of the 'principle', taking a different character in different political communities. By doing so, Montesquieu can be seen in certain aspects as developing a theory of politics which would take into account modern developments of increased national homogeneity, developments which have sometimes been associated with the centralising and levelling tendencies of the early-modern state[27]

Given this general framework of understanding, it is important, however, to come to a clearer idea of what the principle is and what it implies. Montesquieu defines this concept in his first chapter of Book III:

> Il y a cette différence entre la nature du gouvernement et son principe, que sa nature est ce qui le fait être tel, et son principe ce qui le fait agir. L'une est sa structure particulière, et l'autre les passions humaines qui le font mouvoir.[28]

The same terms "agir" and "mouvoir" were also invoked in his reference to virtue and honour in the opening 'Avertissement' of the work. For Derathé, this dynamic element attributed to the principle, as distinguished from the static quality of the institutional structure, is a form of collective political psychology, "les passions qui font d'une constitution ou d'une forme de gouvernement un organisme vivant, capable d'agir et de se maintenir en vie".[29]

The principle can be seen to differ from both his notion of esprit (as discussed in Book XIX, iv), encompassing climate, religion, laws, traditions, morals and manners in a regime and which is unique to each, as well as from a more restricted conception of moeurs, which is not regime specific, but whose strength is a necessary but not sufficient condition for moderate government.[30] Moreover, moeurs are distinguished from manners in their quality as an internalised code of behaviour.[31] In contrast, the principle is a sentiment shared by all citizens and has a public function.

In some respects, it may be counterintuitive to attribute the dynamic

features of the constitution to a general sharing of popular sentiment that has no direct tie to the particular dispositions of the political leaders themselves. It is perhaps for this reason that Thomas Pangle has argued that the principle must be distinguished from any general social motiviation.[32] Montesquieu suggests in the same initial passage of Book Three that the principles flow directly from the nature of government, and serves the function of maintaining it, hence portraying it as both derivative of and instrumental to the institutional needs of the regime considered. Nonetheless, by the end of Book Three it becomes clear that the principle has a certain autonomy by Montesquieu's assertion that in the case of monarchy, the law itself can substitute for the force of republican virtue, thereby ensuring social cohesion despite the sometimes corruptive effects of honour.[33] In addition, in Book Three, chapter vii he shows that even honour itself may serve the ends of public order, but in a way which is of its own dynamic and unrelated to the particular dispositions of the positive law.

As such, then, the coupling of the various principles with the three forms of regime is, it would seem, more one of congruity than of necessity or causal relation. It is for this reason that Montesquieu can make an analytical distinction in the opening books of the work between those laws which derive from the specific nature of a regime, and those which derive from the principle. He had already asserted, in chapter iii of Book I, that the principle had "une suprême influence" over the qualities and dispositions of positive law. Furthermore, the distinction between the types of laws which relate to these two is roughly equivalent to the distinction between public and civil law. Those laws which derive from the nature of government relate to questions of the qualifications of citizenship, modes of suffrage, relative institutional powers, and forms of fundamental law, all matters which are generally within the realm of public law. In contrast, when discussing the laws deriving from the various principles of government, Montesquieu focuses on rules of education, forms of criminal justice and degrees of luxury to be permitted.

In making such a distinction, yet affirming the point that the principles

have a supreme influence in legislation, he could be seen to be in part betraying the constitutional differentiation which seemingly provides the foundation for his basic framework. However, one must recognise here that despite an obvious reliance on the typologies of both classical and early-modern political theorists, Montesquieu's major innovation is not in denying the distinction between good and bad forms of rule. Rather, it is in making the criteria of the number of rulers subordinate to a general distinction among three forms of human association, that is the three principles. If Montesquieu does betray Aristotle, it is in hoisting the conception of a general coupling of a hierarchy of social values and regime types into a principle of classification itself.[34] The possibility of judging regime types on the basis of the disposition of the ruler is to assume that that ruler is consistently effective. However, this effectiveness will depend ultimately on the dispositions of the people at large. The question of the adjudication among regimes thus becomes transposed into a matter of assessing these various wider forms of association.

It is important to see not only how the principles relate to and uphold the institutional structures, but also how they work independently as a system of regulating conduct and of promoting the better possibilities of collective life. Here each principle- virtue, honour and fear- will be examined separately to see how each works as an autonomous system of ethics and social control.

The principle of virtue is distinguished by its predominantly artificial qualities, that is, it is generated by a multitude of measures and exercises which will direct the development of personal dispositions in a direction to which they would not be otherwise inclined. "C'est dans le gouvernement républicain que l'on a besoin de toute la puissance de l'éducation."[35] One of the most striking features of his understanding is the extent to which it diverges from that of both the ancient characterisations and the more modern portrayal found in the work of Machiavelli. Here there is no trace of the traditional manliness of virtue. Instead, it is portrayed in the light of the traditional feminine qualities of love and self-sacrifice.

In the 'Avertissement' he defines virtue as the love of country deemed synonymous with a love of equality. He is careful to distinguish this concept as a political term from moral or Christian virtue and recognises that his meaning is a new one. However, the distinction is predominantly analytical. In a later footnote in Book Three, he recognises a possible overlap of political and moral virtue (understood, it would seem, as a form of attentiveness to the whole which is characteristic of traditional conceptions of justice) in that the first is directed to the common good, although it bears no direct relation to the qualities of the particular ethical and theological virtues.[36]

Nonetheless, in a later passage in Book IV, he seemingly contradicts this position. After defining virtue as the love of the laws and of the country that involves a renunciation of self and a continued preference for the public interest, he asserts that continued respect for this preference will bring in its train the practice of the particular virtues.[37] In subsequent passages he also identifies virtue with a goodness of morals (bonté des moeurs) and eulogises its merits in relation to monarchical honour. It may seem, then, that while republican virtue will not encompass all that is to be deemed to be morally virtuous, by directing personal intentions and dispositions towards a service of the common good, it does represent, despite Montesquieu's initial disclaimer, a form of public ethics.

This is not challenged by Montesquieu's discussion of aristocratic regimes, supported by the principle of moderation, for the distinction concerns firstly the intensity of the feeling of devotion required (that of a democracy being stronger), and secondly, the size of the community.[38] However, even in a democracy, the love of equality itself is exercised with certain moderation. While the love of equality is to extend to all citizens, it is not to be confused with a contempt for authority, the principle means by which a democracy is corrupted.[39]

Although ostensibly theorising about the features of classical republican regimes, his portrayal represents in fact a betrayal of much of the classical tradition.[40] This is revealed not only through this breaking down of the fundamental classical identification of nature and virtue (a position which goes

back at least as far as Augustine), it is also shown in his attempt to focus on the feelings of devotion to the city as the essential quality of civic virtue itself. While there was a diversity of conceptions in the classical world about what virtue consisted in (whether it be through the striving for glory in the performance of courageous military acts, an involvement with public matters in discussion and the performance of public services as the exercise and development of practical wisdom, or obedience to a wise and worthy emperor), there was a shared understanding that the performance of virtuous actions required some form of underlying sense of devotion to the community; but in the literature this devotion, considered apart from successful acts of service, is nowhere itself identified as virtue.[41]

By defining virtue as itself the love of the republic, rather than the love of the republic as the precondition for civic virtue, Montesquieu ushers in a highly internalised and paradoxically individualist understanding. Rather than as an expression of what the political community holds in common and the recognition of the need to serve the community as a means to preserve those goods, Montesquieu's civic virtue is cast in the language of sacrifice and renunciation, a tone echoed in his invocation of the monastic life.[42] This is reinforced by his discussion of the measures necessary to sustain this virtue. Instead of focussing on the rules of debate and the development of common sensitivities in the public forum, Montesquieu regards sumptuary and inheritance laws as essential in promoting a general climate of equality and frugality.[43] This focus also enforces his first claim regarding the artificiality of the sentiment.

As a moral system, virtue plays two roles.[44] Firstly, as Montesquieu expressed in his "Réponses et explications données à la faculté de Théologie" in 1750, virtue is necessary to sustain the authority of the laws in a republic, because in this form of government no magistrate is powerful enough to enforce the law on their own. A citizen's obligation must be based on a broader attachment to the community which will lead them to execute the law regardless of their own interests and the lack of strong institutions of enforcement.[45]

In addition, independently of law, it regulates the actions of citizens. Montesquieu recognises the importance of family education in cultivating virtuous citizens.[46] Beyond the initial rootedness in kinship structures (based on a vision of the sanctity of paternal authority), citizens themselves will survey and censor the conduct of others. "Les lois de Minos, de Lycurgue et de Platon, supposent une attention singulière de tous les citoyens les uns sur les autres."[47] This may bring to mind Montesquieu's own earlier vision of the importance of sincerity and mutual censorship in friendship as a means of individual moral development (discussed in the preceding chapter of this thesis). Placing this vision in the distant past, it may signal Montesquieu's disaffection with this earlier ideal as a means of moral education in modern societies. "On ne peut se promettre cela dans la confusion, dans les négligences, dans l'étendue des affaires d'un grand peuple."[48]

The ancient model of collective mutual censorship is also allied with a system of criminal prosecution based exclusively on personal accusations.[49] He implies here that in the modern era, the role of the state in criminal prosecution will be an important one so long as subjects do not share fully identical moral assumptions and are not driven to intervene actively in the moral improvement of their fellow citizens. The pervasiveness of virtue in ancient republics also meant that punishments themselves would be few and that laws would more likely take the form of advice than of a strict rule. Devotion to the common good would harness and channel ambition to render the greatest service possible to the republic, services rendered in the spirit of extreme gratitude for the common life it nurtured.[50]

The institutions which Montesquieu suggests are necessary to sustain the power of virtue are themselves dependent on independent social sentiment. The efficacy of the rulings of the Senate and the censor, as guardians of morals, is based on a prior respect for the rules and advice of the elderly and of established authority. This is combined with the already noted importance of paternal authority in a republic.[51] Thus, while a love of country will engender a respect

for those institutions to educate the citizens in virtue, virtue itself will engender a goodness which will in turn nourish that respect. The identification of virtue with sentiment, rather than as a form of knowledge, allows him to recognise that all citizens can share in this quality.

It is, however, precisely the autonomy of the system of virtue which also poses limits on its applicability. Because the system is dependent for the most part on informal methods of regulating conduct, it is limited to small and relatively homogeneous communities, where it is more difficult to define one's own interest apart from the fortunes of the whole.[52] Thus, in his portrayal of ancient virtue, Montesquieu offers us a model of moral association based on a heightened collective sentiment and intense devotion to the whole. However, in also recognising the anachronism of such a form of association, the challenge for Montesquieu is to construe a form of moral association better suited to contemporary reality.

Some have asserted that Montesquieu's monarchical honour is a morally bankrupt concept, one which betrays the author's general disaffection for his time and his contemporaries, especially the noble courtesans.[53] This is supported by his assertion that the actions performed through the motive of honour are done separate from any intentions of pure goodness.[54] He defines honour as "le préjugé de chaque personne et de chaque condition" and associates it with the pursuit of self-interest with no clear sense or direct obligation to the needs or interests of the wider community.[55] His portrayal of education in a monarchy also focuses on the self-centredness of motivation for what appears to be beneficent and other-regarding behaviour.[56] This impression is further reinforced by his comparisons of honour with ancient virtue, which some have interpreted as both an expression of nostalgia for the ancient republic, and an instrument of moral criticism of his own era.[57]

However, on closer inspection it is evident that Montesquieu's conception of honour as a principle of monarchical government is not regarded by him as an amoral system of motivation, but rather an alternative moral system that directs

but does not extinguish the virtues.

> Cet honneur bizarre fait que les vertus ne sont que ce qu'il veut, et comme il les veut: il met, de son chef, des règles à tout ce qui nous est prescrit; il étend ou il borne nos devoirs à sa fantaisie, soit qu'ils aient leur source dans la religion, dans la politique, ou dans la morale.[58]

Its tripartite prescription, namely the nobility of virtuous acts, the frankness of morals and the politeness of manners, as outlined in detail by Montesquieu in Book Four can be recognised as a moral system by judging the effects of such actions and motivations as well as noting Montesquieu's recognition of a need to regulate and moderate these forms of motivation. It remains an autonomous system in the main, for Montesquieu also recognises that its rules will be more strictly observed if left unregulated by law.[59] However, it is also relatively fragile and will only flourish within a relatively stable and fixed constitutional structure.[60]

The essence of monarchical honour as an autonomous moral system does not lie predominantly in the fact that merely common ends are served as each pursues their own self-interest. It is important, rather, to recognise that honour is a sense of worth predicated of an individual by a series of external attributes and signs of public distinction, that is, the individual sense of worth and the public's recognition of that claim.[61] As such, its reality is dependent not just on the enjoyment and celebration of personal privileges and modes of distinction, the worth of these is invested also in the opinions of others. Thus, while one's duties may be performed for reasons which are essentially self-regarding, they are also modified by the recognition that the role of the self being served in the calculation is defined publically. It is because of this that the reasoning of the subject of honour will differ from that form of self-serving calculation which is at the centre of utilitarian logic. He distinguishes this dynamic from one of unbridled ambition (thereby distancing this conception from a purely Mandevillian conception of human motivation) with the recognition that in this system it will be at times

necessary in fact to repress excessive ambition as in extreme forms it could be threatening to the state.[62]

Furthermore, it is because the self which acts under the principle of honour is defined publically that the resulting behaviour will also be distinguished from that actor who is only attentive to their own interests. For Montesquieu, the form of calculation involved in monarchical honour will result in a resolution to live up to the expectations others have may have, promote a general veneer of kindness in relations with others, encourage a form of personal sincerity as well as inspire great actions.[63] While it also involves a form of pride leading one to practise self-censorship and hide personal vices in interaction with others, it is a pride which in the end serves a higher form of moral economy.[64] Despite each following their own interest, the common good is in the end served.[65]

The interpersonal basis of the principle of honour (for the nature of the interest it involves is one concerned primarily with social distinction) also allows one to question the view that honour is in fact a limited concept which can be predicated only of a particular class and not of a society at large.[66] The arguments for the exclusivity of honour include four points: that it is primarily a noble ethic, that it is also rooted in the practices of the court, that it is associated with the legacy of the military profession, and finally that as a principle of distinction, it depends on others not being distinguished in this way. To accept these points with respect to the French monarchy would be to accept a supposed general characterisation of a regime with a population of over 20 million, on the basis of the qualities of the roughly 1500 families active in governing.[67] However, a closer look at the dynamics of honour allows us to avoid this seeming anomaly. The notion of being part of a rank which is to be given special honours, is part of a wider vision in which one's understanding of oneself is derived from the whole social structure. While honours themselves are exclusive, honour is a shared principle of reference. It is in this sense that Peter Berger can speak of a 'world of honour', in which all questions of individual identity are strongly linked to established institutional roles.[68]

Also, to the extent that the dynamic of honour relies more concretely on a form of public opinion and collective acknowledgement of achieved status, honour itself cannot be attributed to one class over another but exists in the recognition of one by the other. It is also for this reason that the charge of ambiguity or possible contradiction in Montesquieu's depiction as wavering between values of a traditional military aristocratic ethic and new values of ambition and personal interest identified with a newly emerging commercial class, is not fully justified.[69] At least, the ambiguity is not to be seen as the result of personal confusion, but rather as a need to reflect the reality of the changing priorities of the French polity as a whole. The routes of access to positions of noble status to those with commmercial successes (and which Montesquieu continues to condone) show rather the flexibility in the basic dynamic of social regulation through the economy of status and public recognition, than the weakness or vacuousness of honour. What is basic to the principle is not the specific values which fit into the valued forms of distinction, nor the forms of personal preferences arising from them, but the form of social regulation of behaviour on the basis of an overriding respect for public opinion, the hierarchy of values instantiated in that and the distribution of office in accordance with the content of those values. In this respect, despite a tolerance for a multiplicity of forms of internal motivation, to the extent that a hierarchy of values is both shared and publically recognised, the ethic of honour, like that of virtue, will also only be viable in a society of relative homogeneity. As such, its application as a basic principle of modern regimes in general, as emphasised by those authors who stress the commercial overtones of the concept in Montesquieu's work, is limited.

In noting these points, it is then possible to recognise that in construing his portrait of monarchical society, Montesquieu was not primarily concerned with constructing a moral critique of his own contemporaries and peers, but rather with exploring the alternative moral possibilities in a contemporary context where it was no longer possible to rely on heroic self-sacrifice and pristine virtue to promote the common good. This concern becomes clearer in Montesquieu's

discussion of the corruption of the principle of honour in a monarchy.[70] He notes that this process is encouraged when a contradiction emerges between honour and honours, that is, where the quality and strength of public recognition no longer corresponds with that behaviour and those actions which are conducive to relative social harmony and to the form of the virtues.

> Il se corrompt encore plus, lorsque l'honneur a été mis en contradiction avec les honneurs, et que l'on peut être à la fois couvert d'infamie et de dignités.[71]

It is perhaps for this reason that Montesquieu saw such an important role for the intermediary bodies, including the Parlements, in his understanding of monarchy. These public institutions were not only a way to provide a check on arbitrary power, they also served as a means to harness personal ambition and status to a form of public service, and thereby protected the sanctity and proper functioning of the principle itself.

Because of a need for some public agreement on the constituent features of honourable behaviour (including the frankness of morals and politeness of manners to which Montesquieu referred in Book Four) and on the manner in which this translates into a social hierarchy, an important challenge to the principle of honour is a policy which weakens institutions of social distinction while contesting a basic consensus on the hierarchy of values which underpin those distinctions.[72] In the breakdown of these informal methods of control, the need for a more effective political means of control is understandable as a viable alternative.[73] Thus, in Montesquieu's scenario, the breakdown of the honour ethic does not lead to a humanitarian egalitarianism, but rather to a confusion of value and standards of conduct, one which is compensated for by the rise of despotic prince as a natural solution to the problem of social order.[74] For Montesquieu, the principle of honour is praised in so far as it represents a contemporary viable means of informal social control that may sustain itself through continued respect for those institutions which provide a forum in which personal honour and public duty can be reconciled.

As the principle of virtue was only a possibility in the ancient republics, perhaps the greatest lack of foresight in Montesquieu is his claim that the decline of the honour ethic could only lead to despotism and the eventual reign of the principle of fear. His characterisation of the sentiment of fear is scanty. In chapter nine of Book Three, he asserts that fear will break down all sense of courage and ambition. It involves an exaggerated sense of obedience to the prince and trumps all other natural feelings, rules of honour, health, and natural law. In addition, he affirms that it generates a more destructive form of association in that the citizens of a community of fear will relate to each other on the basis of pure instinct, obedience and threats of punishment.[75] Education in a despotism for Motesquieu will involve merely the inculcation of greater servility while generally encouraging widespread ignorance and unwillingness to engage in deliberation over public matters.[76] In this manner, part of what it means to be living in despotism for Montesquieu is a pervasive lack of concern for the quality of community of which one is a part. In the same way that the running of the state is mistakenly identified with the management of the ruler's own household, so the virtues of citizenship in such a regime are identified with those required by a slave.[77] The only possible barrier to the debilitating effects of despotic power for Montesquieu, is the offsetting power of religion, "une crainte ajoutée à la crainte".[78]

While part of Montesquieu's indictment of despotism rests on the claim that it is ultimately an unviable way of achieving established political objectives and ends, even if these include the traditional quest for personal glory, the main force of his charge rests on his understanding of the degraded forms of community life to which it gives rise.[79] In chapter fourteen of Book Five, he asserts that in such states, physical surroundings are in general disrepair and never renovated or built with the long term in mind. No care is taken in the cultivation and preservation of land, lack of established commercial law make trade and commerce a risky affair and general profession and personal ambitions are constantly thwarted. The failings of civil law generate extra responsibility for the paternal

tribunal in the resolution of personal and local matters.[80] The harshness and difficulties of life, instead of being an occasion for concerted attentiveness, engender a general spirit of cruelty among the citizens themselves, especially in reaction to bad fortune and deprivation.[81] It is because of this general cruelty and harshness among the citizens themselves that the severity of punishments becomes not only a natural complement to despotic rule, but an active necessity in the interests of a limited public tranquillity.

Nonetheless, Montesquieu remarks that despite the disparages of life in a despotic regime, the majority of humankind find themselves in this form of subjection. This is not so much due to the misdirected and insatiable appetite for greater power by all political leaders, but by the relative ease that this can come to be accepted as a solution to the problem of political order by both rulers and citizens, given that it works on the simple principle of a management of basic instinctual passions. However, by looking no further than this in both understanding and seeking to guide political communities, Montesquieu argues that both the rulers and citizens ignore the wider possibilities of more moderate and advantageous forms of political community.[82] This remark in turn serves in part as a justification for a programme of political theorising which takes first and foremost the form of a general exposition of political principles and modes of rule, rather than of a reflection on the best possible regime.

IV. Forms of association and the general spirit.

While the modes of association which constitute the varying forms of political regime provide an important organisational focus to Montesquieu's political reflection, in the course of the work it also becomes clear that other factors are introduced suggesting more varied and multiple forms of association. The attempt to reconcile the basic political forms with these other modes of association based on diverse practices is a central theme of the work.

At a general level, Montesquieu provides a framework of reconciliation in

the doctrine of the general spirit (l'esprit général), a notion which encompasses various factors shaping the character of a society including climate, religion, laws, the principles of government, historical example, morals and manners.[83] While Montesquieu hints that different factors will have differing amounts of influence according to the society considered, the notion glosses over the extent to which these factors provide alternative, if not competing frameworks of governing behaviour. However, Montesquieu was also keenly aware that the general spirit was not to be understood as a monolithic and homogeneous entity. In fact, each form of the general spirit was seen to harbour a vast complexity of virtues constituting varying degrees of moral ambiguity.

> Les divers caractères des nations sont mêlés de vertus et de vices, de bonnes et de mauvaises qualités. Les heureux mélanges sont ceux dont il résulte de grands biens, et souvent on ne les soupçonnerait pas; il y en a dont il résulte de grands maux, et qu'on ne soupçonnerait pas non plus.[84]

The source of this is not only in considerations of human nature and the capacities of individuals to achieve a form of virtuous existence; rather, it is also rooted in the difficulty of reconciling the various forms of virtue both generated and required by varying forms of human association. Thus, for example, what is to be considered a political vice is not necessarily a moral one, and vice versa.[85] In the same way, as we will explore, forms of domestic, religious, commercial and international association are governed by their own rules and principles which sometimes may conflict with those established by and through the form of regime itself. The general rule of established conflicts and tensions within the notion of the esprit général is shown most clearly by Montesquieu's fascination for the one counter-example, i.e. China, where he believed religion, laws, morals and manners all concurred, "tout cela fut la vertu".[86]

In addition, it is important to recognise that the list of factors considered work by varying means. This becomes clear by comparing the factor of climate to that of morals, manners and the principles of government. As the general

contours of Montesquieu's theory of climate, as presented generally in Book Fourteen and developed in the next three, have been discussed extensively in the critical literature, I will only discuss here the extent to which this theory fits, or does not fit into the more general theory of association which I argue is a central focus of the work.[87] In the first allusion to the theory of climate in Book Fourteen, Montesquieu asserts that the effects of climate are first and foremost material and acting directly on the physiology of the individual. His discussion of the experiment with the sheep's tongue implies that temperature is for him the most important feature of climate as an influential factor on personal behaviour, allowing him to make a series of general conclusions about the disposition of peoples in hot and cold climates with regard to a variety of physical pleasures.[88]

While it is clear that Montesquieu is no determinist and saw the importance and necessity for legislative intervention to combat what he regarded as the nefarious effects of climate, it has been little noted the extent to which even in the development of his theory of climate, the determinist themes become weaker and confused.[89] In general terms, the theory suffers from a tension between firstly a purely determinist stance, with the assertion that effects of temperature have a direct individual physiological effect and hence moral effect on collective dispositions and behaviour, and secondly, a form of reasoning which posits the climate and environment as something to be compensated for, or overcome, and which thereby acts as a moral reason determining behaviour. An example of the latter is his recognition that people in colder climates will work harder in order to provide for their needs given that the environment does not yield its fruits as easily as in warmer climates.[90] In this manner, while the environment may be said to condition the type of activities and dispositions of the people concerned, the determinism of his initial observations flowing from his personal experiment is somewhat mitigated.

In this light, climate as a factor of influence in shaping the nature of varying communities can appear to be not so much as a form of materialism jarring with the predominantly moral analysis which pervades the rest of the work.

The conception of climate as a factor which forms the backdrop for a series of collective responses fits into a continuum of environmental factors including the quality and nature of the terrain, the size and density of the population, and the amount of communication with other peoples, all of which generate and encourage certain activities and dispositions.[91]

All these forms of collective association are essentially reactive and as such, form part of a moral background to which other institutional and legal forms will adapt themselves, for example, pure morals and a strong work ethic in a republic, as opposed to the encouragement of luxury, fashions and diverse modes of life in a monarchy. However, in addition to these forms of what could be called reactive, though not determinist, features of association which combine and conciliate themselves to various forms of political rule, Montesquieu also lays out four other levels of association that complement, if not compete with, strictly civic values. These are found both within the state, in the form of domestic association, between states in international association, as well as among or cross-cutting states, such as with religious and commercial association. As a means, then, to uncover the various forms of tension which underlie and are obfuscated by the notion of the general spirit, as well as to better understand the conditions shaping political asssociation, it is important to discuss and explore these other forms.

V. Domestic association.

For Montesquieu, certain aspects of the family structure are dictated by rules of natural law. The most basic rules of family association are considered to apply to all domestic communities regardless of the political regime in which they are situated. He refers to a natural obligation that a father is under to provide food and shelter for his children, a rule which forms the moral basis for the establishment of households.[92] This obligation extends beyond that of providing for material needs encompassing equally the exercise of educational duties, based on a need to develop an infant's rational nature, as well as a certain interest in and

responsibility for the moral probity of one's children.[93] An extension of this obligation, which carries a certain reciprocal right of property in the children, as well as the children's own inexperience and ignorance in turn forms the basis of the need for paternal consent in the marriage of offspring.[94] It is on these grounds that Montesquieu criticises the practice of the Spanish in America in regulating the age of marriage among the native Indians. "dans l'action du monde qui doit être la plus libre, les Indiens sont encore esclaves."[95] He goes on to criticise those forms of political rule which work to destroy natural feelings of domestic attachment and obligation. In particular, he cites those cases of abortion in America, directed by a concern to spare potential offspring from living under such a cruel regime.[96]

The natural basis of the household also raises questions of the perpetuation of family names and traditions. For Montesquieu, while there is no natural rule dictating the parent through which the family tradition will pass, he recognises that the male parent plays this role in the vast majority of peoples.[97] He suggests that the need to perpetuate the family stems from its character as a form of property, a sentiment which is encouraged by the practice of distinguishing families by name. Nonetheless, he recognises that while the obligation to feed, clothe and educate children stems from natural law, there is no obligation on the part of the parents to will them their belongings.[98] In contrast, these rules are purely conventional and guided by civil and political regulations which in turn relate to the form of regime.[99]

With regards to what he calls forms of civil and domestic slavery as treated in Books Fifteen and Sixteen, Montesquieu recognises that while such practices are neither useful nor good of their own nature, the practice of slavery is more tolerable in a despotism given the relative state of deprivation in which all the citizens live.[100] He notes that slaves are regarded as having been established to sustain the family unit. However, Montesquieu refutes three traditional legal arguments justifying slavery (traced to Justinian's Institutes), as well as those arguments based on a perception of different and inferior customs and religion (a

notorious example, though not cited by Montesquieu, being that of Sepulveda).[101] Instead, he recognises a limited right of slavery based on a tradition of a deprivation of political and civil liberties and where citizens can be motivated to perform their duties through nothing more than the fear of physical punishment.[102] As such, it is a product of historical conditioning rather than a right of nature;

> ...comme tous les hommes naissent égaux, il faut dire que l'esclavage est contre la nature, quoique dans certains pays il soit fondé sur une raison naturelle...[103]

and,

> Parce que les lois étaient mals faites on a trouvé des hommes paresseux: parce que ces hommes étaient paresseux, on les a mis dans l'esclavage.[104]

The practice of civil slavery should be governed by laws which guarantee that the basic needs of the slave, apart from liberty, will be met. More particular regulations, including the number of slaves, their public privileges and possibilities for enfranchisement will relate to the specific nature of the political regime.[105] Thus, civil slavery, as a form of human association within a regime, is one feature of domestic organisation which is governed for the most part by broader considerations relating to the political structure itself, including both its past abuses and present needs.

Strict domestic slavery is distinguished from civil slavery in that the former is established clearly within the bounds of the family.[106] It refers generally to the treatment of women in certain countries, and in particular to the practice of polygamy, although Montesquieu also includes reflections on the practice of polyandry in this discussion. Here forms of domestic slavery are linked to climactic conditions, trends in population as well as local and particular reasons such as the need in Malabar to perpetuate a military caste.[107] Despite these reasons, Montesquieu recognises that in itself the practice of polygamy is of no general utility.[108] This coincides with his assertion that the servitude of women

conforms to the general practices of a despotic regime.[109] This derives from an excessive concern for the promotion of public tranquillity by means of general subservience and a climate of suspicion. In contrast, moderate government is seen to coincide with greater equality in domestic relations.

Thus, in general, domestic association is a sphere governed by a series of dispositions. With regards to the relation between parents and children, fundamental rules are dictated by natural law and take the form of duties of parents to feed, clothe and educate their children. It is a set of natural rules which civil law should not contravene, although these rules will not necessarily be formally codified in each society. In contrast, relations between men and women in the household, for Montesquieu, are more directly linked to the nature of the political regime and serve more as a symbol of a history of liberty or oppression than as any effective barrier against the claims or demands of an encroaching state. As such, his theory offers little resources for those who might look to the household as a privileged locus for a general program of social reform.

VI. International association.

In contrast to the formalised procedures of political society and the general presumption in favour of social peace, international association is governed essentially by the rule of force:

> ...les princes, qui ne vivent point entre eux sous des lois civiles, ne sont point libres; ils sont gouvernés par la force; ils peuvent continuellement forcer ou être forcés. De là il suit que les traités qu'ils ont faits par force, sont aussi obligatoires que ceux qu'ils auraient faits de bon gré.[110]

The absence of civil law creates an alternative form of association and consequent rules of obligation. The conduct of princes and of those peoples who have no pastoral existence and no landed property is regulated rather by the droit des gens, understood by Montesquieu as a form of law distinct from civil law and which is

both compatible with, and serves to justify the use of force.[111] The first rule identified by Montesquieu in this perspective is that of a natural right of self-defence.[112] In contrast to traditional just war theories which harboured a somewhat broader notion of just cause on the basis of any injury received, or the Grotian stance which further extended the logic by allowing for wars in defence of commercial interests in the high seas and for any perceived violation of natural law by another state, for Montesquieu, the right of self-defence is presented as the sole precept by which war among states can be justified. Even so, he does recognise that this threat to self-preservation does not have to be immediate and that a preemptive attack is justified if a future threat is perceived.[113] Montesquieu argues that any wider forms of justification, whether they be based on considerations of collective glory, benevolence, or utility will only serve to perpetuate unjust violence.

Nonetheless, Montesquieu does go on to recognise a legitimate right of conquest which itself derives from the right of war.[114] He notes four rules by which the act of conquest is regulated. The first, that of its being guided by an ultimate objective of conservation, is the most important, in that it outlaws all operations which would seek to eliminate, disperse or enslave a society (practices which Montesquieu saw as most predominant in the time of the Romans, despite the more modern example of the Spanish conquest of America). The remaining rules of conquest are that of natural reason which dictates a form of the golden rule, the laws of political societies that accommodate the inevitable corruption and decline of a state, and the rules governing the act of acquisition which also work in favour of conservation.

In addition to these general rules governing the act of conquest, Montesquieu notes the impact on the conquering regime. As an echo of his earlier work, and in a tradition of political reflection that goes back at least to Polybius, he notes that a republic which expands itself in conquest will easily embark on a path of political decline, unless a careful network of political and civil laws serve to counter the effects of relative tyrannical provincial rule and of an extended

citizenship.[115] While some forms of conquest are compatible with the monarchical regime, this must both be limited and done in a way to keep intact the customs and manners of the conquered peoples.[116] He also praises a practice of the conquering Tartars in China whereby provincial troops and tribunals were composed of citizens from both the conquering and the conquered peoples, a mix which through a form of mutual suspicion, kept all in line in the performance of their duties.[117] Finally, he recognises that a despotic regime engages in wide conquests and seeks to stabilise its acquisitions with the establishment of feudatory states and a special militia to keep order, such as the Ottoman Janissaries.[118] As this analysis suggests, a republic based on citizen virtue may in fact be the most cruel of conquerors, while the despotic regime can be selectively kind and accommodating to its acquired territories. Certainly, throughout the history of early-modern Europe, Ottoman sultans were generally more tolerant of the traditions and religions of their conquered subjects, than many of the supposedly Christian rulers vis-à-vis presumed heretics.[119]

Through these latter considerations, it becomes clear that while the act of conquest is derived from the right of war and thereby related to the preservation of the conquering state regardless of its form, the mode of conquest itself is governed by considerations of what contributes to the political health of the particular form of regime. It shows that the manner in which force is exercised by a state has more important internal implications. The nature of the threat to a state's security provides the context in which a recourse to force may or may not be justified, but does not ultimately regulate how this right will be exercised. It is for this reason that Montesquieu looks to the balance of power in Europe as the essential feature in cultivating a tradition of relative peace, as opposed to the history of Asia where the juxtaposition of strong and weak peoples fostered a history of conquest and wars. This relative peace also contributed to the cultivation of a spirit of liberty in relation to what Montesquieu perceived as a spirit of servitude in the East.[120]

A more sure guarantee of international peace for Montesquieu, then, is not

a form of willed interstate association based on a public commitment to peace, but a structure of international relations which will minimise perceived threats to state security, contribute to a relative balance of power and thereby reduce the number of opportunities for which a recourse to violence and war is justified. However, while helping to preserve peace in the long term, Montesquieu also recognises that in his own era, the competitive build-up of arms to achieve relative security in a balance of force is itself in competition with the collective interests of prosperity and economic diversity.[121] The political project, then, in a foreshadowing of Kant, becomes one not of denying the needs of security in a international context, but of ascertaining the natural guarantees of security such that other economic and social interests will not be sacrificed unnecessarily.

VII. Religious association.

Montesquieu's discussion of religious forms of association is qualified by the observation that it is limited to an analysis of the relation it bears to wider social forms and practices. He suggests that by a natural tendency of the human understanding, terms of religious belief often reflect a predeliction for personal challenge, just as in matters of morality one is drawn, at least in theory, to that which carries a quality of great strictness and purity.[122] Corresponding to this inclination is a set of rules in religious behaviour corresponding to a single, perfect model of action and belief; in contrast to human laws which incorporate an understanding of a diversity of goods.

> ...la nature des lois humaines est d'être soumises à tous les accidents qui arrivent, et de varier à mesure que les volontés des hommes changent: au contraire, la nature des lois de la religion est de ne varier jamais. Les lois humaines statuent sur le bien; la religion sur la meilleur. Le bien peut avoir un autre objet, parce qu'il y a plusieurs biens; mais le meilleur n'est qu'un, il ne peut donc pas changer. On peut bien changer les lois, parce qu'elles ne sont censées qu'être bonnes; mais les institutions de la

> religion sont toujours supposées être les meilleurs.[123]

However, despite the differing objectives of religious and civil law, Montesquieu does not adopt the position of Bayle arguing for the incompatibility of Christian ideals and civil realities.[124] In the chapter leading up to this discussion, Montesquieu had already recognised the benefits of the Christian religion in promoting a less harsh practice of warfare.[125] In addition, where the terms of the established religion are compatible with established principles of morality, he recognises that religion can be a more efficient guarantee of general moral probity, a remark supported by his high praise of the Stoic sect.[126] However, with regard to more strict rules of civil law, in view of forming good citizens, Montesquieu notes the need for each to make up for the deficiencies of the other in pursuit of this goal.[127] Thus, with a less demanding and repressive religion, he notes the need for more severe laws, a dynamic which helps in part to explain the harshness of the Japanese penal laws.[128]

However, despite the possibility for religion to play this complementary role to the objectives of a good order of citizens, Montesquieu in the end recognises that it remains an independent form of association. This essential property both forms the basis for a check on despotic power, as well as the grounds for important jurisdictional limits between canon and civil law.[129] The basis for the division stems in part from the different objectives of the two systems of law. By focusing on what is singly best for human beings, and by being driven by ideals which pose a challenge to prevailing practices, religious law also must speak more to the heart and seek to motivate people by means of council rather than by set rules.[130] Thus, as a general rule, Montesquieu proposes that what is relevant to divine law remain separate from the realm of civil law.

> ...on ne doit point statuer par les lois divines ce qui doit l'être par les lois humaines, ni régler par les lois humaines ce qui doit l'être par les lois divines...Ces deux sortes de lois diffèrent par leur origine, par leur objet et par leur nature.[131]

This assertion is grounded on three points: first, that civil law relates to a changing world and thus must itself change, as opposed to religious law which is to remain invariable while aiming at a model of perfection; second, that religious law provides a necessary element of stability in a context where political stability is not assured, thereby performing a necessary but independent social function; and third, that the authority of religious law is grounded on belief, whereby the authority of civil law is based ultimately on fear, implying that by drawing on different psychological bases of authority, their ongoing regulation and administrative points of reference must also differ.[132] He adds in a later chapter that given the object of individual perfection in the drafting of religious law, it has less regard for those more general considerations of the pursuit of a common good which forms the basis for civil law.[133] It is also for these reasons that Montesquieu asserts specifically that there be no penal laws in matters of religion.[134]

Thus, his arguments for a form of secular state do not derive from a strong conviction for a need of wide religious toleration based on a conception of a right to liberty of conscience, nor from a form of scepticism. They are rooted ultimately in a sense that forms of association for purposes of religious worship and belief are guided by objectives and principles which may not always coincide with the purposes and rules of civil association.

VIII. Commercial association.

Commerce and other forms of economic activity, as an autonomous pattern of association, in contrast to religion, are not seen by Montesquieu as grounded primarily on a unique set of principles relating to an alternative ideal of human commmunity. Nor does he trace the practices to his earlier exposition of the bases and features of human sociality (while narrowing the meaning of commerce from a traditional understanding covering a wide array of forms of human communication, to a more restrictive economistic one).[135] While trade harbours

the presumption of mutual needs, its character as an independent form of association is given an historical grounding. Its modern characteristics are shaped largely by the various devices, such as letters of exchange, by which (mainly Jewish) merchants in the late middle ages sought to protect their livelihood in the face of political and clerical opposition to what what was regarded as corrupt and sinful behaviour.[136] These devices were designed expressly to work around, if not against, the schemes and priorities of political rulers. With the breaking down of the scholastic model, the generation of wealth and the practice of commerce were no longer seen to be a part of the state's domain, but a force which could in many ways challenge established political boundaries and whose movements and laws political leaders themselves would come to respect.[137]

Montesquieu combines a wide understanding of the constituents of wealth which includes land, movable goods, as well as acquired labour skills and the opportunity to practice them.[138] By this definition he stands opposed to traditional mercantilist theories which seek to attribute wealth to the state itself with little consideration for those constituents which are in constant circulation and outside direct political control. For this reason, his reflections on the factors which promote economic development prescribe more of a reactive than active role for political leaders. He recognises that one of the best incentives to the generation of wealth is wealth itself and the general spirit of ambition which it can foster, in a climate where gains procured would not be threatened.[139] By this assertion, he draws on a common argument of the Bordeaux court in the years of his service, namely that public prosperity is highly dependent on a general sense of security and confidence. In contrast, if a worker were not rewarded in accordance with the work expended, or if expected returns were to be denied or confiscated, a general distaste for work would be encouraged. It is in part for this reason, that Montesquieu recognises the need for clear discernment on the degree of taxation a community will suffer. He asserts that taxes must be levied with an awareness of the forms of economic livelihood in the jurisdiction, given that state revenues are used largely to create an environment of security for existing wealth

and property.[140]

For the same reason, he advocates that the value of money always be "real" (as opposed to "ideal"), that is, predicated on the real value of the metal standard.[141] He also notes that the infertility of land and a more harsh climate may encourage industriousness given the need to make up for natural deficiencies.[142] The nature of the land and its economic uses may also affect population size. While largely pastoral terrain will draw and sustain only a small number of individuals, land devoted to the farming of wheat or vineyards will require a much larger workforce.[143]

An additional factor conditioning the degree of industriousness, for Montesquieu, is the general moral disposition of the population. He recognises that vanity is a great incentive to industry and luxury, as opposed to pride which encourages laziness.[144] This vanity, ambition and desire for gain are deemed to be indispensable for a regime in which a general inequality in the distribution of wealth and the division of labour requires that many produce more than they need themselves in order to provide for all.[145] He notes that it is largely the work of artisans which help instill this sense of wider needs and which act as important pivots in ensuring increased production.[146] Through this analysis, Montesquieu shows the need to be aware of the relations between various economic sectors and to examine their bearing as a whole on social organisation and development.

Given the independent dynamic of commercial activity, laws themselves are analysed according to their relation to the predominant forms of economic activity. As a basic principle, Montesquieu recognises that civil laws serve first and foremost to constitute and protect individuated forms of property.[147] It is for this reason that they will also vary in number and disposition according to the prevailing forms of property and modes of subsistence.[148] Thus, a nomadic and pastoral society will have few written, civil laws and instead be governed largely by informal morals (moeurs).[149]

The independent effects of commerce include the softening of manners and the taming of harsh prejudices. The history of increased popular communication,

outside the strictly formal channels of diplomatic exchanges, by which the practice of commerce is distinguished serves to increase popular knowledge of other peoples and competing ways of life and thereby to promote peace. It also has led to a greater degree of critical reflection on one's own practices. It is because of this that Montesquieu can in general praise commercial association, despite the recognition that it also is fueled by certain moral sentiments which are less than pure.[150] In particular, apart from his praise of ambition and love of superfluity for assuring that enough is produced to meet the needs of the whole population, given the unequal distribution of land, he also notes how generally virtues themselves can become commodified. The question of payment and commercial exchange will enter into the most trivial matters and render acts of magnamnimity and traditional forms of moral reasoning anachronistic and arbitrary. It gives rise to what Montesquieu calls "un certain sentiment de justice exacte" which acts to extend the principles and reasoning of economic exchange into many realms of human interaction. While it may serve to fashion a less flexible and adaptive moral code, it also is more compatible with a social organisation clearly dependent on a more rigid calculation of benefits and interest which fuels an ethic of ambition.

To say, however, as Hirschman does, that this model of commercial motivation was designed by Montesquieu as a means to constitute a check on the possible abuse of power neglects the extent to which forms of economic association were seen to be separate from political association and thereby could not be governed by identical forms of organisation and reasoning.[151] Montesquieu's theory of commerce may indirectly provide a political check insofar as it constitutes a relatively autonomous activity and thereby generates its own rules to be respected if the ruler is to make economic prosperity a priority. The obvious weakness of this view is that the ruler is nowhere bound to accept this priority. Furthermore, it is a prospect entertained by Montesquieu himself, as shown by his numerous allusions to the almost inevitable corruption of monarchical regimes and by his assertion that monarchies almost certainly end in

poverty.

The extent to which an economy both harnesses and generates ambition also depends on the type of commercial economy. Montesquieu first discusses a commerce based on luxury, one which is compatible with monarchical government and with a distinction of ranks which outlaws commercial practice for the noble class. Here the ambition of commerce feeds into a wider drive for personal distinction, yet does not overtake, nor indeed coincide with, the principle of honour by which the ranks are determined.[152] Commerce of luxury is distinguished from a commerce of economy which is focused more directly on exchange itself, rather than on the development and procurement of luxury items.[153] In regimes characterised by the practice of a commerce of luxury or commerce of economy, it is important for the legislator to respect the values and forms of activity which dominate each. Thus, he argues against the establishment of state banking institutions in luxury economies, given the propensity of rulers to adopt its funds as their own.[154] Apart from the general climate of insecurity generated by Law's System, it is perhaps also this possibility which led Montesquieu in another passage to assert that Law himself, rather than any recent king, was one of the greatest promoters of despotism in France.[155] In addition, Montesquieu finds an incompatibility between trading companies and a monarchical regime for the same reason that it will transform personal gains into public ones and thereby eventually dampen the spirit of individual inventiveness and ambition.[156] As we saw in chapter two, a similar argument was used by the magistrates of the Bordeaux parlement in opposing the extension of privileges to the Compagnie des Indes occidentales in 1725.

IX. Conclusion.

By this examination of the various dynamics and forms of association, it becomes clear that Montesquieu's notion of the esprit général is to serve more as a heuristic device to account for a multitude of diverse and sometimes competing

allegiances, rather than as a homogeneous or organicist explanation of national unity and character. In fact, one challenge which the work sets up for itself is to account for a diversity of forms of association in a society, while still recognising an underlying principle of unity fostered by types of political association whose varying manifestations meet with different degrees of success.

The role of law, then, is multiple. Universal demands for social order and prosperity place differing specific demands on legislators given the variety of deficiencies and strengths of citizen morals and manners, which in turn are conditioned by the nature of collective responses given to the physical environment and general history of the polity. The form of regime in turn will guide the provisions of the law with regard to the role and rights of the citizens. Finally, other relatively autonomous modes of association, such as commerce and religion, are understood as having their own established ends and generate their own pressures on public leaders, or at least demand that the laws promote those conditions needed to ensure their flourishing.

Thus, Montesquieu predicates his theory of law on an essential and pervasive diversity, but this does not generate a form of scepticism. By recognising that the law is not significant for its dispositions, but only by how it relates to a wider set of social and political considerations, and by again placing these considerations within a framework of wider needs and modes of collective regulation of moral conduct, the disparity among the terms of law is less perplexing. In addition, he recognises that the tendency to adopt certain forms of political response over others in order to regulate conduct and achieve shared ends (i.e. recourse to the use of force and the motive of fear as a common response to the problem of social order), may be misguided in its means if not its objectives. It is for this reason that while all forms of law, as forms of remedy, may reflect certain problems of social association and adjudication, they differ in the degree to which they in turn generate further forms of corruption. This permits Montesquieu to harbour firstly a general theory of the phenomena of law, grounding a largely taxonomical enterprise to classify varying manifestations by

their social and political contexts, and secondly, an assessment of these forms. As sociality works in part from the dynamic that a retrospective consideration of the modes and benefits of association is a basis for an assessment and determination of collective duties, so Montesquieu uses his classification of regimes and consideration of the various forms of association, as a means to discern the mixed qualities in each, as well as those which could be considered in general more worthwhile in promoting desired ends of political rule.

By doing so, Montesquieu was developing a more rich approach to an understanding of the social diversity of his day. While modern theorists of natural law had long been recognising the centrality of the concept of sociality for a developed understanding of how political society functions, they (apart perhaps from Hobbes who holds a tendentious link to this school) ignored the multiplicity of ends and bonds of association possible, and in consequence they also ignored the extent to which sociality might work in ways which could be debilitating. In developing this notion as a central criterion in his classification of regimes, Montesquieu also reaffirms the importance of politics and juridical institutions as responses to a certain social dynamic.

Nonetheless, he does so in a manner quite distinct from earlier reflections on the grounds of sovereignty, obligation and the maxims of the reason of state tradition. The social turn in political theory placed an overwhelming challenge to those earlier theories and provided a new dynamic which they could no longer ignore. Once the concept of sociality brought the acknowledgement of informal modes of social regulation, society could not be conceived merely as an object of power or as a forum where more informal disciplinary practices and means of control would be developed. Instead, it became the locus for its own independent moral regulation. Discipline can not be considered as an independent social dynamic without the recognition that people engage in these practices for certain reasons and towards certain ends. This in turn meant that if rulers were to respect and use these practices and social dynamics to consolidate their own positions, they were also required to respect the values immanent in them. Paradoxically,

it meant that in the interest of greater control, rulers would be forced to acknowledge the ends of various forms of human association, and be led to promote those conditions in which they could prosper.

Having established this general vision of social and political life as presented in Montesquieu's L'Esprit des lois, it is now necessary to examine the implications of these principles for a particular field of public policy. While recalling Montesquieu's own experience as a magistrate in the chamber of the Tournelle (as discussed in chapter three), the next chapter will examine how Montesquieu's theory of associationalism allowed him to develop arguments for certain changes in criminal procedure and for the moderation of punishments.

Endnotes

1. See for example, Bendredin Kassem, Décadence et absolutisme dans l'oeuvre de Montesquieu (Paris and Geneva: Droz, 1960). More recently, Judith Shklar in her Past Masters Montesquieu has asserted that Montesquieu's polemical purpose in writing the work (alongside other philosophical and historical purposes) was an anti-despotic one (pp. 68-69). The links between her own conception of a "liberalism of fear", that is one based on the avoidance of cruelty (fear of fear) and her reading of Montesquieu, are clear.

Those who see the indictment of despotism as a veiled form of critique of absolutist government and as a main intent of the work include Robert Dérathé (In "Introduction", L'Esprit des lois, pp. xxx-xxxii and vol. 1, note n. 1, livre II, 425-26), Melvin Richter [In "Introduction," Selected Political Writings, (Indianopolis: Hackett, 1990), 64-65], Franklin Ford (In Robe and Sword) and most recently, Harold Ellis, "Montesquieu's Modern Politics: The Spirit of the Laws and the problem of modern monarchy in old regime France." History of Political Thought 10(1989), 665-700.

2. I allude here to the criticisms of Voltaire, Anquetil-Duperon, and more recently Paul Vernière. See '"Montesquieu et le monde musulman," In Actes du congrès Montesquieu (Bordeaux: Delmas, 1956), 175-215. See also Lettres persanes, letters 37 and 103.

3. Robert Derathé, "Introduction," L'Esprit des lois.

4. Montesquieu praised Fénelon's Télémaque as "l'ouvrage divin de ce siècle". Pensées, n. 115, p. 214.

5. In the first category I refer to the traditional constitutional readings of the work including, among many others, J.C.M. Vile, Constitutionalism and the Separation of Powers, Nannerl Keohane, Philosophy and the State in France, Elie Carcassonne, Montesquieu et le problème de la constitution française au XVIIIe siècle, and Thomas Pangle, Montesquieu's Philosophy of Liberalism. The second category includes those more prone to a Tocquevillian reading of the work, such as Siedentop, Taylor, looking to the cultivation of proper mores to encourage political moderation and to sustain political freedom. Finally, an approach in which a conception of the interests of state play an important role in guarding against tyrannical rule and towards moderation is offered by Albert Hirschman. The work of Hulliung combines elements of these three but with greatest emphasis on the latter. The work of Donald A. Desserud (in "Beyond Virtue and Honour: Montesquieu and the Problem of England in the Spirit of the Laws", unpublished PhD thesis, University of Western Ontario, 1989) looks to the combination of the political structures of the mixed regime and commercial activity as found in England as Montesquieu's solution to the modern need for political liberty.

6. L'Esprit des lois, III, iii.

7. In Book XI, chpater iv he states, "tout homme qui a du pouvoir est porté à en abuser; il va jusqu'à ce qu'il trouve des limites."

See in particular, Jean-Patrice Courtois, "Historicité de la république dans l'Esprit des lois" L'Homme et la société 94(1989), 61-69, and Georges Benrekassa, La Politique et sa mémoire, 309.

8. In a letter to cardinal Querini written in early 1751, Montesquieu affirmed that "Mon livre est le livre d'un jurisconsulte français." The same point is asserted in various essays written to address the criticisms offered by certain church officials regarding his illedged spinozism and deism, etc.. See "Correspondance" n. 590, In Oeuvres complètes ed. André Masson, vol. 3, p. 1365, and Oeuvres complètes, ed. Oster, 808-31.

This position is supported to a certain extent by J. Dedieu: "...prenons l'ouvrage que Montesquieu a voulu qu'il fût: une série d'études assez indépendantes les unes des autres sur les divers phénomènes- physiques et moraux- qui président à la naissance et au développement des lois, leur corruption n'étant due qu'au mépris des causes qui les produisirent. Sans doute, Montesquieu ne les a point toutes découvertes: mais qu'importe à son dessein? Il veut donner une méthode pour étudies la genèse des lois; il montre la valeur de cette méthode par quelques applications concrètes." In Montesquieu. L'homme et l'oeuvre (Paris: Boivin, 1943), 178. However, as will become clear in the course of the chapter, I do not agree that Montesquieu's more immediate concern is the phenomenon of legal development and corruption itself as much as the nature of the political community reflected and sustained by such laws.

In asserting that Montesquieu's primary intention was a taxonomical one, my position can be compared to the basic intuitions of those who place his work in the sociological tradition. [See most recently, Alan Baum, Montesquieu and Social Theory (London: Pergamon Press, 1979)] However, I do not agree that such a motivation also implies a conscious search for a form of objective knowledge and stands outside or is a radical departure from established traditions of moral thinking and jurisprudence. This touches on certain themes addressed in chapter one and is an argument that has been made in various forms by Mark Waddicor (Montesquieu and the philosophy of natural law), Donald Kelley and C.P. Courtney.

9. It is by this point, moreover, that I differ in part from those of the tradition of textual pragmatics who may restrict their understanding of an author's intent to polemical purposes. While it may be granted that these may be sparked as much by contemporary political reasons (to support or undermine one party in debates of the public sphere of the author's day) as by concerns rooted more clearly in an academic sphere (e.g. the quarrel of the ancients and the moderns, or debates over the qualities and limits of dominium), in practice, trends of interpretation within this school of political theory have tended to place more emphasis on the first, or

to collapse the two. The ensuing result is to portray the latter concerns as instrumental to the first.

What I am suggesting by this approach to Montesquieu which I will be developing is that it is possible that the intent to develop a new understanding of law and politics can itself be primary. While this may be worked out in opposition to theories which tend to bolster monarchical prerogative, to assume that an attack on that prerogative is the very point is to deny both that dynamic of the interpretative process which is beyond the conscious grasp of the interpreter and which may lead to sometimes unexpected conclusions, and more importantly, the writer's consciousness of this possibility, yet willingness in good faith to acquiesce to it. It is this reality of the writing process and the writer's consciousness of it which makes it necessary to uphold an analytical distinction between a polemical intent (in the sense of relating to a contemporary political context), for which a conclusion or party position is posited from the beginning of the study and all that lies therein is instrumental to that point (an intent moreover which can be performed to better and lesser extents precisely because the dynamic of writing cannot always be instrumental to that intent), and historical and philosophical intents whose arguments, while constructed in opposition to a variety of theories of their day, may result in unexpected consequences on a practical level. I stress therefore, with the risk of excessive repetitiveness, that Montesquieu's primary objective in L'Esprit des lois is clearly to offer a new framework for understanding and comparing laws and regimes, one which is fashioned in part in reponse to the inadequacies of contemporary trends in jurisprudence. What directed the choices of the means by which this intent was pursued and what in the end is the practical consequence of the working through of this understanding are another matter.

10. In a letter to commander Solar written on March 7, 1749 Montesquieu states: "Il y a vingt ans que je découvris mes principles: ils sont très simples; un autre qui aurait autant travaillé que moi aurait fait mieux que moi." "Correspondance", n. 468 in Oeuvres complètes, ed. A. Masson, vol 3, p. 1206.

11. "Défense de L'Esprit des lois", deuxième partie.

12. I refer here to Nannerl Keohane's analysis of the individualist tradition of French seventeenth century thinking with its ties to the moralist tradition. See Philosophy and the State in France.

13. The two are linked in that the state of nature as an interpretative device is usually invoked to portray that individual on whom our developed moral intuitions in collective life hold no claim on us. In this context see H.A. Prichard, "Does Moral Philosophy rest on a Mistake?", In Moral Obligation (Oxford: Oxford University Press, 1949).

14. Lettres persanes, lettre 84.

15. Lettres persanes, letter n. 95.

16. Despite this, he is not a pre-Durkheimian. Society is nowhere reified in his conception but deemed to be a collection of individuals. However, forms and rules of association are recognised as distinct from a consideration of a collection of individual motivations because in association, these individual motivations are modified in interaction with others. By focusing on the basic dynamic of human association and the values which could be said to govern it, Montesquieu was also in part confirming his conclusions of the Considérations in its attempt to clarify the forms of social good deemed to be the object of modern politics, as opposed to the goals of national glory and power in the ancient world.

17. See for example, Judith Shklar, Montesquieu, 70 and Brethe de la Gressaye ed., L'Esprit des lois, 17-18.

18. L'Esprit des lois, I, i.

19. "L'homme comme être physique, est, ainsi que les autres corps, gouverné par des lois invariables. Comme être intelligent, il viole sans cesse les lois que Dieu a établies, et change celles qu'il établit lui-même. Il faut qu'il se conduise: et cependant il est un être borné; il est sujet à l'ignorance et à l'erreur, comme toutes les intelligences finies; les faibles connaissances qu'il a, il les perd encore. Comme créature sensible, il devient sujet à mille passions. Un tel être pouvait, à tous les instants, oublier son créateur; Dieu l'a rappeleé à lui par les lois de la religion. Un tel être pouvait, à tous les instants, s'oublier lui-même; les philosophes l'ont averti par les lois de la morale. Fait pour vivre dans la société, il y pouvait oublier les autres; les législateurs l'ont rendu à ses devoirs par les lois politiques et civiles." L'Esprit des lois, I, i.

20. This is a point which Montesquieu shared in common with the natural law theorists of his day who deemed the bulk of civil law to be arbitrary and harbouring no threat to the established universal principles of their moral framework. That is, he shared the point that a diversity of legislation is not a necessary indicator of an absence of moral truth. However, he did differ with the theorists of natural law in recognising that most positive law was not arbitrary.

21. "Outre le sentiment que les hommes ont d'abord, ils parviennent encore à avoir des connaissances; ainsi ils ont un second lien que les autres snimaux n'ont pas. Ils ont donc un nouveau motif de s'unir; et le désir de vivre en société est une quatrième loi naturelle." L'Esprit des lois, I, i.

22. It is because of this move to ground human sociality on the understanding that Montesquieu's theory cannot be assimilated to that of Hobbes, contrary to the thesis of Thomas Pangle. See his Montesquieu's Philosophy of Liberalism, chap. 3.

23. L'Esprit des lois, I, i. His fable of the Troglodytes in Lettres persanes also is designed to make the same point.

24. L'Esprit des lois, I, iii. This point is reiterated in VIII, iii, "Dans l'état de nature, les hommes naissent bien dans l'égalité; mais ils n'y sauraient rester. La société la leur fait perdre..."

25. See Ernest Barker, The Politics of Aristotle (Oxford: Clarendon Press, 1948).

26. In this sense, he is more a theorist of Europe than of constitutional monarchy.

27. This point has been made (though perhaps too starkly given new understandings of the complexity of absolutist policies) by Jean-Marie Goulemot: "Nouveau paradoxe d'un Montesquieu antiabsolutiste qui devrait à l'absolutisme lui-même sa compréhension théorique de l'unité et de la rationalité des faits sociaux et politiques." In "Errances sur la nature et le principe dans quelques livres de L'Esprit des lois" Europe 574(1977), 28.

28. L'Esprit des lois, III, i.

29. See his critical edition of L'Esprit des lois, vol. 1, 433.

30. See Book VIII, viii. China provides the case wherein a tradition of strong moeurs is allied with political despotism.

31. "Les moeurs et les manières sont des usages que les lois n'ont point établis, ou n'ont pas pu, ou n'ont pas voulu établir.

Il y a cette différence entre les lois et les moeurs, que les lois règlent plus les actions du citoyen, et que les moeurs règlent plus les actions de l'homme. Il y a cette différence enter les moeurs et les manières, que les premières regardent plus la conduite intérieure, les autres l'extérieure." L'Esprit des lois, XIX, xvi.

32. Pangle, Montesquieu's Philosophy of Liberalism, 44.

33. See in particular, L'Esprit des lois, III, v and vi.

34. Here my assessment is diametrically opposed to that of Thomas Pangle. Pangle (in Montesquieu's Philosophy of Liberalism, 49) argues that the nature of government is primary because the principle is said to derive from the structure of government. In real terms, however, the assertion does not correspond to Montesquieu's own arguments for which clearly if a governmental structure has no clear relation to characteristics of the population, it will not be able to create unilaterally a new form of social disposition to further its effectiveness.

35. L'Esprit des lois, IV, v.

36. L'Esprit des lois, III, v. Later on , however, he does assert that the exercise of political virtue will bring the practice of particular virtues in its wake. "On peut définir cette vertu, l'amour des lois et de la patrie. Cet amour, demandant une préférence continuelle de l'intérêt public au sien propre, donne toutes les vertus particulières; elles ne sont que cette préférence." (IV, v)

37. L'Esprit des lois, IV, v.

38. L'Esprit des lois, III, iv.

39. L'Esprit des lois, VIII, ii.

40. Part of this argument is taken from my "Montesquieu and the Metamorphosis of Political Virtue", an unpublished paper presented at ASECS, 1991.

41. On classical conceptions of virtue (in addition to the conventional sources in the work of Thucydides, Aristotle, Cicero, Tacitus, etc.), see for example, Alasdair MacIntyre, After Virtue (London: Gerald Duckworth and Company, 1981), Cynthia Farrar, The Origins of Democratic Thinking (Cambridge: Cambridge University Press, 1988), Donald Earl, "The Roman Tradition," In Classsical Values and the Modern World, ed. Etienne Gareau (Ottawa: Les Editions de l'Université d'Ottawa, 1972) and John Ferguson, Moral Values in the Ancient World (London: Methuen and Company, 1958), chap. 9.

42. "Pourquoi les moines aiment-ils tant leur order? C'est justement par l'endroit qui fait qu'il leur est insupportable. Leur règle les prive de toutes les choses sur lesquelles les passions ordinaires s'appuient: reste donc cette passion pour la règle même qui les afflige. Plus elle est austère, c'est-à-dire, plus elle retranche de leurs penchants, plus elle donne de force à ceux qu'elle leur laisse." Esprit des lois, V,ii.

Given this, it is odd that Pangle construes Montesquieu's republican virtue as merely an argument for collective self-rule grounded in consideration of the means necessary to ensure self-preservation and negative liberties (a model almost identical to that attributed to Machiavelli by Quentin Skinner). See Pangle, Montesquieu's Philosophy of Liberalism, 54 and Quentin Skinner, "The Idea of Negative Liberty," In Philosophy in History, eds. Richard Rorty et al. (Cambridge: Cambridge University Press, 1984), 193-221.

43. L'Esprit des lois, V, v.

44. By implication then virtue must be understood to be something beyond merely collective self-rule and popular patriotism, as assumed by Pangle. See Montesquieu's Philosophy of Liberalism, 54 and 58.

45. See Oeuvres complètes, 826.

46. L'Esprit des lois, IV, v.

47. L'Esprit des lois, IV, vii.

48. Ibidem.

49. L'Esprit des lois, VI, viii.

50. L'Esprit des lois, V, iii.

51. L'Esprit des lois, V, vii and xix.

52. L'Esprit des lois, VIII, xvi.

53. Authors taking this position include, David Lowenthal, "Montesquieu" In History of Political Philosophy, eds. Leo Strauss et al. (Chicago: University of Chicago Press, 1981), 487-508 and Pierre Rétat, "De Mandeville à Montesquieu: honneur, luxe et dépense noble dans l'Esprit des lois" Studi francesi 50(1973), 238-49.

54. L'Esprit des lois, IV, ii.

55. L'Esprit des lois, III, vi and vii.

56. L'Esprit des lois, IV, ii.

57. "L'Etat subsiste indépendamment de l'amour pour la patrie, du désir de la vraie gloire, du renoncement à soi-même, du sacrifice de ses plus chers intérêts, et de toutes ces vertus héroiques que nous trouvons dans les anciens, et dont nous avons seulement entendu parler." L'Esprit des lois, III, v. See also IV, iv and V, ii.

58. L'Esprit des lois, IV, ii.

59. L'Esprit des lois, IV, ii.

60. "...il ne peut se trouver que dans des Etats où la constitution est fixe, et qui ont des lois certaines." L'Esprit des lois, III, viii.

61. On this point, see Julian Pitt-Rivers, "Honour and Social Status", In Honour and Shame, ed. J.G. Peristiany (Chicago: University of Chicago Press, 1966), 21.

62. L'Esprit des lois, III, vii.

63. See L'Esprit des lois, III, vi and IV, ii.

64. This idea comes across in a passage found in the Défense de l'Esprit des lois: "Considérez les gens du monde entre eux; il n'y a rien de si timide: c'est l'orgueil que n'ose pas dire ses secrets, et qui, dans les égards qu'il a pour les autres, se quitte pour se reprendre. Le christianisme nous donne l'habitude de soumettre cet orgeuil; le monde nous donne l'habitude de le cacher. Avec le peu de vertu que nous avons, que deviendrions-nous, si toute notre âme se mettait en liberté, et si nous n'étions pas attentifs aux moindres paroles, aux moindres signes, aux moindres gestes." (821).

65. L'Esprit des lois, III, vii.

66. This is a position argued by Charles Taylor most recently in his "Multiculturalism and the Politics of Recognition," In Multiculturalism and the Politics of Recognition: an essay, ed. Amy Gutman (Princeton, N.J.: Princeton University Press, 1992).

67. These numbers are drawn from François Bluche, La Vie quotidienne de la noblesse française au XVIIIe siècle (Paris: Librairie Hachette, 1973), 12.

68. Peter Berger, "On the Obsolescence of the Concept of Honour," Archives européennes de sociologie 11(1970), 339-47. However, in certain contrast to Berger, this reading of Montesquieu's conception of honour does not centre on questions of individual identity alone, but rather on how forms of identity serve to regulate social and moral behaviour.

69. On this point, see for example, Corrado Rosso, Montesquieu moraliste (Bordeaux: Ducros, 1977), 99-104; Althusser, Montesquieu, 76ff and Pierre Rétat, "De Mandeville à Montesquieu: honneur, luxe et dépense noble dans l'Esprit des lois", 240ff.

70. L'Esprit des lois, VIII, vii.

71. L'Esprit des lois, VIII, vii.

72. See L'Esprit des lois, VIII, vi and vii.

73. This shows that the rise of the dignity ethic in the modern era (understood as a recognition of a valued notion of a basic humanity irrespective of socially imposed norms and rules and the foundation for the respect of basic rights) is in no way to be seen as the logical outgrowth of the decline of honour. This definition of the dignity ethic and understanding of a historical transition from a society based on 'honour' to one based on 'dignity', can be found in Peter Berger's "On the Obsolescence of the Concept of Honour" and Charles Taylor's, "Multiculturalism and the Politics of Recognition".

74. L'Esprit des lois, VIII, viii.

75. L'Esprit des lois, III, x.

76. L'Esprit des lois, IV, iii.

77. L'Esprit des lois, IV, iii and V, xiv.

78. L'Esprit des lois, V, xiv.

79. This first line of argument has been fully developed in Mark Hulliung's Montesquieu and the Old Regime.

80. L'Esprit des lois, VI, i.

81. "Chez les peuples sauvages qui mènent une vie très dure, et chez les peuples des gouvernements despotiques où il n'y a qu'un homme exorbitamment favorisé de la fortune, tandis que tout le reste en est outragé, on est également cruel." L'Esprit des lois, VI, ix.

82. L'Esprit des lois, V, xiv.

83. L'Esprit des lois, XIX, iv.

84. L'Esprit des lois, XIX, x.

85. L'Esprit des lois, XIX, xi.

86. L'Esprit des lois, XIX, xvii.

87. For a closer look at Montesquieu's theory of climate, see Judith Shklar, "Virtue in a bad climate: good men and good citizens in Montesquieu's L'Esprit des lois," In Enlightenment Studies in honour of Lester G. Crocker, eds. A.J. Bingham and V. Popuzio (Oxford: The Taylorian Institute, 1980); André-Pierre Merquiol, "Montesquieu et la géographie politique," Revue internationale d'histoire politique et constitutionnelle (1957), 127-46; and Robert Shackleton, "The Evolution of Montesquieu's theory of climate," Revue internationale de philosophie 9(1955), 317-29.

88. L'Esprit des lois, XIV, ii.

89. For a discussion of the role of the legislator in overcoming the effects of climate see Judith Shklar's "Virtue in a bad climate," In Enlightenment Studies in honour of Lester G. Crocker, eds. A. Bingham and V. Popuzio.

90. "La stérilité des terres rend les hommes industrieuc, sobres, endurcis au travail, courageuc, propres à la guerre; il faut bien qu'ils se procurent ce que le terrain leur refuse. La fertilité d'un pays donne, avec l'asiance, la mollesse et un

certain amour pour la conservation de la vie." L'Esprit des lois, XVIII, iv. This is also evident in his discussion of the Chinese: "Par la nature du climat et du terrain, il a une vie précaire; on n'y est assuré de sa vie qu'à force d'industrie et de travail."

91. L'Esprit des lois, XIX, viii and xvi.

92. L'Esprit des lois, XXIII, ii.

93. On this latter point, see also L'Esprit des lois, XXVI, xiv.

94. L'Esprit des lois, XXIII, vii. By this wider conception of property, Montesquieu shows himself to be carrying on a more traditional, pre-Lockean view.

95. Ibidem.

96. L'Esprit des lois, XXIII, xi.

97. L'Esprit des lois, XXIII, iv.

98. L'Esprit des lois, XXVI, vi.

99. It is also for this reason that the rules regarding the status and treatment of bastards differs widely in varying regimes. "Maxime général: nourrir ses enfants, est une obligation du droit naturel; leur donner sa succession, est une obligation du droit civil ou politiquel De là dérivent les différentes dispositions sur les bâtards dans les différents pays du monde; elles suivent les lois civiles ou politiques de chaque pays." Ibidem.

100. L'Esprit des lois, XV, i.

101. L'Esprit des lois, XV, ii, iii and iv.

102. L'Esprit des lois, XV, vi and vii.

103. L'Esprit des lois, XV, vii.

104. L'Esprit des lois, XV, viii.

105. L'Esprit des lois, XV, xvii.

106. L'Esprit des lois, XVI, i.

107. L'Esprit des lois, XVI, ii, iv and v.

108. L'Esprit des lois, XVI, vi.

109. L'Esprit des lois, XVI, ix.

110. L'Esprit des lois, XXVI, xx.

111. L'Esprit des lois, XXVIII, xxvi.

112. "...la défense naturelle est d'un ordre supérieur à tous les préceptes." L'Esprit des lois, XXVI, vii.

113. "...entre les sociétés, le droit de la défense naturelle entraîne quelquefois la nécessité d'attaquer, lorsqu'un peuple voit qu'une plus longue paix en mettrait un autre en état de le détruire, et que l'attaque est dans ce moment le seul moyen d'empêcher cette destruction." L'Esprit des lois, X, ii.

114. L'Esprit des lois, X, iv.

115. L'Esprit des lois, X, vi.

116. L'Esprit des lois, X, ix.

117. L'Esprit des lois, X, xv.

118. L'Esprit des lois, X, xvi and xvii.

119. On the rights of subjects under Ottoman rule, see Stanford Shaw, History of the Ottoman Empire and Modern Turkey, vol. 1 (Cambridge: Cambridge University Press, 1976), 151ff. It is clear from a reading of this modern work that Montesquieu for the most part provides a largely distorted picture of Ottoman institutions and practices.

120. L'Esprit des lois, XVII, iii and vi.

121. L'Esprit des lois, XIII, xvii.

122. L'Esprit des lois, XXV, iv.

123. L'Esprit des lois, XXVI, ii. This theme is also addressed in XXVI, ix: "Les lois de perfection, tirées de la religion, ont plus pour objet la bonté de l'homme qui les observe, que celle dee la société dans laquelle elles sont observées: les lois civiles, qu contraire, ont plus pour objet la bonté morale des hommes en général, que celle des individus."

124. L'Esprit des lois, XXIV, vi.

125. L'Esprit des lois, XXIV, iii.

126. L'Esprit des lois, XXIV, viii and x. It is also because of the potential for religious belief to contribute to the health and security of the society where it is established that Montesquieu can advise against an overly speculative religious disposition in chapter eleven of Book XXIV.

127. L'Esprit des lois, XXIV, xiv.

128. "...au Japon, la religion dominante n'ayant presque point de dogmes, et ne proposant point de paradis ni d'enfer, les lois, pour y suppléer, ont été faites avec une sévérité, et exécutées avec une ponctualité extraordinaires." L'Esprit des lois, XXIV, xiv.

129. L'Esprit des lois, XXIV, ii.

130. L'Esprit des lois, XXIV, vii.

131. L'Esprit des lois, XXVI, ii.

132. Ibidem.

133. "Les lois de perfection, tirées de la religion, ont plus pour objet la bonté de l'homme qui les observe, que celle de la société dans laquelle elles sont observées: les lois civiles, au contraire, ont plus pour objet la bonté morale des hommes en général, que celle des individus.

Ainsi, quelque respectables que soient les idées qui naissent immédiatement de la religion, elles ne doivent pas toujours servir de principe aux lois civiles, parce que celles-ci en ont un autre, que est le bien général de la société." L'Esprit des lois, XXVI, ix.

134. L'Esprit des lois, XXV, xii.

135. See Istvan Hont's "The language of sociability and commerce: Samuel Pufendorf and the theoretical foundations of the 'Four-stages Theory'" In The Languages of Political Theory in Early-Modern Europe, ed. Anthony Pagden (Cambridge: Cambridge University Press, 1987), 253-76.

136. L'Esprit des lois, XX, ii and XXI, xx.

137. See also in this light L'Esprit des lois, XXII, xv.

138. See L'Esprit des lois, XX, xxiii and XXIII, xxix.

139. L'Esprit des lois, XIII, ii.

140. L'Esprit des lois, XIII, xii. Also, "La finance détruit le commerce par ses injustices, par ses vexations, par l'excès de ce qu'elle impose: mais elle le détruitt

encore, indépendamment de cela, par les difficultés qu'elle fait naître, et les formalités qu'elle exige." (XX, xiii).

141. "Le négoce par lui-même est très incertain; et c'est un grand mal d'ajouter une nouvelle incertitude à celle qui est fondée sur la nature de la chose." L'Esprit des lois, XXII, iii.

142. "...la stérilité des terres rend les hommes industrieux, sobres, endurcis au travail, courageux, propres à la guerre; il faut bien qu'ils se procurent ce que le terrain leur refuse. La fertilité d'un pays donne, avec l'aisance, la mollesse et un certain amour pour la conservation de la vie." L'Esprit des lois, XVIII, iv.

143. L'Esprit des lois, XXIII, xiv.

144. L'Esprit des lois, XIX, ix.

145. L'Esprit des lois, XXIII, xv.

146. Thus, while it is true that economic development beyond a purely agricultural economy requires the production of food surpluses, as recognised by Nicos Devletoglou in his Montesquieu and the Wealth of Nations (Athens: Center of Economic Research, 1963), chap. 2, Montesquieu goes further by recognising that the taste for a certain luxury is a precondition for this increased production.

147. L'Esprit des lois, XXVI, xv.

148. "...les lois ont un très grand rapport avec la façon dontt les divers peuples se procurent la subsistance. Il faut un code de lois plus étendu pour un peuple qui s'attache au commerce et à la mer, que pour un peuple qui se contente de cultiver ses terres. Il en faut un plus grand pour celui-ci que pour un peuple qui vit de ses troupeaux. Il en faut un plus grand pour ce dernier que pour un peuple qui vit de sa chasse." L'Esprit des lois, XVIII, viii.

149. L'Esprit des lois, XVIII, xiii.

150. L'Esprit des lois, XX, i and ii.

151. Albert Hirschman, The Passions and the Interests (Princeton: Princeton University Press, 1977). This same point could be made with regard to Hulliung's analysis of Montesquieu's commercial theories, in Montesquieu and the Old Regime.

152. L'Esprit des lois, XX, iv-x. To collapse Montesquieu's understanding of monarchical honour and his discussion of the role of ambition in commercial association is to disregard the extent to which the honour of a noble rests precisely on a certain conception of his distance from such activity, however much

commerce in the end may contribute to the perpetuation of the position and estate of the nobility.

153. L'Esprit des lois, XX, iv.

154. L'Esprit des lois, XX, x.

155. "M. Law, par une ignorance égale de la constitution républicaine et de la monarchique, fut un des plus grands promoteurs du despotisme que l'on eût encore vus en Europe. Outre les changements qu'il fit, si brusques, si inusités, si inouis, il voulait ôter les rangs intermédiaires, et anéantir les corps politiques: il dissolvait la monarchie par ses chimériques remboursements, et semblait vouloir racheter la constitution même." L'Esprit des lois, II, iv.

See Santé A. Viselli's "Montesquieu et John Law, " in Studies on Voltaire and the Eighteenth Century 303(1992), 649-52.

156. L'Esprit des lois, XX, x.

CHAPTER SIX

PAIN AND THE PURSUIT OF FREEDOM: MONTESQUIEU'S THEORY OF CRIMINAL JUSTICE. PART 1.

It has been argued recently that the writings of Enlightenment reformers on the issue of criminal justice are largely unoriginal and unrelated to the real causes of the change in judicial practices which took place in the early-modern period throughout Europe. On the whole, the development of scholarship in this matter (despite the differences of interpretation) shows scepticism towards former historiographical appeals to the rise of humanitarianism or new forms of collective moral sentiment in the early-modern era. It is evidence of a more probing and critical stance towards our modern institutions in general and to the principles and practices on which they have been said to be grounded.

The argument involves in part the recognition that prior to the Enlightenment similar appeals for moderation were made by theorists such as More, Ayrault and Montaigne without any popular resonance or practical effect. In addition, it has been noted that the reforms advocated, such as abstention from torture and changes in the modes of punishment, were already established trends in many countries by the middle of the eighteenth century. In their alternative accounts of these changes, revisionist historians point to evolving popular sensibilities, new modes of proof, or a growing awareness of the prevailing inefficacy of traditional judicial practices as a preliminary for the adoption of alternate, rather than necessarily more moderate, modes of punishment.[1]

The work of the Enlightenment reformers has been on various levels a victim of these new directions in interpretation. However, while these new studies offer a more probing account with important insights into the changes of the period, the almost exclusive focus on prevailing juridical and social trends in opposition to the works of the reformers, may tilt the balance too much the other way. In particular, they fail to address adequately the central problem these works now pose in the light of this new research, given the presumable contradiction

between their seeming historical ineffectiveness, if not irrelevance, yet substantial contemporary appeal. To complement these studies, therefore, a critical return to these texts is needed, abandoning the presupposition of a preordained community of philosophe argument and seeking new avenues of meaning in a closer study of the links (or the absence of links) the arguments put forward had to actual practices and judicial trends as well as to the intellectual movements of the time. Thus, while drawing on Montesquieu's judicial experience to help make sense of his reflections in these matters in an effort to reconstruct his comprehensive theory of criminal justice, this chapter is also asking (or reasking) the question of the significance such arguments might have for the theories and practices of justice in his own day.

Voltaire criticised Montesquieu for focusing predominantly on foreign practices of criminal justice in L'Esprit des lois and for not developing an adequate critique of criminal justice within France.[2] Nonetheless, Montesquieu's historical and cultural examples were not unmotivated and fully separate from his own experiences, even if the spirit of a demanding humanist scholarship could sometimes defuse these choices of their critical potential. Contrary to Voltaire, a close reading of the work will show the strong presence of a dialogue with some of the themes and approaches which characterised the work of the Bordeaux parlement as outlined in previous chapters.

In fact, considerations on the practice of criminal justice are not limited to books 6 and 12 of L'Esprit des lois but pervade the work and are as relevant to his discussions of religion, commerce and early French history as to passages discussing civil freedom in general. An analysis of Montesquieu's theory of criminal justice involves therefore a broad exploration of his work bringing its various features to bear on one another and with necessary attentiveness to the tensions and silences to which his more unsystematic approach may be prone. As Braithwaite and Petit have shown, narrow studies of particular features of criminal justice, such as principles of prosecution and punishment can be deceptive in that they ignore the repercussions various prescriptions will have on other elements of

the system, such as policing and civil freedom.[3] For this reason, it is important to emphasise the relations among these features.

The chapter is divided into two sections. First, there is a discussion of Montesquieu's relative silence on the issue of the justification of the state's right to punish, a silence which distinguishes his work from main-stream jurisprudence. It will be argued that this silence is deliberate relating as it does to Montesquieu's attempt to recast the issue of criminal justice in terms which go beyond the mere question of a ruler's judgement. Second, there will be a consideration of the various means and instruments by which a policy and practice of criminal justice is conducted. Here, two levels of analysis are recognised in Montesquieu's work. At one level, he is showing that all political societies in their exercise of criminal justice tend to the limited political good of providing a form of stable social order, although the means through which this good can take form are varied. He complements this first level of analysis with a second which considers how the end of political order can also be combined and reconciled with other ends, the most important being that of freedom. In the next chapter, I examine the three strategies invoked by Montesquieu to study how these various features of a criminal justice policy can be combined, as well as their links to various features of public law and social and economic development. This involves showing how Montesquieu's analysis of the instruments and goals of a criminal justice system applies to his typology of regimes, to his study of the early development of criminal justice in France, and finally to his remarks on various stages of criminal procedure of his own day. In recognising the possibility of diverse paths to the fulfilment of his predetermined political values (paths whose direction is dictated in part by the nature of the constituency) and by reworking traditional themes of the practice of criminal justice in eighteenth century France in the light of wider social considerations, this chapter and the next show how Montesquieu uses associational discourse (for which his experience in Bordeaux was formative) to develop a new understanding of criminal justice. While this dynamic permits Montesquieu to come to terms with and to accept a diversity of judicial practices

on non-sceptical grounds, it also generates its own difficulties. Most notably, it gives rise to a certain tension in his characterisation of monarchical society itself calling for formalised and standardised methods of policing, procedure and punishment, combined with a sensitivity to regional and social diversities.

I. Early-modern justifications for the state's right to punish.

Montesquieu acknowledges a general debt to intellectual predecessors in France, Germany and England, however little he may cite his sources.[4] Nonetheless, with regards to a fundamental question widely discussed in the field of criminal justice, namely the grounds of the state's right to punish, Montesquieu remains largely silent. This may be explained in part by the inadequacies of the prevailing arguments as well as the attempt by Montesquieu to reformulate the general issue so as to turn the focus away from the narrow consideration of state responsibilities and reactive policies.

In the intellectual resources of the early-modern period, one can identify three main arguments justifying the state's monopoly over punishment appealing, respectively, to natural right, the social contract and utility.[5] While in the texts of early-modern thinkers these strands of argument are generally intertwined, one can nonetheless identify those thinkers which place greater weight on one over another. In his Second Treatise, Locke conceptualises punishment, in the form of reparation and restraint, as a pre-political right residing in the individual and derived from the natural law and its precepts of individual and collective self-preservation.[6] The notion of a pre-political right to punish is consonant with the earlier position of Grotius (however, for Grotius this right to punish itself is founded on purely retributivist considerations as a necessary response to the evil perpetrated rather than as a means to further the ends prescribed by natural law).[7] For Locke, in the transition to civil society, this right is wholly transfered to the state although the right to self-defence is retained in cases where the magistrate is distant or absent. The state is conceived as a more efficient wielder of a right

which derives its ultimate justification from the individual channeled and aggregated by the act of popular consent. The position ultimately serves not only to justify a monopoly of state violence towards its own citizenry, but also provides an account which justifies international violence on the grounds that the international arena is governed by the rules and rights of the state of nature.

This may be distinguished from the position which depicts the act of punishment as in essence a public attribute originating from the social contract itself, and not in a pre-established individual right to punish. In the Law of Nature and Nations Pufendorf states that it is not the transfer of right but rather the act of wills coming together that gives power to the state to use all means to protect the collectivity and preserve public order, including the power to punish.[8] Such a prescription ties in with Pufendorf's understanding of the law as a command backed up by force, for in the state of nature, where no human law exists, punishment, as a manifestation of justified force, would have no place (except as that which God would wish to inflict).[9] In this way, recourse to domestic and international violence is no longer grounded on a pre-political right to punish, but on the very need for security and peace which is the object of political association.

Both accounts justify a de facto state monopoly over the formal institutions of punishment; however, on close examination, they also run into a problem of having to explain why the individual would give their consent to the future possibility of being punished, thereby contravening the overriding consideration of self-preservation (something which Hobbes resolves with a permanent right of resistance). For Locke, it also raises the more general question of how a public body, in the absence of any immediate threat, may have the power over the life and death of another when its members do not have the same power over their own lives individually (given the workmanship model which gives the divine creator a stake in the fate of the creation). Locke argues that the committing of a criminal act involves a claim to absolute and arbitrary power over another and thus represents the criminal's defaulting from the community of consent, a form

of declaration of personal war and a voluntary acquiesence to be ruled by the dictates of force rather than right.

> ...Man not having such an Arbitrary Power over his own Life, cannot give another Man such a Power over it; but it is the effect only of Forfeiture, which the Aggressor makes of his own Life, when he puts himself into the state of War with another. For having quitted Reason, which God hath given to be the Rule betwixt Man and Man, and the common bond whereby humane kind is united into one fellowship and societie; and having renounced the way of peace, which that teaches, and made use of the Force of War to compasse his unjust ends upon another, where he has no right, and so revolting from his own kind to that of Beasts by making Force which is theirs, to be his rule of right, he renders himself liable to be destroied by the injur'd person and the rest of mankind, that will joyn with him in the execution of Justice, as any other wild beast, or noxious brute with whom Mankind can have neither Society nor Security.[10]

It is the attempted exercise of absolute control over another, thereby threatening the other's right to self-preservation, which links the common aggressor and the despot and which makes them equally guilty and liable to capital punishment. If, however, as Locke argues, no one can have an absolute power over their life (it being a divine gift), it would seem that the possibility of forfeiture of a right to life is as problematic as that of consent, once the immediate threat of harm is overcome (in which case the immediate right of self-defence would justify the taking of the other's life). The possibility of forfeiture implies a prior individual responsibility for one's life and thus a form of control which can be denied or invalidated by the exercise of certain actions outlawed by the law of nature. It therefore shifts the power of life and death back on to the individual, a power which initially he set out to deny and on which the illegitimacy of despotism depends. Locke's reference to the justified invocation of the laws of the animal kingdom in the event of unwarranted aggression in the passage above introduces an unprecedented consequentialist reasoning and justification for capital

punishment that covers over the difficulties he encounters in justifying this policy from the rules of right alone.[11]

Pufendorf seeks an alternate solution, positing a form of the veil of ignorance and individual presumption of innocence which will permit individuals to consent to a state that will punish and harm potential aggressors conceived as 'others'.

> Quelques-uns prétendent, que, quand un Souverain ôte quelque chose à ses Sujets en forme de punition, il le fait en vertu de leur propre consentement, parce qu'en se soûmettant à son empire ils ont promis d'aquiescer à tout ce qu'il voudroit ou qu'il feroit. Mais il vaut mieux dire, que, comme il dépend des Sujets de ne donner à leur Souverain aucune juste occasion de les punir de mort; chacun regarde l'usage actuel de ce Pouvoir par rapport à lui, comme un cas qui n'arrivera jamais.[12]

However, while this may solve the immediate problem of justifying punishment, it leads one to question whether the contract itself does not become a mere charade taken as it is in a spirit of both fear and personal delusion.

As an alternative to the problems raised by contractualist and rights theories in a justification of the state's right to punish, theorists of utility appealed to the privileged position of the state as an instrument to promote the prescribed political ends of securing public order and preserving private holdings. While written after Montesquieu's death, Beccaria's On Crimes and Punishments (1764) is a classic expression of forms of proto-utilitarian thinking dominant throughout the eighteenth century.[13] Beccaria understood the laws as being means by which the play of human passions could be checked, offering a variety of incentives and disincentives to perpetually defer an underlying tendency to disorder and a return to an original state of chaos. However, as the protection of public security is the purpose of association and the justification for punishment, the state in Beccaria's view cannot exercise this power to a degree beyond what is necessary to secure this goal.[14] Furthermore, as it is by means of law that this end is secured, punishments themselves must be seen as deriving from the terms of the law, and

not from the sovereign alone or his appointed magistrates. But while this version of a proto-utilitarian framework bypasses the problem of consent, it too readily and unproblematically envisions forms of punishment established by law as the necessary and transparent solution to problems of social order. Beccaria does not enquire into other means to promote the prescribed end, nor does he consider other social meanings and functions the institution of punishment might have, for example the expression of collective moral outrage, or the reflection and reinforcement of social distinctions.

The inadequacies of prevailing approaches to the institutions of criminal justice served as one justification for the attempt at an alternative strategy. If one places a consideration of Montesquieu's cursory examination of the origins of political society in Book I of L'Esprit des lois and various general statements strewn throughout the work relating to the nature of punishment alongside the prevailing arguments of the intellectual traditions of his day, one can recognise a move away from a solely state-centred model of crime control through punishment conceived as a state's use of force on its own citizens. Instead, one finds an openness to multiple responses and strategies, with some forms of punishment, such as the dynamics of public shame, founded directly on social sentiment, to be managed but not dominated by the state.[15] The recognition of sources of punishment independent of political monopolies of force can be seen as derivative of a judicial experience which both operated alongside prevailing forms of informal dispute settlement in the early-modern period and drew on forms of popular participation and persistent collusion for its own efficacy with the use, for example, of personal denunciations and public punishments. It also relates more closely to a form of judicial enforcement which was intertwined with wider policing considerations in the jurisdiction as a whole.

For this reason, the transition from pre-political to political society as sketched in Book I of L'Esprit des lois does not involve the expressed transfer of rights of punishment or the problem of consent to punishment. Montesquieu speaks of the right to private vengeance and self-preservation as a justification for

killing for reasons of self-defence in the pre-political society; however, in contrast to Locke he does not speak of an initial right to punish.[16] Political society is established as a response to the immediate need for internal and external peace, but it is also driven by a more general motivation grounded in natural sociality.[17] The founding of political society is in fact overdetermined serving the causes of international, national and civil order. In addition, his characterisation focuses more prominently on the object of association than on the means by force to secure this order. In relation to previous accounts, therefore, initially Montesquieu's rendition obfuscates the centrality of criminal justice as a visible instrument of the state.

Significantly, in this enterprise, Montesquieu removes penal justifications for international intervention against state actions deemed to be violations of natural law, justifications which had been so important to Grotius (and which are being revived, though applied selectively, in the modern era). Nonetheless, punishment as legitimate acts of harm perpetrated by an established state towards its own citizens is justified for Montesquieu within the sphere of civil law by the general object of association being the protection and guarantee of public peace. This must be seen in conjunction with an initial characterisation of the purpose of positive law being to recall to human beings their duties (rather than the protection and enforcement of rights).[18] Thus, it is a development from the initial grounding for social life in natural sociality. In this manner, positive law with its corresponding sanctions is seen not as providing a structure for the immediate adjudication of individual claims and the redress of injuries so much as one last means of recourse when other forms of education or social accomodation fail.

By placing more emphasis on the initial object of association rather than the terms of the contract by which it may be instituted, Montesquieu is able to avoid the distinction, found in the work of both Grotius and Pufendorf, between the justification of the right to punish and the dictates of utility which regulate its actual exercise. This earlier distinction may serve to enjoin rulers to have recourse to strategies other than the use of force as a response to forms of crime, but it

guarantees that such strategies are to be left to the discretion of the leaders themselves. In contrast, the fusing of the foundation and the regulating rule of punishment in the purpose of the association allows Montesquieu to imply that the nature of the association itself will pose certain limits on the types of strategies that will be justified, as it will in fact also participate in ensuring the efficacy of those strategies. In this manner, the question of criminal justice exercised domestically is no longer a narrow problem relating solely to the state's use of force, but part of wider questions of policing and government in general. Nonetheless, he recognises that such a position requires an added awareness of the directions and choices possible, as well as the dangers and risks involved. It is for this reason that knowledge of these matters is of essential importance, "la chose du monde qu'il importe le plus aux hommes de savoir."[19]

II. Instruments of penal policy.

An important feature of this understanding is a recognition of the various instruments to which a state can have recourse in the pursuit of civil order. As one instrument of penal policy, positive law will always be made effective in part by the generation of an underlying sense of public fear. "...la force des lois humaines vient de ce qu'on les craint."[20] In this sense, Pufendorf's implication that fear is a principle of all governments is also found in Montesquieu, as much as it is consonant with the official philosophy of the French government as expressed in the preamble to the 1670 ordinance, using fear as a motive to manage those who are not motivated to right action by a sense of duty.[21] Nonetheless, it is also clear that for Montesquieu positive law also is directed towards one or several political goods, such as public security, order and freedom. All positive law participates in this essential ambiguity required by the preestablished objectives of collective life and the imperfect nature of human beings who will not be consistently motivated by the promise of these goods alone. The recognition of fear as a pervasive motivating feature of all forms of political rule provides an

important realist corrective to classical themes in political thinking.

However, this recognition does not push Montesquieu to the Hobbesian conclusion that the authority of government rests ultimately on its monopoly in managing the overriding fear of violence and death. Fear is not something a strong government can monopolise, for as we have seen, fear of death through the vicissitudes of disease and famine was a constant feature of early-modern life. In addition, fear can be manifested towards a variety of objects apart from violent death. Thus, while based in part on the principle of deterrence through fear, the law can itself take into account and manage various forms of fear aside from a pure fear of corporal harm. A fear of divine retribution for sinful acts may serve on its own as a relatively effective harness on the actions of citizens, if the religious doctrine is tailored to earthly objectives.[22] In addition, a fear of public humiliation and of the certainty of retribution (rather than its modes) are independently based fears which may converge on the institution of punishment, mitigating the need for legislative severity. The fear of a loss of wealth and property may also be exploited to serve as an effective harness on wealthy citizens. As a result of these considerations, Montesquieu argues that a policy of consistent recourse to harsh punishment may be an unnecessary strategy for the preservation of order.

The dynamics of the invocation of capital punishment serves as one illustration of the common thread of fear, yet of the differing modes of managing it which still acts to distinguish despotic and moderate regimes. Montesquieu argues that the strength of capital punishment as a deterrent bears a relation of inverse proportion to the strength of feelings of fear as a general principle of public life.[23] Where the citizens are most attached to their way of life and do not generally fear the public power, a fear of death is strong and the threat of this form will act as an effective harness on most citizens for the most serious of crimes. In contrast, the pervasiveness of fear in the public order, cultivated by repeated threats of public acts of cruelty, will weaken the strong feelings of attachment to life and will make citizens disposed to criminal action less fearful

of their own death, making it necessary to introduce aggravated forms of capital punishment as a deterrent. The object of Montesquieu's analysis here with regard to public responses to the most heinous of crimes is therefore not to advocate the elimination of fear as a consideration in legislative practice; it is to recognise the various manifestations of fear and to manage them more reasonably. The generation of fear through the imposition of public threats of the use of force, while an inescapable feature of political society, can also be invoked to such a degree that it both ignores and diminishes the feelings of fear directed to other objects, feelings which themselves provide a more hidden but effective means of governing popular action and which the enlightened legislator will both recognise and respect.

These arguments are the corollary to the central point that society develops its own mechanisms of moral regulation which the state should not seek to override, but merely to complement. Montesquieu gives many examples of the independent and more effective force of popular morals and manners. The first Roman legislation outlawing the misuse of public funds, while ostensibly calling for a very light punishment in the restitution of the stolen money, was in fact regarded as a very severe punishment given the strength of public morals and popular infamy and humiliation which would accompany such a conviction.[24] Thus, the force of the legislation cannot be determined from the letter alone but only in conjunction with an understanding of how it interacts with public sentiment at large.

The argument is distinct from that which links forms of punishment directly to the order of popular sensibilities, a position which informs a certain amount of current historiographical work on the eighteenth century.[25] For Montesquieu, it is not popular sensibilities in themselves that set directly the limits to what will be deemed acceptable and non-acceptable forms of punishment. Rather, he holds that a recognition of the sources and nature of popular forms of the regulation of conduct (their values and practices over and above their levels of tolerance and perceptions of good taste) is a necessary complement to political

rule.

This is reinforced with the observation that positive law can only be effective directly within a certain sphere of human behaviour, that is for shaping the actions of a citizen and not for determining moral motivation or regulating that behaviour which has no relation to the individual as a member of political society.[26]

> Les princes qui, au lieu de gouverner par les rites, gouvernèrent par la force des supplices, voulurent faire faire aux supplices ce qui n'est pas dans leur pouvoir, qui est de donner des moeurs. Les supplices retrancheront bien de la société un citoyen qui, ayant perdu ses moeurs viole les lois; mais si tout le monde a perdu ses moeurs, les rétabliront-ils? Les supplices arrèteront bien plusieurs conséquences du mal général, mais ils ne corrigeront pas ce mal.[27]

This means that the scope of human behaviour which can be subject to punishment by law is restricted. For this reason, a change in morals and manners must be effected by their own particular dynamics, for example through the introduction of inducements and new examples, rather than the threat of punishment.[28] Here Montesquieu develops the reasoning from necessity to argue that the overstepping of its bounds in legislative prescription is not only superfluous, but also tyrannical.

> Il y a des moyens pour empêcher les crimes: ce sont les peines; il y en a pour faire changer les manières: ce sont les exemples...
>
> Toute peine qui ne dérive pas de la nécessité est tyrannique. La loi n'est pas un pur acte de puissance; les choses indifférentes par leur nature ne sont pas de son ressort.[29]

Legislative necessity is thus invoked to cover both a consideration of specific political ends (to be distinguished by a series of religious, moral and social ends) as well as the most moderate means to achieve them. While the first may seem to pose limits on the power of the legislator, the second consideration leads to the recognition of the power of these independent forces to reinforce those political ends. In this way, Montesquieu draws on an understanding of popular feeling and

social morals to show that the limited scope of legislative tools does not necessarily entail political weakness. While the law must work within the limits set by its own object and not seek to direct all forms of conduct, it also may draw on the dynamics of popular morals and manners to ensure its effectiveness.[30]

The recommendations based on the identification of superfluity and tyranny (and the corollary of necessity and moderation) are in turn reinforced by the argument that unnecessary recourse to a policy of severe punishment will prove in the long run to be counter-productive to the political objective of keeping order. Tyranny thus becomes not only unnecessary but a manifestation of weakness. He states that excessive recourse to the generation of fear of pain through the threat of punishment to mold behaviour will not only prove incapable of rooting out the cause of the vices, it will also harden the citizens to these forms of threat and progressively diminish whatever limited effectiveness the instrument might have. It is the first step on a spiral of violence. "Des âmes, partout effarouchées et rendues plus atroces, n'ont pu être conduits que par une atrocité plus grande."[31] Montesquieu points to the examples of Turkey and Japan where (whatever the gross historical and cultural inaccuracy of his interpretation of Ottoman and Oriental practices) the severity of punishment for all sorts of crime render the laws largely ineffective.[32] He criticises his contemporaries Tournefort and Bernier for invoking the Ottoman model as a direction for French policy, implying it to be based on general ignorance of basic principles of social life.[33]

By his discussion of the transition to political society in Book I of L'Esprit des lois, Montesquieu heralds his departure from the standard discussions of his day with regard to the grounds and objectives of the institution of punishment. Perhaps nowhere could the novel implications of his adoption of the language and reasoning of associationalism be more clear. It remains to explore the consequences of his application of this approach to a study of various forms of political regime, including the history and practice of criminal justice in his own country. This is the subject of the next chapter.

Endnotes

1. Pieter Spierenburg in The Spectacle of Suffering (Cambridge: Cambridge University Press, 1984) borrows the framework of Norbert Elias to argue for the central importance of popular sensibilities, modified by the extension of an aristocratic ethos, in explaining changing modes of punishment. In this outlook, the effect of the movement was not to eliminate pain from punishment but to remove suffering from the public to the private forum. An appeal to the central importance of popular sensibilities is also offered by John Beattie in Crime and the Courts in England 1660-1800 (Princeton: Princeton University Press, 1986), however, his characterisation of the phenomenon is not as a need for the mere dissimulation of punishment, but as a growth of general public abhorrence to physical cruelty coupled with a perceived need to make the justice system more effective.

As we have seen in a previous chapter, John Langbein in Torture and the Law of Proof seeks to construct an argument for the change in judicial practice on the basis of defects in traditional legal reasoning and procedures. I argued that this argument must also take into account wider considerations such as perceptions of the causes or motivations of criminal behaviour. Langbein's overly narrow reading of the trend is also pointed out by Mirjan Damaska in "The Death of Legal Torture," Yale Law Review 87(1977-78), 860-84. He argues that Langbein's reasoning can only apply to a certain range of cases and not to Roman-canon law practice as a whole, and thus, the changes in judicial practice require additional forms of explanation.

Another influential reading is that of Michel Foucault in Surveiller et punir (Paris: Gallimard, 1975), although the work has come to be criticised (most notably by Spierenburg) for its claims of historical accuracy in its depiction of early-modern practices of punishment. Foucault argues that the Enlightenment reformers were articulating hopes for a more effective system of popular control, hopes which were realised inadvertently and for other reasons with the development and spread of disciplinary strategies into the penal realm.

A long-standing, though generally discredited, reading of the evolution of modes of punishment is that of Georg Rusche and Otto Kirchheimer's Punishment and Social Structure (New York: Columbia University Press, 1939) which tries to argue that these institutions are shaped directly by productive needs. A more sophisticated rendering of these Marxian themes of penal policy as a form of class rule is offered by Michael Ignatieff in A Just Measure of Pain (London: Penguin Books, 1978), however, here greater importance is given to the works of the English reformers.

2. "C'était à corriger nos lois que Montesquieu devait consacrer son ouvrage, et non à railler l'empereur d'Orient, le grand vizir et le divan." Voltaire, "Commentaire sur l'Esprit des lois," s. 30, In Oeuvres complètes de Voltaire (Paris: Thamine et Fortic, 1821-22).

3. Braithwaite and Petit, Not Just Deserts. A Republican Theory of Criminal Justice.

4. See the "Préface", 6.

5. For a consideration of these issues see also James Heath, Eighteenth Century Penal Theory (Oxford: Oxford University Press, 1963).

6. John Locke, "The Second Treatise of Government," In Two Treatises of Government, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960), II, s. 8-12.

7. Grotius, Du Droit de la guerre et de la paix. See also André Langui, "Grotius et le droit pénal", XVIIe siècle 126(1980), 37-58.

8. Samuel Pufendorf, Le Droit de la nature et des Gens, ou systeme general des principes les plus importans de la morale, de la jurisprudence et de la politique, trans. Jean Barbeyrac (Amsterdam: Gerard Kuyper, 1706), 2 vols. I work from Barbeyrac's translation assuming that Montesquieu did also. Pufendorf's theory of punishment can be found in Book VIII, chapter iii.

9. "Dans l'indépendance de l'Etat de Nature, où chacun ne reconnoît d'autre Supérieur que Dieu, il n'y a aussi que ce Souverain Législateur qui puisse infliger des Peines proprement dites. Mais la sûreté publique, qui est le but des Sociétez Civiles, demande que le Souverain aît le pouvoir de réprimer la malice de ses Sujets en les menaçant de quelque peine, et la leur faisant souffrir actuellement, lorsqu'ils s'en sont rendus dignes." Devoirs de l'homme et du citoyen, II, c. xiii.

10. Ibid., chap. 15, p. 382.

11. For a different reading see Brain Calvert, "Locke on Punishment and the Death Penalty," Philosophy 68(1993), 211-230.

12. Pufendorf, Le Droit de la nature et des gens, VIII, iii, vol. 2, p. 340.

13. Cesare Beccaria, On Crimes and Punishments (Indianopolis: Bobbs-Merrill, 1963, 1st ed. 1764), 11-12. Beccaria merged the consequentialist logic of utility (a form of argument which can be traced back at least to Cicero) with a calculation of individual interests, in an equation which would subsequently inspire the pioneers of utilitarianism.

14. Ibid., 13.

15. L'Esprit des lois, VI, ii.

16. "La vie des Etats est comme celle des hommes. Ceux-ci ont droit de tuer dans le cas de la défense naturelle; ceux-là ont droit de faire la guerre pour leur propre conservation.

Dans le cas de la défense naturelle, j'ai droit de tuer, parce que ma vie est à moi, comme la vie de celui qui attaque est à lui: de même un Etat fait la guerre, parce que sa conservation est juste comme toute autre conservation." (L'Esprit des lois, X, ii)

The notion of the life belonging to the individual is one which also distinguishes Montesquieu's position from that of Locke, although he does hold that this right of self-defense is strictly limited in political society to those cases in which no immediate recourse to a magistrate is possible. (Ibid.)

The notion of an initial right to personal vengeance in expressed in his Pensées: "Aristote dit que la vengeance est une chose juste, fondée sur ce principe qu'il faut rendre à chacun ce qui lui appartient.

Et c'est la seule façon que la nature nous ait donnée pour arrêter les mauvaises inclinations des autres; c'est la seule puissance coercitive que nous ayons dans cet état de nature: chacun y avait une magistrature qu'il exerçait par la vengeance." (Pensées, n. 469) However, he criticises Aristotle for implying that this principle was also operative in civil society. For Montesquieu, the establishment of tribunals and the institution of laws nullifies this initial right.

17. As discussed in chapters four and five, natural sociality is understood by Montesquieu as a natural disposition which is both based on sentiment and cultivated with the acquisition of knowledge. L'Esprit des lois, I, ii.

18. L'Esprit des lois, I, i.

19. Ibidem.

20. L'Esprit des lois, XXVI, ii.

21. Isambert et al. eds., Recueil, vol. 18, n. 623, pp. 371-72.

22. L'Esprit des lois, XXIV, xiv. Of course the corollary to this, and which Montesquieu stresses in this passage, is that religious motivations, if ordered towards ends which conflict with those of the society, may also render even the most severe legislative prescriptions ineffective given the greater sway of a promise of eternal happiness over the cost of limited pain.

23. L'Esprit des lois, VI, ix.

24. L'Esprit des lois, XIX, xxiii.

25. In matters of criminal justice, I refer to Spierenburg's work, The Spectacle of Suffering, based explicitly on the work of Norbert Elias. There are also

resonances of this position in Beattie, Crime and the Courts in England.

26. "Les moeurs et les manières sont des usages que les loix n'ont point établis, ou n'ont pas pu, ou n'ont pas voulu établir.

Il y a cette différence entre les loix et les moeurs, que les loix règlent plus les actions du citoyen, et que les moeurs règlent plus les actions de l'homme. Il y a cette différence entre les moeurs et les manières, que les premières regardent plus la conduite intérieure, les autres l'extérieure." L'Esprit des lois, XIX, xvi. He goes on in this chapter to relate those exceptional cases (Lycurgus' Sparta and early-modern China) where the legislator was able to combine the rules of each in one code.

This point is also invoked by Montesquieu to distinguish the scope of positive law, seeking the good of society above all, from that of religious law which promotes the moral goodness of the individual and which is regulated by an ideal of perfection rather than relative goods. (Ibid., XXVI, ix)

27. L'Esprit des lois, XIX, xvii.

28. "Nous avons dit que les loix étoient des institutions particulières et précises du législateur; et les moeurs et les manières, des institutions de la nation en général. De là il suit que lorsqu'on veut changer les moeurs et les manières, il ne faut p[as les changer par les loix: cela paroîtroit trop tyrannique: il vaut mieux les changer par d'autres moeurs et d'autres manières." L'Esprit des lois, XIX, xiv. (The reference is to the passage in XIX, xii.) Brethe de la Gressaye notes that this opposition leaves no room for customary law (in his critical edition of the work); however, this consideration of the purpose of the passage leaves one to recognise that Montesquieu was not purporting to provide here a comprehensive account of all the forces governing collective human behaviour.

29. Ibidem.

30. "Les moeurs et les manières sont des usages que les loix n'ont point établis, ou n'ont pas pu, ou n'ont pas voulu établir.

Il y a cette différence entre les loix et les moeurs, que les lois règlent plus les actions du citoyen, et que les moeurs règlent plus les actions de l'homme. Il y a cette différence entre les moeurs et les manières, que les premières regardent plus la conduite intérieure, les autres l'extérieure." L'Esprit des lois, XIX, xvi.

31. L'Esprit des lois, VI, xiii.

32. See VI, xiii entitled "Impuissance des lois japonaises."

33. "On entend dire sans cesse qu'il faudrait que la justice fût rendue partout comme en Turquie. Il n'y aura donc que les plus ignorants de tous les peuples qui auront vu clair dans la chose du monde qu'il importe le plus aux hommes de

savoir?" L'Esprit des lois, VI, ii.

The invocation of the Turkish model ultimately plays a double role in Montesquieu's enterprise. On one level, the Turk is "the other" who resorts to extreme methods to achieve the general political end of public security. This does not imply in the context of Montesquieu's comparative study that Turkish justice is merely relative to other forms; rather, it shows that the study of disfunction and political degeneration may also contribute to a fuller understanding of the nature of politics and of the means to defer its most disturbing possibilities. However, on another level, a closer reading of the text shows us that the practice of managing fear is inseparable from the political enterprise as a whole. Thus, in matters of penal justice the lines of delineation among regimes become more blurred, at least in terms of the principle by which these policies are guided. A study of the other serves in this light to display and magnify a feature which is in fact universal but which often remains hidden in political practice and discourse. To recognise this feature as a universal one is also to recognise that the potential for disfunction and political corruption through excessive reliance on the principle of fear alone in governing is also common to all. Through a study of a form of political corruption magnified in the other, Montesquieu brings his readers face to face with both what sustains but also can corrupt their own political orders. This shifting in the significance of the Turkish example between a form of universal and counterexample (and counterexample because a representative in certain aspects of the universal) is representative of a common technique of Montesquieu's work through which ambiguities discovered in his own experience of political life are transposed for the sake of analysis on cultural and historical planes.

CHAPTER SEVEN

PAIN AND THE PURSUIT OF FREEDOM. PART 2.

To explore the use of the various means by which civil peace is furthered and criminal justice ordered Montesquieu has recourse to three discernible strategies. The first stands out most clearly in his work and involves a study of the link between various features of the criminal justice system and general constitutional principles, or forms of public law. This approach examines the forms of criminal procedure which correspond to the three types of government introduced at the beginning of the work. The second strategy involves a study of the historical evolution of forms of criminal justice in France, focusing on the three modes of Germanic (or barbarian), seigneurial and modern monarchical justice with the introduction of the enquête procedure. Finally, one can find dispersed throughout the work various reflections on particular features and stages of criminal procedure, reflections which shape a new distinction between moderate and tyrannical governments. It is on the basis of this latter that Montesquieu is able to relate his study of criminal procedures to wider considerations of political and civil freedom, including questions of relative judicial autonomy.

Through these three approaches, Montesquieu builds his theory of criminal justice on the basis of three antinomies. While his first approach through the lens of his typology of regimes, emphasises the possible diversity of means to fulfill the ends of political order, it also shows that nowhere are the needs of order inseparable from the infliction of harm and the generation of suffering. His second approach, outlining the history of the development of criminal justice in early France is centred on the theme of how a rationalisation of procedure, offering more dependable means of conviction and protection for the accused and society, was accompanied by a parallel process of legal specialisation and the consequent elimination of lay judges and popular participation. His third approach, finally, in a variety of reflections on criminal procedure shows how the pursuit of political and civil freedom as moderation is characterised by a dual

process of concern for the health of informal modes of dispute settlement alongside an implied theory of political consolidation (or state-building) including reinforcing the rule of law and the adoption of policies of crime-prevention and efficient policing. Here, traditional justifications for territorial divisions and multiple jurisdictions are transformed by the introduction of functional arguments consonant with the more modern structures of the nation-state.

I. Criminal justice and the three types of regime.

The awareness of ever-present popular rules of conduct, together with the recognition that these rules are nowhere the same, supports not only an acknowledgement of but also a justification for a diversity of approaches to the problem of civil order. Montesquieu's first strategy is to relate these differences to the type of political regime established, with secondary consideration for the particular political object of the regime, and the particular social and economic circumstances of the regime and its people. He regards his efforts to draw a link between the nature of criminal law and the form of government to be vindicated by the example of Rome, whose criminal law changed in concert with broader constitutional changes.[1]

In a republic where the population shares in a general practice of virtue, morals will regulate behaviour in general such that laws will take more often the form of counsel and warning and will rarely prescribe punishments.[2] Morals themselves also will adapt to the limited force of the law, a development which for Montesquieu explains the force of paternal authority in Roman practice.[3] In contrast, a monarchy can not require such a strict informal rule of behaviour, so that here both the use of positive law and the power of the magistrate are greater.[4] In a despotism, the prince himself, ultimately without hope of success according to Montesquieu, seeks by his personal rule to supplant the role of morals and laws in maintaining order.[5] All three types of regime can be seen as both aiming for and achieving a limited political good, that is the establishment of a form of public

order.

The disfunction of the despotic regime for Montesquieu is not in the despot's motivation, but in his conception of the means to achieve it. The despot draws on a model of domestic order for political goals and by his inconstancy of rule, creates instead a general climate of insecurity. In its place, the limited order that a despotic regime enjoys can be generated by the continued force of religion.[6]

The case of China is particularly interesting in this regard and would seem at first to pose a challenge to Montesquieu's principles. The regime is characterised by Montesquieu as a combination of strong reliance on the force of religion, morals and manners (compared by Montesquieu himself to the institutions of Lycurgus' Sparta) implying a large degree of informal mediation of disputes and suggesting a more moderate government, with a history of conquest and servitude allied with what Montesquieu sees as a general trend of Asiatic despotism.[7] Despite this dichotomy and the tendency of missionary accounts to depict the regime in a most favourable light, Montesquieu insists that the regime fits into his classification as a despotism.[8] His analysis rests largely on the identification of the political regime with domestic rule. The force of morals and manners is seen as part of a cultural reaction to natural scarcity, as a code which encourages hard work and popular solidarity in the face of hardship. For Montesquieu, these forces provide a check on despotic power, but they do not eliminate a basic motivation of fear which informs popular conduct.

Significantly, his examples of features most revealing of this despotic power are all taken from the penal code. These include fathers being punished for crimes of their children, a vague legal definition of the crime of lese-majesty and the primacy of corporal punishments (or rule by the stick).[9] Nonetheless, despite pervasive severity and legal prescription of immoderate force, Montesquieu finds merit in a principle of proportion which is found there and which helps to deter the committing of the most serious of crimes.[10] Among other things (including his critical reading of some of the major sources available at the time), the analysis shows that Montesquieu is open to the recognition of the many

ambiguities in forms of political rule. While despotism is to be avoided as a general political model, a study of its dynamics can reveal limited forms of political goods.

In the study of the relation of the practice of criminal justice to his typology of regimes, Montesquieu seems to take for granted that a certain number of individuals will in all circumstances be predisposed to criminal behaviour. His study of the various combinations of laws and morals in these different orders centres on the relative efficiency of each in checking these initial impulses. For this reason, he will not go so far as Godwin, who, drawing on similar principles, envisages the eventual eradication of crime accompanied by a radical version of Montesquieu's republican model whereby all differences are discussed and mediated informally by a collective enforcement of morals, replacing altogether the need for positive law.[11] For Montesquieu, the use of violence by the state on its own citizens is an inescapable feature of a political order, although he never envisages the basic point as problematic.

II. Criminal justice in French history.

The basic principles of his study of the working of criminal justice, as presented rather summarily in the sketch of his political typology, are developed in his more detailed examination of the history of the development of criminal justice in France. This forms the second strategy of approach in Montesquieu's exploration and adjudication of the possible combinations of the instruments of criminal justice. While Book XXVIII is ostensibly devoted to the more general consideration of the character and causes of shifts in legal practice in France (De l'Origine et des révolutions des lois civiles chez les Français), a great portion of it is devoted more narrowly to the evolution of criminal law and procedure itself and could be read as a genealogy of various features of early-modern practice. A consideration of the points argued here, as well as relevant comments in Book XXX, will show how his basic conjectures, as demonstrated earlier in the work,

can give rise to a discriminating and subtle analysis of the factors which serve to mold practices of criminal justice. The basic dynamic portrayed in this study of the development of procedure of criminal justice in France is the dual process of rationalisation and professional specialisation.

His reading of the development of French criminal justice can be divided into three periods: the early-middle ages from the Germanic invasions to the fall of Charlemagne and ensuing decadence of the Carolingian dynasty, dominated by the civil character and often popular and informal modes of dispute settlement; the main feudal period characterised by the model of patrimonial justice as exercised by the seigneurs; and the reign of St. Louis (1226-1270) and his immediate successors who introduced reforms which served as an impetus to change and as an indirect inspiration for judicial practices, such as trial by enquête, which were conventional in France into the modern era.

a) Criminal justice in Frankish times: the waning of the principle of personal vengeance.

Despite a common tendency to associate criminal procedure in France with the practices and principles of imperial Roman law, Montesquieu recognises that in its early history, French practice was more highly influenced by forms of Germanic justice, as sketched most notably by Tacitus.[12] The distinguishing feature of these forms was its nature as essentially a civil process, that is the resolving of a dispute among private parties and for which the political leaders would intervene only as a means to facilitate and regulate settlements, in cases where informal methods failed.[13] The corollary to this conception was that apart from the most serious of offenses to public authority, such as treason or desertion, crime itself was considered as an injury to individuals and their kin, rather than as a public infraction. Nonetheless, this limited form of public regulation of private feuds was preferable to a condition of unlimited personal vengeance and was seen by Montesquieu as a defining feature in the establishment of civil

society, leaving behind the more general state of insecurity of pre-political society.[14] It offered a more secure form of social order.

> Les Germains, qui, n'avaient jamais été subjugués, jouissaient d'une indépendance extrême. Les familles se faisaient la guerre pour des meurtres, des vols, des injures. On modifia cette coutume, en mettant ces guerres sous des règles; elles se firent par ordre et sous les yeux du magistrat; ce qui était préférable à une licence générale de se nuire.[15]

This general feature of the early practices explains the absence of a public party to prosecute crimes on behalf of the public.[16] It also helps to explain why, after the invasion of these tribes into the Roman provinces of Gaul (Franks in the north, Wisigoths in the south-west and Burgundians in the south-east), they coexisted, as they had in Germania, under the system of the personality of law.[17] Here each race continued to be governed by its own code, even after the Franks under the Merovingian kings had succeeded in conquering the political leaders of the other tribes, in the same way that the Gallo-Romans continued to be governed by the dictates of Roman law.[18] Montesquieu, while stressing the importance of the Germanic heritage of France, also is keenly aware of the diversity within this heritage (the first chapter of Book 28 is entitled "Du Différent Caractère des lois des peuples germains"). This coexistence, however, did not persist without cross-influences: for example, the drafting of the Germanic tribal codes was in part an effort to emulate Roman codes (despite the fact that law as practised but not formalised in the Roman provinces- sometimes called vulgar law- could diverge significantly from the written codes).[19]

The main link between the wider political structure and the civil process of dispute settlement was the appointment of the office of count (in its origin a limited and revocable office) to preside over popular decisions in the various local jurisdictions (the pagus, based on the Roman local circonscriptions).[20] The local courts (the mallus), however, also employed local notables, or rachimbourg, on an ad hoc basis, to advise the court on the terms of the law. Trials were held in public, and attendance was mandatory. Thus, from its Frankish origins, the

practice of criminal justice in France had a distinctly local grounding, one which derived at first from its links to civil law, rather than as a principle of public law. As the count expanded his power of presiding into one of judgement, his power of jurisdiction came to be allied with an array of local fiscal, military and administrative responsibilities. As one example, the count was responsible for organising the free-men of his jurisdiction to fight in the king's armies. The establishment of the Carolingian dynasty brought concern for greater central control, hence the creation of the missi dominici to oversee the counts' work, the introduction of the counts and dukes into the system of vassalage to ennance their personal ties to the king and the progressive abandoning of the obligation for popular attendance at the judicial assemblies; however, this was done in conjunction with measures which also worked to mitigate these trends, such as the establishment of vicaires to judge less serious cases and the continued acceptance of local judgements as authoritative with no possibility of appeal.[21]

The conventional procedure and forms of proof in these early courts are also a reflection of the predominantly civil conception of criminal law. These developments in turn facilitated the transition from a diversity of customary law based on tribe or personality, to one based on territory. The judicial process was set in motion by a formal accusation made orally and publically. While a defence could be conducted on the basis of testimonial evidence, for many crimes this was not available. In its place, certain tribal codes adopted the use of negative proofs, involving the swearing of an oath by the accused assuring his innocence, with additional oaths by associates of the accused professing his good character. Montesquieu compares the practices of the Salian and Ripuarian Franks in this regard. He shows indirectly that while the negative proof could be considered on the surface as a procedure to offer great security for the accused, as the ability to exonerate oneself with relative ease, it in fact led to more unjust practices. In particular, he demonstrates that the pervasive suspicion of perjury led to the introduction of trial by combat.[22] It was one step in the continuing spread of irrational proofs and ordeals, accompanied by the abandoning of learned

jurisprudence and the consequent desuetude of the diverse Germanic codes themselves.

While the use of ordeals including judicial combat could appear to be an abnegation of judicial responsibility in leaving judgements to what was deemed to be divine providence, Montesquieu recognises that these forms of proof corresponded to a warrior ethic and a way of life where one was educated to be suspicious of a lack of courage and strength.[23]

> Je dis donc que, dans les circonstances des temps où la preuve par le combat et la preuve par le fer chaud et l'eau bouillante furent en usage, il y eut un tel accord de ces lois avec les moeurs, que ces lois produisirent moins d'injustices qu'elles ne furent injustes; que les effets furent plus innocents que les causes; qu'elles choquèrent plus l'équité qu'elles n'en violèrent les droits; qu'elles furent plus déraisonnables que tyranniques.[24]

The reasoning that Montesquieu brings to bear on this practice is thus similar to what he invokes throughout the work, namely, a consideration of the forms and characteristics of social association which give meaning to various legal codes and which in turn regulate them. Nonetheless, he recognises that the adoption of judicial ordeals made a science of jurisprudence unnecessary as it required no special procedure, apart from the oath and challenge, to direct the adjudication of facts.

The specifically civil character of the conception of crime and criminal procedure as well as the limited scope for developed forms of judicial prudence, were reflected in the predominance of fixed monetary compositions (or their relative value in kind) imposed on the offender to expiate the offense. It was less a form of punishment than a form of restoring a form of balance among the parties involved (although one third of the sum exacted from the offender was to go to public officials for their role in protecting the accused from the possibly violent consequences of renewed feelings of vengeance, the fredum).[25]

As the Franks kept a presence in their first homeland of Germania they

were able to keep more closely to the original prescriptions of Germanic law. In contrast, the Visigoths and Burgundians who were fully cut off from their land of origin (their advances into Roman territory had been sparked in turn by the advance of the Hungarians into their own lands), also found their legal prescriptions evolving more rapidly. This factor, led these tribes to introduce corporal punishments into their legal codes, just as the Franks did in order to subdue the Saxons.[26] This leads Montesquieu to conclude that the adoption of corporal punishment was the product of a policy of conquest and servitude.

By this picture of the development of Germanic codes combining relative freedom and order with increasing severity and leading to the adoption of proof by ordeal and judicial combat, Montesquieu provides an ambiguous picture of the early roots of French judicial practice. It also yields a more rich insight into Montesquieu's conception of the character of justice. We find through a study of these diverse practices and their contexts, that justice is not, as in a Platonic conception, the congruity of a theoretical ideal and actual practice, but an accord of the effects of existing practices with various prescribed political ends. In the case of judicial ordeals, while from an essentialist standpoint their invocation was unjust, in the context of Merovingian France their application both furthered the ends of political order, as an alternative to a previous reign of unlimited personal vengeance, and gave some substance to a limited form of justice which required drawing on the values which had meaning in that society. Essentially, however, this portrayal of the practice of criminal justice in the high Middle Ages provides a model of highly decentralised and predominantly popular forms of judgement, coupled with frequent recourse to irrational forms of proof and fixed monetary compositions. It is a model against which subsequent developments up to his own day could be measured and judged.

b) Criminal justice in Carolingian France: patrimonialism and judicial combat.

The second form of the practice of criminal justice in France emerged, for Montesquieu, with changes in the civil law governing the holding and transferral of property, that is, the law of fiefs. The notion of the exercise of justice and its emoluments as a right of local jurisdiction is traced to the early Germanic practices of payment of the fredum.[27] However, justice could only become patrimonial when the judicial offices and responsibilities were themselves tied to a general territorial jurisdiction (as opposed to local tribal jurisdiction) and when the exercise of this jurisdiction was a fixed and hereditary right. The laws regulating the combination of military and civil jurisdiction in the context of the abandoning of distinct, written tribal codes, and the introduction of the right of inheritance in fiefs thus were the grounding of the exercise of feudal seigneurial justice and contributed towards the general parcelling of political authority which was characteristic of the feudal era in general.[28] In portraying the onset of the feudal era in this way, Montesquieu provides a rival account to certain apologists of strong monarchical power, such as Loyseau, who see the feudal era as a product of concerted noble efforts to usurp the power of the kings. For Montesquieu, such an argument portrays historical insensitivity to the general divisions within the kingdom from its inception, as well as ignorance of the origins of the general principles governing the system of patrimonial justice.[29] Patrimonial justice also contributed to the general abandoning of the barbarian codes not only by tieing the exercise of justice to rights in property (as opposed to personality or tribal origin) but also because the old rules governing property were no longer applicable.[30] As Montesquieu remarks, by the time of the election of Hugues Capet as king, there is little trace of the prescriptions of the barbarian codes. This went hand in hand with the spread of illiteracy and the consequent reliance on custom as the sole source of law. Nonetheless, the diversity of law was not fully erased, but was integrated into customary practices, a development which helps account for the strength of certain principles of Roman law in informal practice

in the south of France as early as the ninth century.[31] The prevailing use of judicial combat also discouraged any developed science of jurisprudence.[32]

While forms of proof and procedure were a general continuation of practices and trends established in the early-middle ages under the Merovingian and Carolingian dynasties (that is, accusatory, public, use of negative proofs and ordeals), their exercise was infused with new meanings in a social and political structure which emphasised the spirit of honour, loyalty and chivalry.[33] The abandonment of trials by the ordeals of fire and water as a result of their outlaw by the church (the fourth Council of Latran in 1215), led to the increased use of combat in judicial procedure. This is the height of particularised and local justice unified by the use of common forms, but ostensibly defaulting on claims to rationalised jurisprudence guided instead by what was presumed to be the independent intervention of divine providence. It served not only as a means to judge the question of ultimate guilt or innocence of the accused, but also was used to challenge false witnesses and interlocutory decisions of the seigneurial court.[34] However, Montesquieu is also aware that judicial combat was not an arbitrary practice but was itself governed by a variety of regulations.[35] Thus, while he still judges it to be an abhorrent practice ("cet usage monstrueux"), he recognises that it was a means to achieve certain stability at a time when political authority was weak and ignorance was widespread.[36] Here again the analysis is infused with a tension between an understanding of the political benefits at which the practice was aiming and which it may have accrued given the dangers and deficiencies of the era, and the questionable means by which it was achieved. The tension is not of an idealism and relativism in Montesquieu's own ideological approach, but an attempt to come to grips with the very ambiguities rooted in political practice itself.

c) The reforms of St. Louis: towards a national system of criminal justice.

It is to the reign of Louis IX that Montesquieu traces the beginning of a movement for reform that would provide the grounding for the major features of criminal justice as it was practiced in his own day. It is necessary to note that most of these changes did not involve a reconsideration of what was to be determined a crime, nor even the requisite punishments to be administered. The focus on procedure shows its importance to the magistrates of early-modern France in general as a defining feature of their exercise of criminal justice. It was also important to the king and his court as it was one means by which a form of national uniformity could be enforced, given that they could not so easily control how the laws themselves were to be interpreted and applied.

The credible construction of a practice of royal and delegated justice was possible in part with the growing de facto separation of the fief and judging powers. The feudal system in certain cases had broken down land tenures to such a great degree that some seigneurs could not afford to keep vassals to judge for them, forcing them to transfer judicial rights to the overlord.[37] The lords themselves were also weakened by the creeping jurisdiction of ecclesiastical justice.[38] In such a situation, it was easier for the king to try and consolidate central control over the exercise of justice, although at first this was only a credible enterprise within his own domain. Prévôts had been established in the eleventh century to help in the exercise of local justice, and just before the time of Saint Louis baillis had been appointed in turn to oversee the work of the prévots. These reforms were significant as they were the institutional scaffolding on which a theory of delegated justice, that is justice which is descending (to highjack Walter Ullmann's term), could have any meaning. With the establishment of the parlement of Paris in the thirteenth century as an outgrowth of the king's council, the introduction of a process of appeal for which the parlement was to be the supreme court in the king's domain and the introduction of new modes of proof, the system was virtually complete. Thus, while the

reforms ostensibly involved the reworking of certain procedures and offices, they went much further in significance by both contributing towards, and setting limits on, a new practice of monarchical government.

The Etablissements, the legal code in which many of Saint Louis' reforms were introduced, were applicable only to the king's domain, and even here they were resisted by his own barons. At this early date, therefore, many of the procedural changes were largely symbolic although they heralded further changes.[39] The passage of the act itself and the subsequent encouragement of the drafting of local custom served as an impetus for a conception of written law which would have a wide application within France.[40] In addition, the king ordered the translation of the major texts of Roman law which had been only recently reintroduced into France from Italy and thereby became a catalyst for the revival of learned jurisprudence and the establishment of French legal humanism.[41] The need for a more developed science of jurisprudence is symbolised for Montesquieu by the Etablissements themselves, as they invoke a rather contradictory mix of principles from Roman and French customary law.[42]

The abolition of judicial combat (1258) is the most well known of the king's reforms. However, it is also recognised that in its time it was a limited success. It was not until much later that the practice was fully abandoned in criminal disputes. Nonetheless, Montesquieu recognises that the progressive abandoning of the use of judicial combat set the stage for the introduction of a whole new set of judicial practices. Recourse to the workings of divine providence was replaced by the possibility of a form of judicial review in the establishment of a system of appeals.[43] While accusatory methods remained dominant, the revival of Roman law also saw the progressive, parallel introduction of trial by inquest resting on the magistrate's independent powers of investigation and subsequent laying of charges. The rise of the public party in a dispute is something which would have been incompatible with judicial combat given that the officer would be constantly subject to challenge.[44] With the use of new procedures derived in part from the study of learned jurisprudence, there was also

a new need for legal representatives and trained legal officers. The trends thus contributed towards the creation of a professional class of magistrates and advocates who eventually would render the judicial rights of the seigneurs a mere fiction even in their own jurisdictions.[45] Thus, while the new directions served as both an instrument and a support for the monarch to bolster and spread his authority in the wake of the relative impotence of the institution during the feudal era, they also combined the centralising dynamic with one of functional specialisation.

In conjunction with these changes, the general system of appeal made judicial procedure more expensive and brought the need for private parties to pay the costs of proceedings; but this did provide a check on what Montesquieu perceived as a possible abuse of the system.[46] In addition, as a means to keep down the cost of proceedings and to make investigation easier, the practice of keeping public registers was eventually introduced (1539-79 according to Montesquieu), a practice which would also provide more definitive evidence on questions of status, age, marriage and legitimacy of birth.[47] Inadvertently, from the basic material needs of the system of criminal justice, a foundation was laid that would facilitate greater state regulation and control of popular movements and practices.

In this way, the systems of Germanic tribal justice, as predominantly a civil dispute mechanism, and seigneurial patrimonial justice, with a public right to punish based in a form of property, came to be superseded by a system of delegated justice which took justification and guidance from the king and his regulations, but which became institutionally separate from this source of legitimacy and which continued to function in an environment with long established traditions of local justice. The reforms of Saint Louis and his successors set in motion the double dynamic of increased centralisation, yet professional specialisation.[48] As a whole, then, the study of these three periods in the history of French criminal justice serves to show how the process of legal rationalisation (as subjecting the legal process to a wide range of common

principles, standard procedures along with the progressive elimination of those determining factors of decision that lie outside human judgement) was linked to the suspension of popular participation in judicial decision-making and the rise of a professional class of magistrates. This would provide an important historical justification for his picture of a politics of freedom supported by both a process of political consolidation and functional specialisation.

III. Practices of criminal justice and civil freedom in pre-revolutionary France.

Montesquieu is no exception among theorists of the Enlightenment era in combining an allegiance to certain universal principles and the recognition of the need for diverse means of accomodating them.[49] Those models taken from the various stages in the development of criminal justice in France show that these means were seen as neither historically consistent nor fully culturally determined. However, despite their shared participation in the political good of promoting relative social order, Montesquieu does recognise the greater merits of the latter model over and above what preceded it. It is perhaps in part this perspective which prevents him from voicing a stronger criticism of the practices of his own day. The merit of this model lies in a procedure for determining guilt which neither granted to the accused easy means of self-exoneration in a wish to avoid miscarriages of justice, nor relied on supernatural forces in a search for ultimate certainty in judgement. In addition, it introduced a greater degree of procedural formality in a regime of relative stability and growing strength which Montesquieu saw as important conditions for the promotion of security and civil freedom.

a) Criminal justice and freedom.

It is important to consider at this point, then, Montesquieu's understanding of the concept of freedom and of how it can be combined with the good of order in the exercise of criminal justice. While political liberty was not seen as a

sufficient or even necessary condition for civil freedom, Montesquieu nonetheless thought the two to be enough related that the analysis of one directly follows the other in the work, with both using common motifs and examples. He is first concerned to dismiss (as Hobbes did before him) the idea that political freedom can be assimilated with popular sovereignty and collective autonomy.[50] It reflects the more general point developed in his Pensées that political freedom cannot be confused with any specific form of government (defined by a locus of sovereignty and a popular principle of motivation). He states here that instead, political freedom is to be found in a certain practice of government dictated by the rule of law, a practice which can be associated with a monarchy as much as a republic.

> Un peuple libre n'est pas celui qui a une telle ou une telle forme de gouvernement; c'est celui qui jouit de la forme de gouvernement établie par la Loi...la liberté polittique concerne les monarchies moderées comme les républiques, et n'est pas plus éloignée du trône que d'un sénat; et tout homme est libre qui a un juste sujet de croire que la fureur d'un seul ou de plusieurs ne lui ôteront pas la vie ou la propriété des biens.[51]

He thus defines political freedom as "le droit de faire tout ce que les lois permettent".[52] It is distinct from the general claim of the proponents of negative liberty, tracing their position to one formulation of the concept of freedom in Hobbes, that in civil society freedom is the ability to act where the law is silent.[53] This Hobbesian definition rests on a simple assertion of whether the individual is being forcibly prevented from acting in a way which is not denied by law and thus is applied to a sphere distinct from law. In Montesquieu's formulation, the law is part of the structure of freedom. Thus, whereas for Hobbes there can be more or less freedom depending on the extent of regulation by the sovereign, Montesquieu insists that it is not the number of regulations which affects the degree of freedom, but rather the quality of the exercise of power.[54] What he advocates, with the presumption that political freedom is a

good, is then not the minimalist state, but the moderate state, that is one where rulers do not abuse their power by overstepping the boundaries of established law and forcing citizens to act in ways not officially prescribed.[55]

Montesquieu's doctrine of the balance of powers, then, as a means to guard against the possible abuses of power given the natural propensities of rulers to want to disregard the law, is designed to be instrumental to the rule of law. It is not designed as a system to promote political longevity (as the Polybian mixed regime is designed to do), nor is it seen as a means to balance political interests so as to encourage less partial legislation. Its efficacy is measured, rather, in terms of how it relates to the execution of existing law.

> Pour qu'on ne puisse abuser du pouvoir, il faut que, par la disposition des choses, le pouvoir arrête le pouvoir. Une constitution peut être telle que personne ne sera contraint de faire les choses auxquelles la loi ne l'oblige pas, et à ne point faire celles que la loi lui permet.[56]

In this way, moderate government, as one which regulates and orders political power such that one body is able to resist and offset the actions of another, is not an end in itself for Montesquieu, but one means whereby the rule of law is promoted. This is why moderate government can be seen in opposition to despotic government which is depicted as a form of personal rule by the same principles as rule of the household or seraglio.[57]

It is this concern which grounds his favour for the relative autonomy of the courts. In Book VI he presents the argument that in a monarchy the ministers of the king's council should not be judges of contentious cases.[58] He states that the council is a small body holding to the practice of deciding questions in a quick and definitive way. This style of decision-making is deemed by Montesquieu to be both contrary to the general style of judicial decision-making in France (notoriously slow and methodical) and outside the traditional parlementary channels. In the same vein he argues that in a monarchy, the king cannot judge as he already is the power which orders prosecutions, enforces punishments and

exercises clemency.[59]

What Montesquieu is ultimately doing by this argument, is cutting a wedge in the theory of delegated justice. He accentuates the functional association of the centre of sovereign power with the tasks of policing, punishment and clemency and recognises that for these powers to be effective, they must be exercised in a context which does not consistently generate self-contradiction, that is, where the power of judging is separate from that of granting pardon and preparing a case in prosecution. In the same manner, he separates the parlements, who initially were established as an institutional outgrowth of the king's power to judge as exercised in the curia regis, from their original justification. This was possible for Montesquieu in part by the mere fact of the important institutional presence of the parlements in early-modern France, their importance as courts of appeal, the large numbers of legal officials who had independent career interests invested in their work, the ownership and hereditary transfer of office and the growing regulation tied to the intracacies of the inquest procedure which required a set of specially trained officials. However, by presenting the argument from the perspective of the sovereign power, Montesquieu also was modifying what was essentially an argument for a degree of regional independence in the case of the Bordeaux parlement, into a case for functional judicial autonomy. Thus, while seemingly defending the cause of the parlements by this argument, his reasoning also ultimately points beyond this defence for it gestures towards a vision of politics undergirded by assumptions of a centralised and unitary state.

This move, however, also was dictated by the very precedence of his theory of the rule of law as a condition for political freedom. Once the rule of law is no longer defined negatively as the opposite of personal rule, or rule by an arbitrary will, but considered in its positive dimension as the common subjection and observance of the same regulations and procedures, the defence of regional autonomy for its own sake becomes problematic. The intermediary bodies which are integral to Montesquieu's definition of monarchy, once subject to the condition of the rule of one and the same law within the regime, can be instrumental to the

cause of freedom not insofar as they are self-regulating, but as they are able to participate in the exercise of other judicial and executive powers previously indistinguishable from the exercise of sovereignty. It may be that some of the interpretative confusion surrounding the relative anachronism or modernity of Montesquieu's work in this regard lies in this relative ambiguity of the work itself in using the terms and standard references for a defence of territorial and professional autonomy in early-modern France, for what is in essence a functional argument.

This ambiguity carries over into his discussion of the conditions for civil freedom. Montesquieu himself is insistent that the forms of a free constitution are neither a sufficient nor necessary condition for civil liberty.[60] Nonetheless, there is some room for certain parallels between his theory of the rule of law and the need for standard procedures of prosecution. However, while his analysis of political liberty rests predominantly on a recognition of the importance of standard rules to guard against the possible abuse of power given the established distribution of sovereign power, his analysis of civil liberty places his procedural recommendations in a much wider scope incorporating the study of existing morals, manners, traditions as well as established positive laws.[61] To treat these reflections methodically we will follow the model of the criminal justice process itself, with an examination of his remarks concerning the dispositions of the law, trial procedure, the judges and the act of judging, punishments, and the relation of the criminal justice process to other powers of government.

In the first chapter of Book XII, Montesquieu defines civil freedom in terms of security, "Elle consiste dans la sûreté, ou dans l'opinion que l'on a de sa sûreté."[62] In the next chapter he affirms that this freedom is best promoted (or undermined) by the nature of the criminal laws, as it is in the event of being made the object of an accusation, both public and private, that one's security is most threatened.[63] His discussion here may at first seem to pose a challenge to the doctrine of the rule of law as developed in his discussion of political freedom. At one level, Montesquieu voices his suspicions of a zealous concern for legislative

uniformity. He portrays such concern for apparent legal perfection as the deceptive garb of a despotic will.[64] In a context of given territorial legal diversity within a political society, he notes that the costs of change required by such a policy may be more than the possible inconveniences of retaining the status quo. However, in the course of the discussion it becomes clear that what is important here for Montesquieu is not that legal diversity within a society (such as the varying prescriptions of regional customary law which existed in France up to the revolution) is itself of intrinsic value for the promotion of freedom, it is, rather, instrumental to the more basic good of political order. "Lorsque les citoyens suivent les lois, qu'importe qu'ils suivent la même?"[65] While this defence of internal legal diversity may at first appear problematic given his previous defence of a rule of law, the conflict is less blatant than it seems. If the rule of law is understood solely as opposed to the rule of the will, certainly legal diversity can be accomodated, at least insofar as it does not undermine collective perceptions of security. Furthermore, in the context of eighteenth century France, as we have seen, the laws that might differ among regions were predominantly civil laws relating to the transfer of property and contracts. In criminal matters, regional variation, as far as legal rules and procedures were concerned, was slight.

Montesquieu is also sensitive to the need for functional jurisdictional diversity, but here the reasoning is based on a consideration of the characteristics of the activity concerned. For example, he notes that Xénophon advocated special legal rules which would allow merchants to expedite their affairs more quickly, a need also met by the various consular courts in trading centres across France in the eighteenth century.[66] In the same manner, he argues for separate ecclesiastical responsibility for what are considered to be crimes of religion with no visible threat to established political order, for reasons that the particular nature of strong religious allegiance will make legislative prescription either useless or destructive.[67] Nonetheless, in Book XII he does not rule out altogether the public prosecution of the crime of heresy, but only suggests that it proceed with great circumspection, given that it is based primarily on a judgement of character rather

than clearly discernible criminal behaviour.[68]

b) The province of criminal law.

This defence of certain jurisdictional diversity, however, is compatible with Montesquieu's more general stance regarding the legitimate province of criminal law. He states in Book XII (in tacit agreement with Pufendorf), that positive laws are suitable for the punishing of external actions and not for mere intentions.[69] He rules out punishment for spoken words, not because they are not actions and not for reasons of free speech, but because for Montesquieu, the spoken word is essentially unreliable, open to a multiplicity of interpretations with meanings determined by a whole array of considerations including the tone and context of delivery.[70] They become crimes in the event that they prepare, accompany or follow a criminal act. In this assertion he is offering a critique of the contemporary rules regarding the crime of lese-majesty. As we have seen, however, from the evidence available, such rules were not invoked in practice in the work of the Bordeaux court when Montesquieu was serving as a magistrate.[71]

But despite these general prescriptions in the drafting of criminal law and the consideration of the proper jurisdiction for its regulation, Montesquieu is also aware that the particular nature of the society also poses a certain constraint on how these general rules will be applied and will take form. While much of the work emphasises the dependence of civil laws on established political laws, there is also recognition that the level of social and economic development, in determining the nature of popular activities, will also affect the laws regulating them. Thus, in a society which uses no money, crime will be open and usually violent given that there is not the opportunity for crimes of fraud and other forms of ruse that comes with a more complex organisation of public business.[72] The creation of new criminal opportunities generates in its turn a need for a more developed network of legal rules.

c) Criminal justice and the monarchical regime.

For Montesquieu, the character of the political laws are most important in determining directly the particular character of civil law, although he is clear to concede that his prescriptions are not meant as an unchanging and universally valid set of political laws, but rather the statement of certain discernible patterns for which exceptions can be found. The fundamental importance of political law (what he also calls public law) for the character of civil law is stated in Book XXIX, as well as generally implied by the organisation of the first books of the work.[73] Thus, in a republic, all crimes will carry a more public character than they would in a monarchy.[74] This brings both the opportunity for great penal severity and the need for clemency. Chapter twenty-one of Book XII is entitled "De la cruauté des lois envers débiteurs dans la république," in which Montesquieu compares a feature of the laws of Athens and Rome and condemns the decemvirs for preserving the ancient practice of enslaving citizens for reasons of debt.[75] While he argues here that such treatment ran contrary to the spirit of democracy, he also makes it clear in other passages that democratic forms are no guarantee of moderate policies and that popular rule can be as tyrannical and severe as the worst despotism. It is due to the possibility of popular justice in a republic becoming a foil for unlimited and unregulated popular vengeance, that he recommends that where a republic is threatened by a popular revolt, a policy of general pardon take precedence over one of widespread punishment and imposed exile.[76]

Republican laws distinguish themselves most clearly from those of a monarchy in that they are drafted to apply to all citizens indiscriminately. In contrast, the social distinctions inherent in a monarchical regime will multiply the legal distinctions and relative privileges.[77] The diversity of cases gives rise to the need for a more highly developed science of jurisprudence, not only for more competent invocation of the ruling codes, but also for an understanding of traditions of judicial precedent. Here, in contrast, Montesquieu provides a defence

of periodic attempts at legal rationalisation.[78] His defence of diversity does not extend beyond the point at which the courts are used as means to clarify the law rather than to solve disputes; that is, when the uncertainty begins to undermine security. It is for this reason that Montesquieu also is critical of attempts by the central power to establish special ad hoc courts (chambres de justice) to judge particular cases, such as the court established in 1716 to investigate abuses in financial collection.[79] It is clear then that Montesquieu's praise of certain legislative and jurisdictional diversity is neither unlimited nor undiscerning. Its value is judged in relation to various ends of political society, such as collective security, freedom and relative order.

d) Criminal procedures.

In this and in the following sections it will be shown how Montesquieu reworks the understanding of several key principles of the practice of criminal justice in pre-revolutionary France in order to advocate his new theory of criminal justice allied with civil freedom. These principles include the centrality of the inquest procedure, the exercise of judicial discretion or arbitrium, the justification of punishment for reasons of deterrence (as evoked in the preamble to the 1670 ordinance), the building on and generating popular sentiments of fear and the place of criminal justice in a wider array of policing responsibilities.

His discussion of the need of a set of standard procedures in the promotion of civil freedom attest to further limits on the apparent defence of diversity. He states in Book XXIX that formalities in the exercise of justice, if not so excessive as to obstruct the resolution of disputes and undermine a popular sense of security, are necessary for freedom.[80] In the context of early-modern France, such formalities included the need to follow closely the various steps of criminal procedure as outlined in the ordinances with the corresponding documentation, authorisation and payment of fees. As we have seen, judicial irregularities and corruption were pervasive in the jurisdiction of the Bordeaux parlement and

Montesquieu's concern for the sanctity of procedure is one which was shared by the court. While formalities are defended as a form of standardised procedure, their merit for Montesquieu is not the same as for the rule of law. Their benefits are not found in themselves as an exercise in impartiality and protection from arbitrary rule, rather, they are regarded as means by which the trial of an accused is assured of a certain duration, and the case is given due consideration with guaranteed opportunities for open self-defence. Montesquieu thus considered the judicial procedures of his day in fact to offer a great deal of protection for the accused and to promote civil freedom.

He offers a general defence of inquisitorial procedures, giving the magistrate's independent powers of investigation for suspected crimes, in chapter eight of Book VI.[81] He states that accusatorial procedure, as practised in republican Rome and in England of his day, was only suited to those republics where public zeal was strong enough that each citizen would take policing responsibilities into their own hands, even in cases where they were not directly affected. In other circumstances, the system is apt to be misused by those placing accusations for other motives. For this reason, Montesquieu defends the institution of a public prosecutor whose actions are open to scrutiny.[82] In addition, he praises a central tenet of French Roman-canon procedure which rules that two eye-witness accounts are necessary for a full proof of guilt.[83] He contrasts this with the Greek and Roman law which allowed for a conviction on the basis of one witness account alone, a rule which he declares to be inimical to freedom.

However, despite his defence of the main features of contemporary French criminal procedure, it was not an uncritical one. As Brethe de la Gressaye notes in his critical edition of L'Esprit des lois, in the manuscript version of XII, xxii, Montesquieu offered a condemnation of the use of lettres de cachet, by which the king can independently order an arrest without the standard process of preliminary information.[84] This passage was retracted in the course of publication. More significant is his condemnation of the practice of torture in judicial questioning. His case is presented in chapter seventeen of Book VI. It rests on the principle

that the practice is superfluous for the general object of procedure to discern guilt and innocence. He declines to develop, or even to repeat the arguments of his predecessors for reform, being content instead to refer to the example of England where prosecutions were conducted without resort to torture.[85]

> Nous voyons aujourd'hui une nation très bien policée la rejeter sans inconvénient. Elle n'est donc pas nécessaire par sa nature.
>
> Tant d'habiles gens et tant de beaux génies ont écrit contre cette pratique, que je n'ose parler après eux. J'allais dire qu'elle pourrait convenir dans les gouvernements despotiques, où tout ce qui inspire la crainte entre plus dans les ressorts du gouvernement; j'allais dire que les esclaves chez les Grecs et chez les Romains...Mais j'entends la voix de la nature qui crie contre moi.[86]

This passage accentuates a tension in Montesquieu's invocation of the despotic regime as both a relatively viable and common (though misguided) means of securing the object of political order, and its use as a vessel for all that he regards as disfunctional in politics. The latter leads him to the theoretical stance that where slavery and general inhumanity are the rule, torture itself could be defended, however, for a regime which also is seen as participating in minimum standards of civil order, Montesquieu must lay his final and definitive condemnation in the form of invoking the more powerful voice of nature's conscience.

It may seem to some that such a condemnation, especially given the limited recourse to the practice in the courts of his day, was weaker than it could have been. Its treatment is slight in comparison to his treatment of the issue of slavery, which for Montesquieu merits two books. However, an examination of his treatment of the same question in his notebooks may lead one to a slightly different and more subtle conclusion. In his Pensées Montesquieu offers three brief arguments against the practice. He first voices the standard judicial point of opposition to the procedure that it was not an effective means of generating certainty in determining guilt and innocence, and in the process, it multiplied

injustices by wrongly subjecting the innocent to cruel treatment and by letting those who were guilty avoid the death penalty.[87] He also makes the link between torture and slavery, and thereby implies that the institution could not be defended on the basis of juridical reasons alone, but required a repudiation of contemporary understandings of humanity. Finally, he refutes the point that the practice was necessary as it was implicated in a whole array of laws and procedures. He argues that such reasoning would have preserved even the use of judicial ordeals into his own era. This last argument recalls his own description of the transition in the practice of criminal justice in France from pervasive recourse to judicial combat to the adoption of standard appeal procedures and the introduction of Roman law. St. Louis was praised by Montesquieu in that historical survey, not for the outright abolition of the practice of judicial combat (for in this St. Louis did not have full authority over all of France to do so and even in his own domain he was not fully successful), but for introducing the procedures and an approach to jurisprudence which would render the practice fully anachronistic and unnecessary. By examining closely Montesquieu's prescriptions for the forms of criminal judgements, one can see how he himself would come to render the practice of torture superfluous.

e) Criminal judgements.

Montesquieu makes the repeated distinction between judging in a republic and in a monarchy. In the first, drawing from the experience of Rome (as well as a misreading of contemporary English practice) he argues that judgements in a republic are made generally in accordance with the letter of the law.[88] In contrast, he portrays the monarchy as a regime where judges are granted a certain latitude in their judgements (within the limits of what they deem to be the spirit of the law), especially in cases where the law is imprecise. He sketches the process of judicial arbitrium where the royal judges deliberate among themselves and seek to reconcile their views through conciliation and accomodation, as

opposed to judgment in a republic which takes place on an individual basis and is voiced publically and formally.[89] What is most significant about this characterisation is that Montesquieu is shifting the application of the standard notion of arbitrium from the discernment of the appropriate punishment to fit the crime and the offender, to one which relates to determining guilt or innocence itself. As has been shown in chapter 3, according to the official theory of legal proofs, guilt itself was to be determined by the nature and quantity of evidence and testimony, with no regard for the particular opinions of the magistrates on the question of ultimate guilt or innocence. For such a theory there would be no need for consultation or accomodation on the question of conviction, for that matter would be decided immediately according to the evidence available. By offering this new characterisation of the dynamics of judgement in a monarchy, Montesquieu is thereby tacitly declaring the practical abandon of part of the strict rules governing the theory of judicial proofs in France. Furthermore, the practice of judicial torture was strictly dependent on the official laws of judicial proof, as chapter 3 also demonstrated. By showing a form of legal decision-making in a monarchy whereby questions of guilt and innocence could be worked out among the judges themselves on the basis of testimony provided, the arguments of their colleagues and their inner convictions, Montesquieu was already pointing to a system in which the practice of torture would be unnecessary.

It has been shown how such movements also had a resonance in epistemological theories of the early-modern period, for which a science of probability was being developed to allow space for relative certainty in matters where absolute certainty was now felt to be impossible.[90] This allowed for a relative certainty on conviction which had not been possible before, at least in theory. For Langbein, however, this parallel appears merely coincidental, for the doctrine of legal presumption which had formed the basis of a justification for the application of torture in the Romano-canon system of proofs, and which had been subsequently applied to the process of conviction, had existed since the Middle Ages. In Montesquieu's work, however, the depiction of the process of judicial

deliberation appeals neither to contemporary philosophical theories of probability nor to the juridical doctrine of presumption. By focusing on the activity of judging, l'arbitrage, according to a procedure which had initially governed the application of punishment, rather than the determination of guilt, and by linking this process to the political constitution, he is showing that the matter is not fundamentally one of epistemology, but largely an organisational one. This is perhaps not so surprising given the recognition of all the institutional factors which contributed to the possibility for the Bordeaux magistrates to have enough latitude to establish their own tradition of jurisprudence. In Montesquieu's arbitrage, judgement by inner conviction is still not the general rule. Instead, it is a process of accomodation, and part renunciation for the object of providing a common front.

> Dans les monarchies, les juges prennent la manière des arbitres; ils délibèrent ensemble, ils se communiquent leurs pensées, ils se concilient; on modifie son avis pour le rendre conforme à celui d'un autre; les avis les moins nombreux sont rappelés aux deux plus grands.[91]

Here Montesquieu is turning an associational logic on the very institution from which it was derived in such a way that the redescription of the rules and practices governing criminal judgements takes its justification from the larger political association of which it is a part. In this description of monarchical justice, it is no longer the consideration of the diversity of offenders or Fleury's "infinite crimes" which justifies a multiplicity of responses. The association which is primary in giving meaning to the practices of the judges is the wider political regime itself with the latitude of judgement which the law provides. In the portrait of monarchical criminal justice, it is this characterisation and use of associational discourse which allows Montesquieu to continue to uphold features of the theory of legal proofs which he admires, namely the need for two eye-witness accounts as a basis for conviction, while providing an alternative account of the process of judgement to replace the need for those features which he finds

objectionable, allowing him to judge them to be superfluous.

f) Punishments.

Having transfered the principle of arbitrium from the determinination of the requisite punishment to the process of judging itself in a monarchy, Montesquieu opens the way for a new consideration of the rules to govern this stage of the penal process. In this field, Montesquieu can be seen to build on the basic conceptual framework of traditional practice, however, in his analysis he shows that the most effective means to implementing the traditional objectives of penal policy is in fact a strategy of moderation and greater legislative uniformity. He shares the premiss with most early-modern jurists that the object of punishment is first and foremost the reestablishment of public order.

> Il y a des règles de pudeur observés chez presque toutes les nations du monde: il serait absurde de les violer dans la punition des crimes, qui doit toujours avoir pour objet le rétablissement de l'ordre.[92]

For Montesquieu, the rules to follow in the implementation of this objective are also borrowed from mainstream penal practice: namely, that punishments be personal, tailored to the crime, assessed for their value as a deterrent on other potential criminals, and thereby used to generate a certain degree of public fear, and finally, that they be considered amidst wider questions of public policing.

His support for the principle of personal punishments is presented largely through a condemnation of the practices of many despotic regimes (including China, and Peru) which are said to punish family groups for the deeds of one of their members.[93] But while supporting this general principle upheld by the practices of pre-revolutionary justice in France (apart from extremely rare cases of lese-majesty in the first degree for which the family of the convicted could be adversely affected in a secondary way), Montesquieu combines it with the suggestion that punishments, while individual, must also be seen to be derived from the law and not from the individual will of the wielder of public authority.

In other words, they are to be personal in their object, and impersonal in their origin. In this way, the principle of personality cannot be confused with the motive of personal vengeance, as illustrated by the counter-example of Japan.[94] Montesquieu invokes again the value of freedom to condemn such practices. It is this value which will allow public authority to discern justice from tyranny.

He also advocates the principle of tailoring the punishment to the crime, one widely held in early-modern jurisprudence and practice. However, in exploring this principle he leaves out from his sketch of the possible character of crimes any consideration of the status or history of the accused and the victim to focus instead solely on the act committed. He identifies four types of crime: those against religion, those contravening general moral practices, those adversely affecting public traquillity and those undermining public security.[95] The principles guiding the appropriate form of punishment are thus to be determined by the principles governing the sphere of social practice offended by the criminal action. In the case of the first, the sanctions are to be taken from the sphere of religion itself, namely excommunication, and calls for repentance. Such prescriptions are consistent with Montesquieu's earlier defence of the sanctity of the ecclesiastical jurisdiction. For the second, he argues that an array of informal and popular sanctions which play on natural feelings of public shame and infamy can serve as strong responses for such crimes. However, in speaking always in terms of punishment he is not depossessing the state of the ultimate right to respond to such acts; rather, he is recognising that the force of popular sentiment can be used by the state in its imposition of punishments in these matters and can contribute to their effectiveness. Such prescriptions underlie Montesquieu's commonly cited critique of early-modern sanctions against suicide. While he does not diverge from the common opinion of his day that such acts were crimes, he argues that the public infamy which comes from public denunciation of such actions as well as the sanctions of ecclesiastical law are a sufficient response and that the customary recourse to other forms of corporal punishment are unnecessary and inappropriate.[96]

For crimes which affect public tranquillity, Montesquieu advocates the restoration of order through measures which will remove the convicted person from the jurisdiction, such as prison and exile.[97] In this instance, he seems to resort momentarily back to a localist perspective for which the practice of exile outside the particular jurisdiction was conceived as a viable solution to the problem of public order, with no consideration, it would seem, for the repercussions for the country as a whole.

In the case of crimes against public security, and as such a direct assault on the sentiments which are a necessary condition of a free society, Montesquieu advocates penal servitude, invoking the law of the talion.[98] Such crimes include murder, attempted murder and some forms of aggravated theft which for Montesquieu merit the death penalty as they not only are a violation of individual goods, but of the confidence necessary for public order. However, he also hints at a recognition that these criminal acts themselves are reflections of a wider social malaise and not just imputable to forms of a malevolent will. As such, it appears as a remedy of the last resort, "cette peine de mort est comme le remède de la société malade." He had remarked earlier in the work that resort to the talion law was a distinctive mark of despotism which was not eliminated in moderate governments, but could only be tempered in its use.[99] Nonetheless, the sudden introduction of retributivist logic in this passage jars with the rest of his analysis in this field. It may be that given the fundamental importance of the value of a popular sense of security for Montesquieu's theory of public order and freedom, combined with the limited options in the early-modern lexicon of possible punishments, he could conceive of no alternative. Later in the work, however, as if unsatisfied with this justification, he does seek to justify the death penalty on consequentialist terms by arguing that the law did work in the criminal's favour before the conviction, a point which distinguishes it from a law of slavery.[100] The goal of public security and freedom, as furthered by the rule of law, works in the advantage of those who abide by its dictates, and offers a good for each individual which compensates for the pain (or death) consequent on its violation.

In this way, Montesquieu seeks to rework aspects of the traditional doctrine of suiting the punishment to the crime. He does so by creating greater awareness of both the motivating factors for the criminal act as well as the public injury done, conceived directly rather than mediated through sentiments of personal offence.

After an acceptance of basic inquisitorial procedure (as compatible with civil freedom) while reworking the traditional understanding of judicial prudence or arbitration in the act of judging guilt and punishment, the third principle of the early-modern penal regime on which Montesquieu focuses is that of deterrence. As we have seen, this was sought as much in the judicial practice of the Bordeaux parlement as in France as a whole through the use of public and exemplary punishments. Montesquieu argues, however, that the accepted end of deterrence is more effectively pursued by two means. First, he invokes the principle of proportionality which is not only applied with respect to the crime, as we have just studied, but also for punishments among themselves. He refers to the need for harmony among punishments, so that in their effectiveness as deterrents, they will not encourage more severe crimes by offering no graduated degrees of threat.[101] He invokes the practice in France of assigning in law the same punishment to one who steals on a public road and one who both steals and murders. While the first may have been justified by the assumption that the thief in such circumstances was likely to be armed and pose a threat to the lives of the victims anyway, the distinction nonetheless serves to illustrate the general point.[102] He then offers some praise for the British system, which while not offering proportionality in its code (in fact, at this time of the Bloody Code punishments were becoming increasingly severe and disproportioned on paper), offered the possibility of pardon which served as a practical remedy to a lack of legal harmony. The need for proportionality among punishments as a condition of deterrence is backed up by the allusion to the need for certainty of punishment also.

> Il ne faut point mener les hommes par les voies extrêmes; on doit être ménager des moyens

> que la nature nous donne pour les conduire. Qu'on examine la cause de tous les relâchements, on verra qu'elle vient de l'impunité des crimes, et non pas de la modération des peines.[103]

Here Montesquieu implies that the pre-revolutionary practice of selective and exemplary punishments is not the most effective means of establishing a credible deterrent. The lack of adequate resources, however, would make the positive notion of an efficient national police force a chimera at the time, although the 1720 reforms of the provincial maréchaussée went some way in that direction.[104]

The fourth principle invoked by Montesquieu in his discussion of punishment is the centrality of popular fear as a means to make these various measures effective. But while he shares this assumption with common opinion of his day, he argues that this can be undermined by a consistent policy of severity and be promoted by a policy of general moderation. He states that in a regime upheld by the principles of honour and virtue, the fear of dishonour, infamy and even loss of wealth through imposed fines can themselves serve as effective deterrents in crime prevention. In such circumstances, a policy of severe penal retribution may only serve to modify that fear of public disapproval into a fear of public authority which as an instrument of deterrence is ultimately less effective.

> Il ne faut pas des peines trop cruelles, pour n'accoutumer pas les hommes à n'être touchés que de la crainte des châtiments cruels.[105]

For this reason, the best penal policy has nothing to do with forms of public punishment but resides in prevention, the cultivation of public morals and a consideration of those features of the "société malade" which helps to motivate crime in the first place. The point, then, is not to eliminate fear as a motivating feature of public behaviour. It is to encourage the development of political societies in such a way that the forms of fear used are more compatible with a sense of public security and freedom, that they are ultimately more effective in securing public order and that they are less exacting on the public authorities who are highly susceptible of generating a vicious spiral of public violence imposing

greater demands and responsibilities on themselves while corrupting society in the process. In his Pensées, Montesquieu cites the example of the Ethiopian kings of Egypt who abolished the death penalty and who were able to rule effectively with both humanity and justice.[106] It also serves to demonstrate that moderate government is possible for both republican and monarchical forms.

Finally, Montesquieu builds on the notion found in the practice of pre-revolutionary criminal justice to situate the exercise of the authority to punish in a wider set of policing considerations. However, while in Bordeaux this was done on the basis of principles of territorial jurisdiction, or for reasons of the judicial hierarchy itself, for Montesquieu, a concern for policies of education and attention to public morals flows directly from a basic concern for order. To this extent, he continues a theoretical tradition which recognises both the foundational role of the exercise of justice for public authority, as well as how this concern both justifies and grounds other public functions.

> Un législateur sage aurait cherché à ramener les esprits par un juste tempérament des peines et des récompenses; par des maximes de philosophie, de morale et de religion, assorties à ces caractères; par la juste application des règles de l'honneur; par le supplice de la honte; par la jouissance d'un bonheur constant et d'une douce tranquillité; et, s'il avait craint que les esprits, accoutumés à n'être arrêtés que par une peine cruelle, ne pussent plus l'être par une plus douce, il aurait agi d'une manière sourde et insensible; il aurait, dans les cas particuliers les plus graciables, modéré la peine du crime, jusqu'à ce qu'il eût pu parvenir à la modifier dans tous les cas.[107]

He is arguing, therefore, that a concern for a just public policy in the resolution of disputes and in a manner most conducive to freedom, will necessarily entail a broader concern for public values and the conditions which support them. In so doing, however, as a realist, he recognises that the exercise can be viewed as a means of managing public fears in a way which is instrumental to the end of public order. Furthermore, it is a theory of criminal justice fully centred on the

necessity of punishment and publically justified imposition of pain, however strong his plea for moderation.

IV. Conclusion.

In his Pensées, Montesquieu proposes an epigraph for Book XI of L'Esprit des lois taken from Tacitus' Agricola: "Res olim dissociabiles, principatus et libertas."[108] We have seen equally how in his study of the principles of criminal justice he was largely concerned to reconcile the need for order and the goods of freedom. From a concern for order itself he argues that the sometimes seemingly obvious solution in the form of greater severity is liable to do more harm than good, for in assuming that people are principally motivated by fear of state violence, they may become that way, requiring a general rule of terror in most if not all matters. In this line of argument, freedom as moderation is promoted by a consideration of the most efficient means to order. As we have seen, this also directs his particular analysis of the modes of determining punishments in relation to the crimes. He shows again how moderation can be a means toward the traditional goals of pre-revolutionary criminal judgements (namely, the personality of punishments, proportionality and their value as deterrents).

In the end, however, those traditional practices do not include the basic guarantees that such means would be consistently invoked. For this reason, alongside this argument, one can see that Montesquieu also tries to reconcile freedom and order in another manner. He draws on features, sometimes conflicting, of the public order of his day, such as certain provincial autonomy, an independent professional corps of magistrates in the midst of a general trend to centralisation and national consolidation to build a theory in which the benefits of consolidation with uniform procedures, improved policing and more moderate sentencing, could be combined with a functional justification of a long tradition of effective judicial autonomy. On this basis, however, Montesquieu is showing in the end that a society ultimately must have an underlying commitment to the

value of freedom, for on these terms alone can it be inspired to adopt the measures through which it will be promoted.

Behind this argument is the invocation of the general premisses of an earlier associational discourse which allows him to recognise multiple motivations and strategies of governing. In the context of France, therefore, it forms the groundwork for the possibility of moderation reconciled with order. However, the basic theory also leads to the recognition that, given the fact of human diversity, there is no such thing as a universal solution. Montesquieu, thus, slides from one pole to another, constructing a framework from which to judge the promotion of freedom in various societies, but with a nagging awareness of the fragility of his attempts given that no one framework can ever be definitive. Amidst this search for the means to civil freedom, he may show us that it is above all the public commitment that is important.

Endnotes

1. "Je me trouve fort dans mes maximes, lorsque j'ai pour moi les Romains; et je crois que les peines tiennent à la nature du gouvernement, lorsque je vois cee grand peuple changer à cet égard de lois civiles, à mesure qu'il changeait de lois politiques." L'Esprit des lois, VI, xv.

2. L'Esprit des lois, VI, xi, "Que lorsqu'un peuple est vertueux, il faut peu de peines."

3. L'Esprit des lois, V, vii.

4. Ibidem.

5. "Il ne faut pas beaucoup de probité pour qu'un gouvernement monarchique ou un gouvernement despotique se mainteinnent ou se soutiennent. La force des lois dans l'un, le bras du prince toujours levé dans l'autre, règlent ou contiennent tout. Mais, dans un Etat populaire, il faut un ressort de plus, qui est la vertu." L'Esprit des lois, III, iii.

Montesquieu also observes that while despotic states are often driven by the pure logic of retribution in punishment, moderate governments will be more attentive to prevention. L'Esprit des lois, VI, xiii.

6. "C'est une maxime capitale, qu'il ne faut jamais changer les moeurs et les manières dans l'Etat despotique; rien ne seroit plus promptement suivi d'une révolution. C'est que, dans ces Etats, il n'y a point de loix, pour anisi dire; il n'y a que des moeurs et des manières; et, si vous renversez cela, vous renversez tout." (L'Esprit des lois, XIX, xii).

"Dans les Etats despotiques, où il n'y a point de lois fondamentales, il n'y a pas non plus de dépôt de lois. De là vient que, dans ces pays, la religion a ordinairement tant de force; c'est qu'elle forme une espèce de dépôt et de permanence: et, si ce n'est pas la religion, ce sont les coutumes qu'on y vénère au lieu des lois." (II, iv).

7. Montesquieu discusses this combination of laws, morals and manners (what he calls the Chinese rites, that is the basic Confucian rules of civil harmony) in chapters xvi to xix of Book XIX. Reflections on Asiatic trends of despotism are offered in chapter 3 of Book XVII.

8. He addresses the question directly in chapter xxi of Book VIII.

9. These references are found in VI, xvi, XII, vii and VIII, xxi.

10. "A la Chine, les voleurs cruels sont coupés en morceaux, les autres non: cette différence fait que l'on y vole, mais qu'on n'y assassine pas." L'Esprit des lois, VI, xvi.

11. As K. Codell Carter notes in his edition of William Godwin's Enquiry Concerning Political Justice, Godwin's work was originally conceived as a commentary on L'Esprit des lois. See "Introduction," An Enquiry Concerning Political Justice (Oxford: Clarendon Press, 1971), xii.

12. Tacitus, Germania, trans. by Harold Mattingly (London: Penguin Books, 1948).

Reference works consulted in the writing of this section included André Castaldo and Pierre-Clément Timbal, Histoire des institutions publiques et des faits sociaux (Paris: Dalloz, 1990); Jean Barbey et al. Histoire des institutions de l'époque franque à la Révolution; Edward James, The Origins of France (London: Macmillan Education Limited, 1982); Robert Bartlett, Trial by Fire and Water (Oxford: Clarendon Press, 1986); John P. Dawson, A History of Lay Judges (Cambridge, Massachusetts: Harvard University Press, 1960); Carbasse, Introduction historique au droit pénal; Laingui and Lebigre, Histoire du droit pénal. II. La Procédure criminelle; Laingui, Histoire du droit pénal; Esmein, A History of Continental Criminal Procedure with Special Reference to France.

13. L'Esprit des lois, XXX, xix, pp. 328-29.

14. Ibidem.

15. L'Esprit des lois, XVIII, xvii, p. 228.

16. L'Esprit des lois, XVIII, xxxvi, p. 264 and XXIV, xvii, p. 144.

17. L'Esprit des lois, XXVIII, ii. Again in XXX, xi, he notes that in a state of peace after the violence of invasion, the Germanic tribes would generally preserve the original civil and political rights of the inhabitants.

18. Montesquieu makes the point that the laws of other Germanic tribes continued to be in effect even after the defeat of Alaric II at Vouillé (507) by the Frankish king Clovis and the later defeat of the Burgundians.

19. On the practical diversity of law, even within Roman jurisdictions, and of the possible influences of Gallic provincial law on early-medieval French practice, see Ian Wood, "Disputes in late fifth- and sixth-century Gaul: some problems." In The Settlement of Disputes in Early Medieval Europe eds. Wendy Davies and Paul Fouracre (Cambridge: Cambridge University Press, 1986), 7-22.

20. In XXXI, i, Montesquieu remarks that the counts were appointed annually.

21. Recourse to higher authorities was possible only in the case of deni de justice, that is when the local court did not exercise its obligation to try a case.

22. The nature of this procedure, as distinguished from other judicial ordeals, is its invocation by an outright challenge and its form as a conflict involving two parties. Ibid., XVIII, xiv, p. 226.

23. L'Esprit des lois, XVIII, xvii, p. 229.

24. L'Esprit des lois, XVIII, xvii, p. 230.

25. L'Esprit des lois, XXX, xx, pp. 332-33; XXVIII, i, ii, and iii, pp. 207-12; XXII, ii, p. 69.

Montesquieu's characterisation of the process as one of civil procedure opens up the possibility for a parallel with the role of the civil party in pre-revolutionary forms of justice. The notion of personal, monetary compensation for injury apart from the public nature of the crime could be seen as an endemic feature of French criminal justice rooted in some of the earliest political practices among its settlers.

26. L'Esprit des lois, XVIII, i, pp. 207-09.

27. L'Esprit des lois, XXX, xx. There is emphasis here on the fredum as a local right.

28. L'Esprit des lois, XXX, xx, xxvi and xxviii. Fiefs became subject to hereditary transferal in the twelfth century and alienable in the thirteenth century.

29. Ibidem.

30. L'Esprit des lois, XXVIII, ix, 219.

31. See the Edit de Pistes 867 and L'Esprit des lois XVIII, xii.

32. L'Esprit des lois, XVIII, xix.

33. See chapters xviii to xxvii of Book XXVIII.

34. L'Esprit des lois, XXVIII, xix.

35. L'Esprit des lois, XXVIII, xxiii.

36. L'Esprit des lois, XVIII, xxiii.

37. L'Esprit des lois, XXVIII, xxvii.

38. L'Esprit des lois, XVIII, xli.

39. L'Esprit des lois, XVIII, xxxix.

40. L'Esprit des lois, XVIII, xlv, pp. 279-80.

41. L'Esprit des lois, XVIII, xxxvii, 275.

42. L'Esprit des lois, XVIII, xxxviii.

43. L'Esprit des lois, XVIII, xxix to xxxii.

44. L'Esprit des lois, XVIII, xxxvi.

45. L'Esprit des lois, XVIII, xlii, 276.

46. L'Esprit des lois, XVIII, xxix and xxxv.

47. L'Esprit des lois, XXVIII, xliv.

48. Peter Stein has argued that the conditions for judicial independence in early-modern Europe were best fulfilled by the French example because of the large number of judges (over 1,200 royal judges by the eighteenth century), the lack of lay participation in the judicial process and the venality and inheritance of office (introduced in the sixteenth and seventeenth centuries). As we have seen in this analysis of Montesquieu's reading of France's criminal justice history, these are factors which themselves need to be explained. For Montesquieu, they are tied first to the local origins of the practice of public penal justice (necessitating a highly decentralised system of royal justice) and second to the means whereby this localised system could be integrated into a wider project of political consolidation through the introduction of standardised procedures and specialised judicial knowledge. See Peter Stein, "Safety in Numbers: sharing of responsibility for judicial decision in early modern Europe," In The Character and Influence of Roman Civil Law, (London and Ronceverte: The Hambledon Press, 1988), 101-13.

49. On this theme see Isaiah Berlin's "Alleged Relativism in Eighteenth-Century European Thought." In The Crooked Timber of Humanity (London: Fontana Press, 1991), 70-90.

50. This idea is also expressed in his Pensées: "Ce mot de liberté dans la politique ne signifiee pas à beaucoup près, ce que les orateurs et les poètes lui font signifier. Ce mot n'exprime proprement qu'un rapport et ne peut servir à distinguer les différentes sortes de gouvernements: car l'état populaire est la liberté des personnes pauvres et faibles et la servitude des personnes riches et puissantes; et la monarchie est la liberté des grands et la servitude des petits." (n. 874)

See Hobbes, Leviathan, ed. C.B. Macpherson (London: Penguin Books,

1951), 266.

51. Pensées, n. 884.

52. L'Esprit des lois, XI, iii, 167.

53. While the concept of negative freedom is generally traced to the work of Hobbes, scholars have noted that chapter 21 of Leviathan in fact offers several definitions of the concept of freedom.

54. "As for other Lyberties, they depend on the silence of the Law. In cases where the Soveraign has prescribed no rule, there the Subject hath the liberty to do ,or forbeare, according to his own discretion. And therefore such Liberty is in some places more, and in some lesse; and in some times more, and in some lesse, according as they that have the Soveraignty shall think most convenient." Leviathan, 271.

55. "La liberté politique ne se trouve que dans les Etats modérés; elle n'y est que lorsqu'on n'abuse pas du pouvoir..." L'Esprit des lois, XI, iv.

56. L'Esprit des lois, XI, iv.

57. "Ce qui fait que la plupart des gouvernements de la terre sont despotiques, c'est qu'un pareil gouvernement saute aux yeux; qu'il est uniforme partout. Comme il ne faut que des passions violentes pour l'établir, tout le monde est bon pour cela. Mais, pour établir un gouvernement modéré, il faut combiner les puisisances, les tempérer, les faire agir et les régler; donner un lest à l'une, pour la mettre en état de résister à une autre; enfin, il faut faire un système." Pensées, n. 935. On despotism as personal rule see L'Esprit des lois, V, xiv.

58. L'Esprit des lois, VI, vi.

59. L'Esprit des lois, VI, v.

60. "Il pourra arriver que la constitution sera libre, et que le citoyen ne le sera point. Le citoyen pourra être libre, et la constitution ne l'être pas..." L'Esprit des lois, XII, i, 201.

61. Ibidem.

62. L'Esprit des lois, XII, i.

63. L'Esprit des lois, XII, ii, 204.

64. L'Esprit des lois, XXIX, xvi, xviii and V, xiv.

65. L'Esprit des lois, XXIX, xviii.

66. L'Esprit des lois, XX, xviii. See Paul Butel, Les Négociants bordelais, l'Europe et les Iles au XVIIIe (Paris: Aubier, 1974).

67. "Il faut éviter les lois pénales en fait de religion. Elles impriment de la crainte, il est vrai; mais comme la religion a ses lois pénales aussi qui inspirent de la crainte, l'une est effacée par l'autre. Entre ces deux craintes différentes, les âmes deviennent atroces.

La religion a de si grandes menaces, elle a de si grandese promesses, que lorsqu'elles sont présentés à notre esprit, quelque chose que le magistrat puisse faire pour nous contraindre à la quitter, il semble qu'on ne nous laisse rien quand on nous l'ôte, et qu'on ne nous ôte rien lorsqu'on nous la laisse." L'Esprit des lois, XXV, xii.

However, when the denominational constituency does not yet exist in the society, Montesquieu notes that the state can refuse to welcome it. Ibid., XXV, ix.

In the same manner, Montesquieu notes that the province of canon law should not imply unrestricted jurisdiction over all crimes performed in a sacred place, but only for those crimes which involve a direct offence to religious principles. For this reason, he states that the theft of a private object in a sacred place should not be considered an example of sacrilege.(L'Esprit des lois, XXVI, viii) Thus, while Montesquieu, in contrast to many voices for judicial reform in his era, defends the traditional jurisdiction of the church, he also recognises the legitimacy of some of the principles of the encroachment of royal justice into this area.

68. L'Esprit des lois, XII, v, 206.

69. L'Esprit des lois, XII, xi. "Les lois ne se chargent de punir que les actions extérieures."

70. "Les paroles ne forment point un corps de délit; elles ne restent que dans l'idée. La plupart du temps, elles ne signifient point par elles-mêmes, mais par le ton dont on les dit. Souvent, en redisant les mêmes paroles, on ne rend pas le même sens; ce sens dépend de la liaison qu'elles ont avec d'autres choses. Quelquefois le silence exprime plus que tous les discours. Il n'y a rien de si équivoque que tout cela." L'Esprit des lois, XII, xii, 212.

71. The written word is also portrayed in a rather ambiguous manner for Montesquieu. While he recognises that texts are more permanent and their meanings more easily fixed, they may play a cathartic role in republics and monarchies, and through the genre of political satire, reconcile the discontented and the powerless to the established order. See L'Esprit des lois, XII, xiii.

72. L'Esprit des lois, XVIII, xvi, 311.

73. "Comme les lois civiles dépendent des lois politiques, parce que c'est toujours pour une société qu'elles sont faites, il seroit bon que, quand on veut porter une loi civile d'une nation chez une autre, on examinât auparavant si elles ont toutes les deux les mêmes institutions et le même droit politique." L'Esprit des lois, XXIX, xiii.

74. L'Esprit des lois, III, v.

75. L'Esprit des lois, XII, xxi, 220-21.

76. L'Esprit des lois, XII, xviii, 217.

77. L'Esprit des lois, VI, i.

78. "A mesure que les jugements de tribunaux se multiplient dans les monarchies, la jurisprudeence se charge de décisions qui quelquefois se contredisent, ou parce que les juges qui se succèdent pensent différemment; ou parce que les mêmes affaires sont tantôt bien, tantôt mal défendues; ou enfin par une infinité d'abus que se glissent dans out ce qui passee par la main des hommes. C'est un mal nécessaire, que le législateur corrige de temps en temps, comme contraire même l'esprit des gouvernements modéręs. Car, quand on est obligé de recourir aux tribunaux, il faut que cela vienne de la nature de la constitution, et non pas des contradictions et de l'incertitude des lois." L'Esprit des lois, VI, i.

79. L'Esprit des lois, XII, xxii.

80. L'Esprit des lois, XXIX, i; and VI, ii.

81. L'Esprit des lois, VI, viii, 90-91.

82. "Nous avons aujourd'hui une loi admirable: c'est celle qui veut que le prince, établi pour faire exécuter les lois, prépose un officier dans chaque tribunal, pour poursuivre en son nom, tous les crimes: de sorte que la fonction des délateurs est inconnu parmi nous; et, si ce vengeur public était soupçonné d'abuser de son ministère, on l'obligerait de nommer son dénonciateur." Ibidem.

83. L'Esprit des lois, XII, iii, 203.

84. In volume 2 of his 1971 edition, n. 65, pp. 380-81.

85. In fact, as historians of English criminal procedure often note, while English courts did not formally resort to the practice of torture in prosecution, they did have recourse to what is called la peine forte et dure, that is, the pressing down of an accused under weights, in the event that a suspect refused to speak in court.

86. L'Esprit des lois, VI, xvii, 102.

87. Pensées, n. 643.

88. L'Esprit des lois, VI, iii, 84-85.

89. L'Esprit des lois, VI, iv, 85.

90. It is this development in judicial reasoning that, as Shapiro argues, was borrowed by British courts from continental practice in the eighteenth century and used to forge the doctrine of conviction "beyond a reasonable doubt". See Barbara Shapiro, 'Beyond Reasonable Doubt' and 'Probable Cause' (Berkeley and Oxford: University of California Press, 1991), especially chapters 3 and 4.

91. L'Esprit des lois, VI, iv, 85.

92. L'Esprit des lois, XII, xiv, 215.

93. L'Esprit des lois, VI, xx, 103. See also Pensées, n. 1693.

94. "Les Japonais ne punissent pas pour corriger le coupable, mais pour venger leur Empereur. Toutes ces idées sont des idées de servitude." Spicilège, n. 524. See also L'Esprit des lois, XXV, xiv.

95. L'Esprit des lois, XII, iv, 203.

96. Pensées, n. 1890.

97. L'Esprit des lois, XII, iv, 205.

98. Ibidem.

99. L'Esprit des lois, VI, xix, 103.

100. L'Esprit des lois, XV, ii, 263.

101. L'Esprit des lois, VI, xvi, 100-01.

102. More significantly for this particular example, however, is the fact that Montesquieu is applying his general principles of penal practice across traditional boudaries of jurisdiction. Traditionally the crimes committed on a public road were of the jurisdiction of the maréchaussée courts who ruled summarily with no possibility of appeal to the parlements. By this example, Montesquieu is denying the traditional identification of these courts with more pressing affairs of public security and hence special powers and privileges in the dispensing of justice. He is arguing that their powers should not exempt them from more general principles

of justice to promote freedom. He thus promotes the idea of a general penal code and principles of application of universal validity across France, to be combined with functional distinctions of jurisdiction based primarily on the nature of the communities governed, rather than on traditional territorial distinctions.

103. L'Esprit des lois, VI, xii, 94.

104. See Julius Ruff's Crime, Justice and Public Order in Old Regime France.

105. Pensées, n. 735.

106. Pensées, n. 1796.

107. L'Esprit des lois, VI, xiii, 96.

108. Pensées, n. 1786.

CONCLUSION.

I hope that this thesis has accomplished three things, reflecting the three purposes as expressed in the introduction. Firstly, as a historical study of the circumstances of Montesquieu's judicial career at the parlement of Bordeaux, it has sought to make up for what up to now has been an important lacuna in scholarship regarding the nature and circumstances of Montesquieu's intellectual development. In this perspective, it takes as a model the heralded work of J. Hale, Machiavelli and Renaissance Italy, which has done so much to shed light on the importance of Machiavelli's experiences as a diplomat for his subsequent work in political theory.[1] The historical research into the working of the parlementary institutions in pre-revolutionary France, as presented in chapter two, was essential in order to understand the court's records as well as to make better sense of the significance of Montesquieu's reflections on the political institutions of his day.

However, this thesis has also sought to contribute to scholarship in another way. By recognising the importance of the language and logic of the court's pronouncements in Montesquieu's own intellectual development, it must also be noted that Montesquieu's enrichment of the basic intuitions of the court and his application of this language in his own political reflection provides an important challenge to traditional renditions of the shape of political thinking in the early Enlightenment. It has often been suggested that the thinkers of the French Enlightenment engaged in a project of popularisation of the general principles of science and natural law as worked out in the seventeenth century. Nonetheless, Montesquieu's political theory has never sat comfortably with such an assertion. This is particularly evident in the wake of new research on the Scottish Enlightenment and the thinkers such as Smith and Ferguson for whom Montesquieu's work was such an important influence. By tracing the relation between Montesquieu's development of the concept of associationalism and its institutional and regional sources, we are led to recognise the possibility of a more varied landscape in the nature of French eighteenth century thought, a picture

which is also more in line with the newly discovered institutional and social pluralism within the pre-revolutionary regime itself.

More specifically, by building a theory around an understanding of the concept of associationalism, Montesquieu shows us how a standard logic of juridical sovereignty and reason of state had to come to terms (if only for reasons of institutional interest), not only with independent social forces, but more importantly, with the moral systems by which they were underpinned. It was argued that a regard for the practices and dispositions of the public, meant in turn to recognise the values and reasons which directed their behaviour. A notable feature of this argument, in the light of recent literature on the importance of custom in the eighteenth century, is that Montesquieu nowhere makes the division which will be important in the latter part of the century, between elite and popular culture. His notion of the principle clearly implies a shared public sentiment (as was argued in chapter five). This is a feature which distinguishes Montesquieu from traditional thinkers of the société des ordres.

In the context of current directions in political thought, a focus on Montesquieu's discussion of the dynamic of association and of its importance to politics, leads one to recognise that there is middle ground between the seeming dichotomy in public discourse between a formal liberalism, which derives its universal principles of political conduct from a pre-social understanding of the qualities and capacities of the human agent, and a general social sceptical pluralism which grants certain legitimacy and primacy to all established heritages and most traditions or choices of behaviour. Montesquieu leads us to recognise that while respect is to be paid to established traditions as a form of independent social regulation which has its distinct moral sources, it must also be recognised that some forms of interrelation are shaped also by a history of rule and may in fact generate ways of living together which are debilitating. The basis on which we are to judge forms of community life according to Montesquieu does not rest on a classical understanding of human nature, but on a recognition of the ends for which communities are established (peace, order, freedom, prosperity) and of the

available means necessary to promote them. It is this shift in political thinking that allows Montesquieu to accept and reflect on a diversity of established political regimes (thereby by-passing the universalist fallacies of, in particular, the modern theorists of natural law), while avoiding a relativist stance.

Thus, in the current context, it shows us that our own (read Western) history of political reflection does offer possibilities for alternative ways of understanding social diversity (as neither arbitrary nor irrelevant) as well as adjudicating among various forms of life. Furthermore, by focusing on those ends towards which societies may tend, rather than the minimalist features which individuals and communities may or may not share, Montesquieu's approach offers a better means for understanding other groups in their own terms.

It is important to distinguish this approach from standard functionalism, as that school which was dominant in post-war American political science and traced most notably to the work of Talcott Parsons. Parsonian functionalism was centred on the recognition of certain universal psychological and affective needs which all communities were destined to fulfill. In this school of thinking, it was assumed that these needs were met so that the act of social and political interpretation was a matter of finding those institutions or social structures where this was effectively done. In contrast, Montesquieu does not argue that all societies will effectively meet those ends established. His arguments relating to the practical inefficiencies and deficiencies of despotic regimes are clear in this regard.

Finally, as related to the third and final expressed purpose of this thesis, I have tried to show how this understanding of societies and politics will affect approaches to the policy field of criminal justice. In particular, I have shown that in drawing on an understanding and appreciation for the independent moral force of association, a legislator will recognise the need for and in fact the greater efficiency of relative moderation in addressing the problems of social order. While not ignoring the necessity for a government to respond to and to a certain extent to manage popular forms of fear, Montesquieu is also clearly aware that an excessive reliance on terror will render the law less effective and the problems of

order more acute. What results from this dynamic is the recognition that the best means for a government to promote the effectiveness of those measures that will best ensure social peace, is in fact strong regard for the quality of association in the community and groups which are to be governed.

By these implications, Montesquieu suggests to us an intriguing vision of the principles of government. Given a possible plurality of ways of living together, Montesquieu could not return to a classical vision of a single model of an ideal community, based on a shared participation in and commitment to a common political telos. However, nor would he argue that the state remain neutral with regards to the nature and quality of civil association. By implicating the health of civil associations in the very health and efficiency of the political order, Montesquieu gives political leaders a vested interest in the quality of associations in their constituencies. Yet, in doing so, the state does not legislate its own moral code, for it will recognise that the moral force of community life will come from the associations themselves.

By arguing in this manner, Montesquieu shows us how the languages of politics in pre-revolutionary France can be relevant to modern reflection by more than just a point of contrast. This corresponds to an important juncture in the development of modern historiography which has come to problematise traditional understandings of the French revolution and to question its status as a key feature of our modern political identities. It may be that by blocking out and devaluing features of pre-revolutionary practice we have impoverished our political understanding.

More specifically, through this (still rudimentary) examination of important themes and approaches in Montesquieu's work, I hope that one of the effects of this thesis will be to contribute to a growing sense of legitimacy for studies in the history of political thought. In particular, the work demonstrates that this type of study may help us to formulate a compelling theoretical alternative through which our contemporary landscape and practices can be reexamined.

Endnotes

1. John Rigby Hale, Machiavelli and Renaissance Italy (London: English Universities Press, 1961).

APPENDIX 1: Montesquieu and the Cagots of Biarritz: fighting for equality in early-modern France.

> Une race maudite de ladres et Cagots,
> Descendants de sauvages, de vilains Ostrogoths,
> Infectent les villages, les villes et chemins.
> Nous leur donnerons en partage les hêtres, les buis, les pins.
> Avec les bêtes farouches ils doivent habiter,
> Avec les bons catholiques ne doivent pas se mêler.
> Réunissez-vous, jeunesse, pour les chasser d'ici,
> Pour que nous puissions aller en voyages sans les trouver en chemin.
>
> Popular song translated from the patois of Béarn.

This chapter is designed to show how the basic associational premisses of Montesquieu's political thought, as shown in the second half of the thesis, can shed light on the social dynamics in an early-modern struggle for equality, as well as give an account of the very fragile nature of those gains. I would argue that this serves as a better framework to understand these struggles for the very reason that it can account for the continuing tensions and struggles for recognition in a society which ostensibly holds a general presumption in favour of equality.[1]

Montesquieu, as a theorist of both monarchical and republican regimes, was aware of some of the difficulties associated with a struggle for equality. While his observations derive in part from a study of the histories of Rome and of the republican experiment in England, the early-modern campaign of the cagots also raised themes which would be central to his later work. The cagots (also called agots or gahets) lived almost five-hundred years in effective segregation in communities of south-west France. Despite periods of resistance and attempts to regain full communal privileges, it was not until the latter seventeenth and early eighteenth centuries that they achieved relative success. A study of this struggle and of its relation to the work of Montesquieu, firstly as a magistrate and later as a political theorist, will show some of the resources for early-modern arguments

for equality (outside a discourse of natural law), the applications of these arguments in a particular local context, and the dangers couched in the very success of these struggles. In doing so, it will combine a study of institutional, social and theoretical factors towards a more comprehensive approach to the history of political ideas.

The paper is divided into three sections. The first section provides a detailed account of the plight of the cagots and of the various means by which their fringe status was enforced. In addition, it examines the forms of resistance the cagots offered, their arguments for equality and the responses given by the inhabitants of the local communes, the historians and intellectuals, and the royal administration. The second section examines a particular case concerning the cagots of Biarritz which came before la Tournelle, the criminal chamber of the Bordeaux parlement, in January 1724 when Montesquieu was the presiding judge. It also outlines the court's ruling which was signed by Montesquieu himself. Finally, the third section uses the findings of the first two sections to shed light on relevant passages of Montesquieu's L'Esprit des lois and on his understanding of equality. The paper will show that in pre-revolutionary France, the public discourse of honour was complemented by a pre-social conception of equality, necessary for a justification of legitimate public distinctions. This conception of equality, combined with an understanding of official grounds for public distinction, allowed for the emergence of arguments for pockets of social equality. As such, then, arguments for equality could be used to shore up the official order against the various traditions of communal culture and were appealed to by various elements of the communal orders themselves in an effort to work out their own internal struggles. In other words, the cagots were arguing for equality through the premisses of the dominant social principle, a principle, therefore, which was not fully static but open for appropriation and interpretation. This account shows that an appeal to established social principles (as an element of associational understanding) is not by necessity traditionalist, but can also be grounds for arguing for social change. Furthermore, it implies that the invocation of an

equality presumption was not an immediate result of forms of modernisation and democratisation, but in part the outgrowth of various political strategies whose objectives were limited.

I. Historical plight of the cagots.

In the popular imagination of the inhabitants of the provinces of Béarn, Basse-Navarre, Labourd, Gascogne and Guyenne, the cagots were reputed to be descendants of a race of lepers. Although leprosy is not a hereditary disease, fear of contagion was seen to have justified a practice of communal segregation which some date back as early as the eleventh century. A charter of the abbey of Luc mentions the cagots by their earlier designation, the crestiaas, a term used in Béarn until the fifteenth century. However, while clear cases of leprosy brought civil death (that is, a general outlawing from any forms of contractual relation or communication with the general population) and, by the time of the crusades, internment in various forms of lazaretto, the cagots were given special intermediary status. For some, the nature of the disease, which in some strands is less apparent and less severe (so-called white leprosy) and the long period of incubation, which generated an economy of suspicion and fear, both explained and justified the introduction of various measures to regulate the contacts these suspected lepers were to have with the population at large.[2] For others, their distinct status is evidence of a completely different origin, whether as descendants of conquered races or sects or as victims of a form of underdevelopment.[3] Subsequently, however, the practice of segregation was to generate the popular belief that the cagots were a race of lepers, thereby giving rise to a whole set of legislative measures and popular restrictions fashioned loosely on the model of those applied to lepers in general.

The status of the cagots was governed by three main sources of law: popular custom, the church and the state (as both centrally appointed officials and various forms of local government). Furthermore, these sources were not

independent. Various practices and prescriptions were to shift from the hold of one to the other in response to different pressures. The forms of early customary regulation are known largely through their later legislative articulation, starting in the late thirteenth century, but most prevalent from the late sixteenth century on. The first sphere of restriction concerned various forms of popular sociability.[4] In each town or often just outside the city walls, separate quarters were established to house the cagots who intermarried and raised their families separately. In Bordeaux, the cagot quarter established around the church St. Nicolas-des-gahets dates from the thirteenth century. Along with separate quarters, they were assigned separate fountains (Marmande 1396) and were prohibited from walking bare-foot (Bordeaux 1555, 1573, 1592).[5] Residential segregation, however, did not adequately address the extent of popular fears which also led to the need to banish the cagots from centres of conviviality and exchange in the taverns and cabarets as well as the bakeries and butcher shops (Bordeaux 1555, 1573, 1592; Soule 1606). Until the early seventeenth century, various municipalities also ruled that the cagots, when in public, wear a piece of red cloth in the form of a duck's foot high on their chest (Bordeaux 1555, 1573, 1592; in 1578, the Bordeaux parlement used the occasion of a request from a citizen of Casteljaloux to order that this rule be enforced across the court's jurisdiction; in 1581 this ruling was reiterated for the town of Capbreton, in 1592 for Espelette, in 1593 for the bailliage of Labourd and in 1604 for the pays de Soule). By imposing these forms of exclusion on a basic condition of inclusiveness for supposed reasons of public safety, the inhabitants showed how a presumption of sociability could be used to usher in a regime of sustained subjection.

This logic also carried over into the sphere of commerce. The cagots were restricted in the marketplace, both as consumers and vendors. Various municipal laws regulated their movements in the market, the hands are banned from touching produce (Béarn 1471; Bordeaux 1581; a parlementary ruling regarding the town of Espelette 1592; and the region of Labourd 1593), and they could sit only in specially designated areas (Marmande 1396). They were also banned from various

professions such as food and wine merchant (Mas-d'Agenais 1388; Béarn 1610; Navarre 1680) and baker (Bordeaux 1577). By the mid-sixteenth century in Béarn, provincial law had ruled that all cagots and their descendants were to practise carpentry to the exclusion of everything else (the fors of 1551 and 1610). The professional monopoly in certain localities did carry with it a form of economic power and opportunities for the acquisition of wealth, despite the general condition of poverty among the cagots. This was supported by tacit recognition of their contractual freedom. However, as is evident, this realm of economic liberty was not in itself sufficient to shape the trends of popular pressures and local regulations which rendered the economic rights of little ultimate consolation. Here it is shown that a system of mutual need could be structured to reinforce de facto inequalities, and that possibilities for economic success were insufficient in themselves to usher in a more general change of practice.

These social and commercial restrictions carried over into political life in that the cagots were banned from taking part in communal assemblies and holding any public charge (Nay 1687). As early as 1288 their reliability as witnesses in court was questioned with the ruling that the word of thirty cagots would be equivalent to that of six other witnesses in the case of a murder accusation, and of seven for other crimes (Béarn).[6] In addition, the cagots were banned from carrying weapons or any tools not necessary for the exercise of their trade (Béarn 1551 and 1610; Navarre and Pau 1672; Saint-Jean-Pied-de-Port 1678). With these restrictions, however, came a certain array of possible benefits which would later be exploited by the cagots in their struggles. These included a general exemption from military service and from payment of la taille (Béarn 1379, 1551, 1642).

The church had been the traditional jurisdiction for the care of lepers until the thirteenth century. In 314 a church council had ruled that lepers were to sit in a separate part of the church, although by the middle ages they were outlawed from communities altogether. The practice of segregation within the churches was

taken up by the communities in south-west France and applied to the cagots and became an additional prescription of communal legislation by the end of the sixteenth century (the parlement of Bordeaux 1596). It was also from this time that churches in the area were designed to include a low door as a separate entrance for the cagots. They already had a long tradition of using a separate font, and of receiving communion after the rest of the population although in certain communities they were denied communion altogether (the parlement of Bordeaux regarding the cagots of Espelette 1592; Labour 1593). A particularly resilient tradition was the use of separate graveyards or burial plots which as a practice continued long after it had fallen into disfavour by the courts.[7]

It is one indication that perhaps the strongest source of law in regulating the condition of the cagots was popular custom itself, though its shortcomings are also evident by the need to seek legislative confirmation of its rules by the late sixteenth century.[8] Apart from the restrictions on movement and residence, custom bred a form of visceral hostility towards the cagots born of a mixture of brazenness and fear. The belief in their physical affliction was fused with scorn and expressed in various forms of insults and ritualised popular mocking, "une haine convertie en habitude".[9]

The response of many cagots was a form of passive resignation. However, there was also a long tradition of resistance which was characterised by a multiplicity of strategies and arguments. Unfortunately, in many cases the voices of the cagots themselves are lost so that their struggles must be reconstructed largely through secondary accounts, most being legal records. It is important to note the extent to which many of these imply an organised collective effort to modify their condition.

The first record of resistance is a request of the cagots of Navarre sent to the pope in the early sixteenth century complaining that they were not given an equal standing in the ceremonies and conferral of the sacraments.[10] They argued that the belief that their ancestors were Albigensian heretics should not prejudice their current status within the church. They tried to work from within the existing

church traditions, seeking redress through the office of the highest church official and focusing on the apparent contradiction between the sanctioned belief in a community of the faithful and the clerical practice of progressive exclusion. In this effort, however, the cagots were unsuccessful.[11] A combination of the limited effectiveness of state and papal rulings, the unwillingness of these authorities to commit themselves beyond the issuing of orders in this affair, and the strength of local custom and prejudice all worked against the cause of the cagots in Navarre and explained the perpetuation of their fringe status. It showed the failure of a strategy of appeal to the highest government and church officials and of arguments derived from shared traditions of religious doctrine.

A similar appeal to principles of equality among the faithful was used by the cagots of Rivière in 1718.[12] These principles were used to justify a campaign of direct action in which Hillot Degos, called Mouscardez, and his valet led a group of cagots to the altar on the Sunday of Pentecost to receive communion. It was a matter here not only of the equality implied in the notion of a community of the faithful, but also of the shared duties required of all Christians indiscriminately. However, while approaching the altar, the cagots were stopped by Lamouliatte, Marbatt and Duboué and general fighting soon broke out. Incidents of violence in church continued and the cagots appealed to the royal court of Dax, not for support in their ultimate cause as in the case of the cagots of Navarre, but to begin proceedings against the individuals who had assaulted them, just as the other parishioners had initiated a case against them. Here the royal law is used as a means to offer the protection through which a campaign for de facto equality within the churches could be waged, rather than as a means to institute that equality. By this later date the courts were generally favourable to the campaign of the cagots and condemned Duboué, Marbat and Lamoliatte to a fine of 50 livres, civil damages of 200 livres, and 100 livres to be paid to the church.[13]

But while the argument for equality from within the church traditions may have had a certain resonance with some officials, its application was also limited

to a specific sphere. An alternate strategy of the cagots was to continue to contravene certain restrictions, in particular those regarding roles and movements within the market-place, in a quiet, non-confrontational way and on a daily basis. Here was an attempt to redefine the established rules of popular sociability to prove the absurdity of the restrictions and to render these common-law prescriptions anachronistic by default. In this form, the struggle for equality was also an exercise in forgetting, of seeking anonymity "pelle et melle" in the crowd, as an immediate denial of all the imposed signs which set the cagots apart. This quiet campaign, however, was aborted by a flurry of legislative activity in the latter sixteenth and early seventeenth centuries which reiterated the restrictions and, in the context of the consolidation of the absolutist state, solicited more powerful institutional forces to help ensure their effective enforcement.

A third approach, given the resilience of the practices, was to turn the restrictions to their own advantage. Here the cagots worked to undermine the logic of the limitations from within. They used the exemption from payment of la taille and military service as keys to draw parallels between themselves and the nobility. The court records reveal cases in which popular forces sought to curb such pretensions. The cagots of Oloron built pigeon-houses in their residential quarters, a local privilege of the nobility, and a cagot of Mont, among others, took to hunting with firearms and dogs as well as adopting noble airs wearing a sword, cloak, boots and spurs.[14] The governor of Béarn, the duke of Grammont, ruled in 1640 that these practices were to be stopped. In 1610, there was a complaint that the cagots were hiring valets and other servants.[15] Alongside this brushing with the noble temptation some cagots were also gaining a sense of their economic power, especially given their virtual monopoly over carpentry work in some localities. In 1607 the cagots of Garos went on a strike refusing to make any coffins. They were forced back to work by a special ordinance of the jurats (the municipal council) who ruled that a large fine be imposed on all those refusing to work at a set price. A similar demand for a doubling of wages was outlawed by the états of Béarn.[16] While the transformation of the imposed restrictions into

grounds for greater social and economic power had little hope as a viable political strategy, the raising of the unthinkable was a sign of a growing trend to reflect on the bases for legitimate social and political distinctions.

Such reflection was not of course limited to the cagots. There was a growing body of jurisprudence in the seventeenth century which regulated the adjudication of claims to noble status given the rise in fraudulent cases of those seeking to gain from the privilege of exemption from la taille and other taxes.[17] It raised the perspective that politically recognised distinctions were not to be taken for granted, or based on the claims of the parties concerned, but needed to have an officially recognised justification grounded ultimately on the king's power to grant noble status. As such, then, the discourse of honour which in its public face upheld a society of unequals, required for its very legitimacy an underlying conception of equality. A mainstream jurist of pre-revolutionary France could easily declare without scandal that all men are born equal ("Tous les hommes naissent égaux."), however, inequalities were perceived to be justified by the very prerogative of the king to create and maintain social distinctions. A pre-social conception of equality served in this way an additional function to that of a force of negative moral harness on the rulers.[18] It also supported their claim to be adjudicators in the distribution of privileges and distinctions. Insodoing, it inaugurated a subtle shift from an alliance with a form of moral doctrine to a policing of status, bringing with it the need to recognise pockets of equality within the orders themselves and among those groups where no distinctions had been officially recognised. A basic principle of the policing of status by the various Cours des aides and commissaires départi was that noble status is something to be proven and not presumed.

> La roture est l'état naturel des hommes. La noblesse est une qualité accidentelle qui doit être prouvée par ceux qui la prétendent.[19]

The policy also implied the interdependence of the nobility and the king, the former relying on royal prerogative for its very existence and the latter relying on

the public recognition of legitimate political distinctions embodied in a noble class, underlying in part the ruler's own claim to sovereign authority.

It was this space in the discourse of honour evolving from an understanding of a pre-social condition of equality which eventually permitted an alliance between the cagots and the crown and which led to a reversal of judicial trends in the courts of south-west France by the end of the seventeenth century. However, before this could occur, it was necessary to dispel the popular myths concerning the diseased state of this group.

At the turn of the sixteenth century, a series of conflicts between the cagots and the other inhabitants of the towns of Saint-Clar and Lectoure gave rise to a court case which was brought to the parlement of Toulouse on appeal. In its review of the case, the magistrates ordered that the cagots be subjected to a medical examination. Twenty-two individuals were examined, including a four month old baby, by two doctors of the faculty of medicine of Toulouse and two master surgeons. All were declared in good health with no sign of disease or predisposition for contagious infection.[20] This discovery in itself, however, was not sufficient to undermine popular prejudices.

As if to fill the void of justification, various authors at this time came up with alternative accounts of the origin of this group. In the first wave of interpretation, the dominant theory traced their lineage to Wisigoths who had been defeated by the Franks at the battle of Vouillé in 507 but who had not followed the majority of their people out of Aquitaine. The strength of this interpretation rested predominantly on its etymological claims tracing the term cagots to the expression caas gots, or chiens goths. However, it could offer no evidence nor explanation as to why some would stay behind, nor could it account for the earlier exclusive use of the term crestiaas in the records dating from the eleventh century.[21] A second wave of interpretation initiated by Pierre de Marca's Histoire de Béarn (1640) argued that the cagots were descendants of the defeated Sarrasins, driven for the most part out of France after the battle of Poitiers in 732. The Mohammedans were spared from death, according to Marca, if they adopted

the Christian faith, hence the name crestiaas; however, feelings of popular disaffection remained. The link with leprosy was possible because of the Syrian origin of the disease and even the sign of the duck's foot for Marca can be explained by one of the five pillars of Islam which stresses the importance of cleanliness. Again, however, the interpretation suffered from a lack of any positive evidence, an unexplained silence of three hundred years and ignorance of the early history of the spread of Islam.[22] These interpretations also suffered from a sharing of the ambiguous status of posing as both explanations and justifications. If Francisque-Michel is correct in asserting that popular opinion, particularly in the pays basque, adopted the Wisigoth theory, such narratives only served to provide an alternative reason for the perpetuation of traditional practices of exclusion.[23]

In this light, the account published in 1754 by the abbé Venuti, a librarian of the Académie de Bordeaux and a close friend and correspondent of Montesquieu, is innovative in two respects. Not only does it offer an alternative explanation, tracing the phenomenon to popular suspicions of contracted leprosy by the first religious enthusiasts from the south-west who travelled to the holy land prior to the organised crusades; it also separates a judgement of initial justification, given the possible ravages if the suspicion proved to be true, from a recognition of its contemporary injustice.[24] Apart from the obvious erudition of the author, perhaps the most significant feature of the work lies in the more general implication that the practice cannot be explained by the presence of a foreign threat or as a response to international injustice. Instead, the source of and responsibility for this injustice is placed squarely within the popular traditions themselves. He attunes the reader to the possibility that a once justifiable policy is not always so and insodoing also demonstrates both the absurdity and the tenacity of a culture of fear, if left unexamined.

But while enlightened opinion was only slowly coming to terms with the injustice of the phenomenon, the courts were more quick to respond to demands of the cagots to give them access to full communal privileges. In 1627 the

parlement of Toulouse had already ruled that it was an offense to insult the cagots, under threat of a 500 livre fine.[25] However, the most important breakthrough is reported to be in Béarn where the intendant Bois de Baillet, in consultation with Colbert, devised a plan whereby the cagots could purchase their freedom for two louis, with an estimated return of over forty-five thousand livres for the state.[26] A recognition of equal status also implied that the cagots would no longer benefit from traditional tax advantages, namely exemption from la taille. Fiscal incentives, thus, provided an immediate incentive for an alliance between crown and cagot, an alliance which a recognition of common purpose had already prepared.[27] This common ground is clearly articulated in the draft of patent letters prepared by Bois de Baillet.

> Désirant traiter lesdits Cagots avec bonté, effacer toutes les marques de l'esclavage qui peuvent encore rester sur les terres de notre obéissance, entretenir l'égalité entre nos sujets et lever toutes distinctions qui, n'estant establies que sur une erreur populaire, ne servent qu'à troubler la concorde entre nos sujets: à ces causes nous avons éteint et supprimé toutes les distinctions qui pourroient estre entre lesdits Chrestians, Cagots, et nos autres sujets, pour qu'ils jouissent à l'advenir des mêmes privilèges et advantages...[28]

It recognises the complementarity of a discourse of honour controlled in its principles of distinction by the sovereign and an underlying condition of popular equality as shared access to like privileges.

While historians have not retrieved the official version of the letters, it is known that the king addressed them to the parlements of Navarre, Bordeaux and Toulouse notifying them of a change in official policy regarding the cagots.[29] From 1688 the parlement of Navarre ruled in favour of the cagots in a variety of cases involving conflicts in the churches, outlawed the insulting of reputed cagots and called for their inclusion in popular assemblies, as well as on the rosters for payment of la taille.[30] The repetition of such rulings, however, is also a sign of their relative ineffectiveness. It is also important to note that in almost all matters,

the parlements were responding to requests and cases appealed by the cagots themselves who now took fair advantage of their new powerful ally. At the same time, popular forces also continued to appeal their cases to the courts based on suppositions that precedent would favour them. However, changing trends of jurisprudence would also bring with it greater possibilities for new forms of resistance.

In 1697, following slowly on the lead of the officials in Béarn, the intendant of Guyenne, de Besons, ordered that all the cagots of the parishes of Biarritz and Arcangues were to be admitted to public assemblies. The inhabitants sent their official protest to the parlement of Bordeaux two years later, but to no avail.[31] The strength of popular resistance to the new policy is shown by the extent of violence exercised against the cagots in two subsequent cases, one in Condom where inhabitants twice opposed the burial of reputed cagots in the common plot, and again in Rivière where a full-scale battle broke out during communion in the local church with such violence and bloodshed that the church was closed for several weeks.[32] It was in such a context that another case came before the Bordeaux parlement, one which would implicate Montesquieu in his duties as a criminal court magistrate.

II. Montesquieu the magistrate and the cagots.

Montesquieu began his career as a magistrate of the Bordeaux parlement in 1714. At the end of 1715 he was assigned to the criminal chamber where he was to remain, even after inheriting his uncle's charge of <u>président à mortier</u> in 1716, until 1726 when he sold his charge. During his ten and a half years of service in the criminal chamber there were various incidents of rebellion by the cagots which resulted in several cases being brought to the lower courts of the jurisdiction of the parlement. However, it was not until near the end of his judicial career that Montesquieu came to sign a court ruling which related to this long history of struggle.[33]

The case involved cagots of the Basque community of Biarritz. In 1722, Miquel Legaret, a carpenter and reputed cagot and his son also named Miquel chose a seat in church among the general pews. Their attempt was met with opposition from Jean Lartigue, Guillaume Vaillet and Pierre Dalbarade, all municipal councillors. The insults turned to violence and the younger Legaret, seemingly prepared for battle, defended himself with a stick and a knife. Both Legaret and his son, and the councillors registered complaints with the bailliage of Ustaritz and orders for arrest went out to all involved, except Dalbarade. On March 6, 1722, the court convicted Lartigue, Vaillet and Dalbarade and ordered them to offer a public excuse for their conduct to be delivered on their knees at the door of the church at the end of the Sunday mass. Procedures were also being continued in the accusations brought against the younger Legaret. Appeals were initiated on both sides and the matter was ruled on by the Bordeaux parlement, with Vincens as the reporting judge, on July 9, 1723.[34] The court condemned Lartigue, Vaillet and Dalbarade to a fine of 20 livres to the crown, and 50 livres to the church at Biarritz for repairs. In addition, Dalbarade was ordered to pay a hundred livres to both the father and the son in the form of civil damages because of the violence committed against the younger Legaret. Appended to this specific case ruling was a more general statement of policy which outlawed all forms of insult towards the reputed cagots under threat of a 500 livres fine and even corporal punishment if the case required it. Also, the court ordered that all cagots were to be admitted into public assemblies and into the general pews of the church, that all were to be eligible for municipal office and that their children were to be admitted to the schools and colleges. Furthermore, it was ordered that the ruling would be read and posted by all royal judges in the jurisdiction. To combat the strength of the popular prejudices in the town of Biarritz in particular, the substitute of the procurator-general in the bailliage of Ustaritz was ordered to travel to the town one Sunday every month to ensure that the ruling was being obeyed. Among other things, it was a clear avowal of the inadequacy of resources for judicial enforcement.

It is not surprising, therefore, that news of the ruling in the cagots favour, which preceded the arrival of the royal clerks, was occasion for general protest and rebellion. The story of the protest is related by the procurator-general in his requisition to the Parlement on January 19, 1724, the day on which Montesquieu was the presiding judge.[35] On the 29th of August 1723, Saint-Martin, a sergeant of the royal army and two municipal soldiers came to the church of Biarritz to post the ruling as required. On arrival they were confronted by a great crowd of people crying "Alerte! Alerte!". As they approached the entrance to the church, a group of women were shouting for them to leave and threatened to assault the sergeant as they prevented him from reading or posting the ruling. Nor would any of the rest of the crowd, both men and women, come to the help of the sergeant despite his pleas. The continued threats and insults by the crowd of women, some of whom were suspected by the sergeant as being men in disguise and who were carrying quantities of quick-lime, salt, ashes and whale oil to throw in protest, created a general climate of fear and danger for the royal representatives who retreated in haste.

This act of resistance to the orders of the highest court was juridically an act of lese-majesty of the second degree which was punishable by death.[36] The centrality of the female person (in body and representative disguise), may best be explained by an understanding of women as privileged defenders of traditional practices and communal solidarity. This form of protest was not a timid defiance of royal orders, but an act full of risk for all involved, whose gravity was only heightened by the attempt of some to mask their real identities.

This incident shows that the changes in popular practice which the court and royal administration were seeking to impose were perceived as posing a direct threat to traditional communal values. It starkly reveals the dilemma that the gains for the cagots in their struggle for equality were won in part at the cost of a series of death-blows to local popular culture.[37]

In accepting the requisition of the procurator-general, the Bordeaux parlement ruled that the matter be investigated by the officials of the royal court

of Bayonne, with the issuing of ecclesiastical monitoires calling for witnesses throughout the parish. In addition, the court persisted in its order that the ruling of July 9th be read and posted outside the church of Biarritz and asked that the judge of the court of Bayonne take all measures necessary to ensure that the ruling be followed. By referring the incident to a local court rather than settling the matter with the appointment of its own commissioners, as the court had done in the past for another case of lese-majesty, the parlement recognised both the short-term inefficacy of a policy of direct confrontation, when it was a matter of trying to change popular prejudices, and the long-term inevitability of the eventual triumph of their position, given its greater political legitimacy as both complementary to and supportive of the official discourse of honour.

III. Related themes in L'Esprit des lois.

While Montesquieu was responsible for this 1724 ruling in his judicial duties, he never refers to the struggle of the cagots in his political commentaries; however, many of the themes raised in the struggle are explored in his work. These can be divided roughly into three fields: those prescriptions which relate to specific features of the cagots condition and prevailing justifications for their subjection; the relative weight of laws and morals or popular custom in governing social behaviour and the difficulties of instituting reform; and the politics of equality.

Like his friend the abbé Venuti, Montesquieu defends a practice of segregation in the case of a threat to public health, as he supports the laws regarding the containment of lepers in post-crusade Europe.[38] However, he discards the arguments from Roman law justifying a policy of slavery as a consequence of military defeat and which underpinned various academic and popular justifications of the cagots' inferior status, once the suspicions of leprosy were refuted.[39] In addition, he asserts that the laws that tie a class of people and their descendants to a particular profession is only appropriate in a despotism, as

it runs counter to the drive for distinction.[40] It is a first allusion to the possible alliance between the principle of honour and the fight for limited occupational mobility. By these points, Montesquieu can be seen to address and undermine the prevailing arguments which justified the segregation of the cagots.

More significantly, one can discern throughout his work also a general condemnation of a culture of fear. While Montesquieu is perhaps best known for his indictment of despotism, this is commonly taken as a criticism of its institutional structure, namely the rule of one with no regard for fundamental laws and traditions. Nonetheless, as we have seen in the second half of the thesis his indictment of despostism is as much one of a human association based predominantly on fear, as it is of the arbitrary rule of the despot. Furthermore, as the abbé Venuti showed, it was a ritual of fear which was at the root of sustained subjection in the case of the cagots. It demonstrates that for Montesquieu, human association can lead as much to corruption, as to civility.

But while association itself can be corrupting if founded on the wrong principles, despite all his Stoic sympathies Montesquieu does not advocate withdrawal, but actively considers the road of collective reform, regardless of the inevitable hasards. In the first instance, he notes the tenacity of popular custom and tradition:

> ...les hommes tiennent prodigieusement à leurs loix et à leurs coutumes; elles font la félicité de chaque nation; il est rare qu'on les change sans de grandes secousses et une grande effusion de sang, comme les histoires de tous les pays le font voir.[41]

For this reason, strategies of change must be implemented with caution. In the preface to L'Esprit des lois, he notes that the possible advantages of imposed reform must be weighed against a sense of the possible abuses inherent in the process of correction itself. Montesquieu's own sense of caution in face of the strength of popular prejudice was reflected in the policy of the Bordeaux court itself in referring the incident of rebellion to local magistrates.

Different forms of strategy of change are evaluated in Book XIX of

L'Esprit des lois.[42] He argues that it is bad policy to change by law what is regulated in large part by custom. Instead he advocates the use of inducements so that the people will be brought to change the customs themselves. While the forcing of reform through legislation may give the appearance of tyranny and excite popular violence, in the case of the cagots, the continued legislative pronouncements in support of their new status long into the eighteenth century, also showed their real inefficacy. As such, then, Montesquieu's arguments in Book XIX appear as a prescription for a new economy of power, abandoning the appearance of tyranny, "cela paraîtrait trop tyrannique", as in essence the masquerade of weakness, and seeking ultimate success in the manipulation of existing motivations and practices. Perhaps it is an indication that while the principle of honour was used as a justification of change, it could have been effectively used as an instrument of change also.

However, it is the need for such strategies which also point to the difficulties inherent in the politics of equality. Equality itself is conceived by Montesquieu as first and foremost a disposition which can be favoured or undermined by certain material and political conditions. In general, it is a disposition to be shared by the citizens at large and not just a predisposition of public officials in their treatment of subjects and citizens. However, the form of this disposition is not universal, but varies in relation to the society considered. Firstly, while he does recognise a pre-social condition of equality, this condition is undermined by the establishment of civil society.[43] Within political society certain values such as peace, order and liberty remain constant and universal, while the means by which these are achieved differ according to the history and the circumstances of a society. Thus, as equality remains only a means by which certain preestablished ends are pursued, each regime can be seen to establish its own particular relation and use of the theme of equality. A republic is that regime expressly devoted to retrieving and reestablishing features of the initial condition through a series of measures to distribute political and economic power among the designated class of citizens. Here the value of equality develops from a general

social predisposition to a recognition of the need for a relatively equal distribution of material wealth, as well as identical political rights.[44] In contrast, despotism draws its force in part from a dynamic of almost total and equally shared subjection through the principle of fear. In the society of orders, as we have seen, equality was conceived as an initial condition on which the officially sanctioned distribution of status was based, as well as a social condition within these orders, involving a narrow range of shared rights and privileges. What was shared by both Montesquieu and the official philosophy of a society of orders, as articulated in the defence of the cagots, was a sense that the social orders were not to be conceived as preordained. Those social distinctions which did exist must be justified by some criterion of utility, whether that be dictated by some structural feature of the regime (as Montesquieu argues), or left to the discretion of the king himself as privileged interpreter of the common good.[45] When Montesquieu states that no one in a monarchy aspires to equality, he is arguing that no one in that regime will identify their ambition with the good of the whole or will advocate legislative measures for the redistribution of property and wealth to reduce material disparities.[46] It is a point from which distinctions are to be justified, rather than a social condition to be attained. We have seen also that the cagots were not advocating a form of equality as an end in itself, or as a sweeping social principle; rather, the slide from the recognition of a pre-social form of equality, to a need in official circles to police the distribution of status, allowed the cagots to ally their demands with the major tenets of state thinking as a means to enter the official network of relative privileges and honours.

It is this instrumentality of equality in a society of honour which helps to illuminate its fragility in a democratic society harbouring a special public commitment to the value of equality.

> Quand, dans une nation, la naissance et les dignités ne donnent point d'empire, chacun cherche un empire naturel, qui est celui du mérite personnel.[47]

Here the distribution of honours and privileges is no longer in the hands of

political rulers, but formed by collective conceptions of merit. The tenacity of the drive for distinction carries over into the very society whose principle would seem at first to deny them.

The tensions involved in establishing and maintaining equality in a democracy are explored in Montesquieu's discussion of property laws and the regulation of disparities in wealth.[48] The subsequent accumulation of property beyond the initial terms of distribution, further skewed by principles of succession pose a challenge to the long-term viability of the regime in its original design. As a default position, he advocates a form of difference principle, whereby such equalities as hinder the overall viability of the democracy can be proscribed ("...l'égalité entre les citoyens peut être ôtée dans la démocratie pour l'utilité de la démocratie.").[49] This may be justified by the recognition that these material measures serve not as the embodiment of democratic equality, but as a means to encourage the principle of virtue, which in its essence is a popular sentiment.

However, a greater threat to the regime of equality, and evidence of its essential fragility, is the pervasiveness of three forms of ambition which mask as the very champions of equality. The first is what Montesquieu calls the spirit of extreme equality ("l'égalité extrême") when all seek to be equal to those they have chosen to lead them.[50] It serves as a preliminary step to the breakdown of political authority and stability and is based on an apparent tendency to confuse the foundations of political legitimacy with political power. The second threat to the establishment of equality in a democratic order is the drive for distinction that is rooted in the principle of virtue itself: that is, the ambition to render the community greater services than other citizens.[51] This combined with a natural inequality of talents will lead inevitably to unequal recognition.[52] A heightened awareness of the values and forms of public contribution can itself be a threat to civic-mindedness. Finally, the third feature of the fragility of a politics of equality, is implied by Montesquieu's stress on the limiting condition of frugality as an economic condition for a viable democracy. While he recognizes that a republic can also be a commercial society, as in the case of ancient Athens, this

will be sustained only for so long as the citizens live in roughly comparable material conditions driven by a spirit of moderation and as they are willing to invest their surplus wealth in public projects. In due course, however, the prevalence of large amounts of material wealth will give rise to a taste for luxury and personal enjoyment of superfluous goods which will undermine general practices of social equality. Resentment may be expressed in the form of demands based on relative want, rather than on a vision of a stable and free political order. While the spirit of commerce in republican regimes may originally favour (and in its turn be promoted by) a regime of equality, the very success of this dynamic serves in the end to subvert it.

In all these cases, it may be noted that the change in motivation is not necessarily accompanied by a blatant rhetorical one. What distinguishes the shift for Montesquieu is rather the breach of the invocation of the value of equality from the accepted ends of the political order, being public order, the promotion of common freedom and common prosperity. Nonetheless, Montesquieu uses his insight to show that these shifts are not a result of concerted usurpation of democratic rhetoric, but an outgrowth of those practices initially valuable in protecting and promoting democratic values. For these reasons, according to Montesquieu, a society publically devoted to the principle of equality will face a continous set of challenges.

IV. Conclusion.

Montesquieu's career as a magistrate from 1714 to 1726 (from the age of 25 to 37) was not only an occasion for him to play the role which his family had handed down to him; it was a formative intellectual experience as well. While the details of this experience have remained largely unexplored, this study of the struggle of the cagots in south-west France and of Montesquieu's involvement in their struggle is evidence of the potential a knowledge of the work of the court would have on shedding light on various features of his political thought.

Through a study of the cagots, we come to understand the position which argues that the struggle for equality as a social reality makes sense primarily from within a community. The value of equality itself can bear a variety of relations to the prescribed ends of a political society. The ultimate success of the cagots' struggle was due in part to a strategy of exploiting the prevailing official invocation of this value. However, such a strategy was not without its costs. These involved, firstly, with the identification of equality as shared privileges and common status, an accompanying process of disavowal and forgetting. The lack of any direct records of the cagots is one symbol of this dynamic. In addition, the alliance between the cagots and the central power was the product of limited and the ultimately competing objectives of popular autonomy and political consolidation. As one step towards the emergence of the modern presumption of social equality, it shows that this process may have been an overdetermined one and that, therefore, the debates over varying forms of liberal equality can be understood more fully with a consideration of the non-liberal circumstances within which these arguments were first put forward and in which they were hoped to be effective.

The struggle also sheds light on the fragility of the politics of equality itself for it shows how the desire for equality can be transposed into the very things by which it is undermined. Just as arguments for a form of equality may be used instrumentally in a society of honour, both as means of liberation and advancement as with the cagots, or as means of political consolidation, so in a democracy, the declared public commitment to equality gives rise inevitably to forms of distinction, causes for ambition and occasions for resentment. As such, equality cannot be aspired to as a definite social gain. It may be that it exists in aspiration and is promoted and undermined continuously through a series of local struggles.

Endnotes

1. The notion of a modern presumption in favour of equality is taken from Charles Taylor's article in Amy Guttman, ed.,Multiculturalism and the 'Politics of Recognition'.

2. The clearest statement of this case is given by H. M. Fay in Lépreux et cagots du sud-ouest (Paris: Librairie ancienne Honoré Champion, 1910).

3. These alternative accounts were first generated in the seventeenth century. While the early accounts settle largely on racialist grounds, a recent study offers a social-economic explanation of the cagots' origin using a model of varying levels of development within the feudal mode of production. See Alain Guerreau and Yves Guy, Les Cagots de Béarn (Paris: Minerve, 1988). While the question of origin is important and interesting in itself, it also must be based largely on supposition given the lack of textual evidence. In contrast, despite the variety of texts, the study of the politics of these varying accounts of origin has been neglected.

4. I use the concept of sociability here in the Annales tradition referring to both a popular disposition and the forms of association which flow from it (as distinguished from the early-modern natural law conception as a structural feature of human existence accounting for forms of peaceful coexistence prior to the institution of civil society). See for example, Rémy Ponton, "Une Histoire des sociabilités politiques," Annales 35(1980), 1269-70.

5. References to known pieces of legislation in various localities or important court rulings are offered here by their place and date of enactment. The texts of the majority of these laws and rulings can be found in the appendix to Fay's Lépreux et cagots du sud-ouest. Some are also taken from Francisque-Michel's Histoire des races maudites de la France et de l'Espagne (Paris: A. Franck, 1847 and 1986).

6. This prescription is curious in that it does not fit clearly into the leprosy theory, except perhaps insofar as the contraction of disease was deemed to be a sign of divine disfavour and hence certain moral depravity.

7. It was the custom in the eighteenth century to bury bodies in a common grave unless one had a noble privilege to be buried in the sanctuary or could afford a family vault, or group crypt. The organisation of the graveyard was thus a reflection of existing social divisions. See John McManners, Death and the Enlightenment, chap. 10.

8. One may also note in this context that the passage to English rule in Aquitaine in 1152, and the passage back again to French rule in the mid-fifteenth century, had little apparent effect on these early legislative trends, except insofar as the restoration of French rule also created conditions for the institution of the Bordeaux parlement (1462).

9. Filippo Venuti, "Recherches sur les gahets de la ville de Bordeaux," In Dissertations sur les anciens monumens de la ville de Bordeaux sur les gahets, les antiquités et les ducs d'Aquitaine (Bordeaux: Jean Chappuis, 1754), 142.

10. See Francisque-Michel, Histoire des races maudites de la France et de l'Espagne, 189ff.

11. Pope Leon X, although favourable to the cause of the cagots, submitted the matter for further investigation. In 1517, after waiting two years, the cagots of the region decided to voice their grievances in an alternate forum, the états of Navarre. Again the matter was sent for further investigation by the archdeacon of Santa-Gema. After an additional two years, the archdeacon accepted the petition of the cagots and enjoined all to obey a papal bull ordering equal treatment for the cagots under sanction of official church censure and a fine of 500 ducats. This was confirmed by the états of Navarre in 1520. However, the ineffectiveness of such pronouncements given the tenacity of the lower clergy and the local population, led the cagots to seek help from the emperor Charles Vth. An imperial order was sent out in 1524, supporting the papal bull and raising the fine to 1000 ducats. A series of incidents led to repeated recourse to these authorities who could only but reiterate their previous orders.

12. The text of the resulting complaint can be found in the appendix of Fay's Lépreux et cagots du sud-ouest, n. 75, pp. 404-05.

13. Witness testimony in the case is reproduced in ibid., n. 77, pp. 411-16.

14. The text of the complaint can be found in Francisque-Michel, Histoire des races maudites de la France et de l'Espagne, 216. For a discussion of the variety of regulations regarding the use of pigeon-houses in pre-revolutionary France see Guyot's Répertoire universel et raisonné de jurisprudence civile, criminelle, canonique et bénéficiale (Paris, 1784), article "colombier". The main objection to the widespread use of pigeon-houses was that the pigeons nourished themselves from the seeds and fruits of the land of others. Given the variety of regulations throughout France it was clear that there was no consensus on the appropriate response to integrating a traditional object of common property (ie. birds), into a regime of private and exclusive property.

15. Fay, Lépreux et cagots du sud-ouest, 140.

16. Ibidem.

17. Denise Bege-Seurin, "Droit et identité nobiliaire", unpublished paper presented at the colloque IRENA, September, 1991.

18. Corrado Rosso argues with regard to the thought of Pascal and Bossuet that the conception of moral equality which pervades their work offers no radical threat to the prevailing order because it rested on a completely different plane than that of politics and may have served, at most, as a story to encourage self-restraint among the rulers. In Mythe de l'égalité et rayonnement des lumières (Pise: Editrice Libreria Goharidica, 1980), chap. 1 and 2.

19. Guyot, Répertoire de jurisprudence, vol. 12, article "noblesse". The same point is found in Claude de Ferrière's Dictionnaire de droit et de pratique, article "noblesse".

20. An account of the visit is cited by Francisque-Michel in Histoire des races maudites, 218-19.

21. A full exposition and refutation of this thesis is offered by Venuti in his "Recherches sur les gahets de la ville de Bordeaux." Authors adopting this position include Zinzerling and Florimond de Raemond. See also Francisque-Michel, Histoire des races maudites, 10-15.

22. Venuti's "Recherches sur les gahets de la ville de Bordeaux." offers a refutation of this thesis. See also Francisque-Michel, Histoire des races maudites, 21-29.

23. See Histoire des races maudites, 31.

24. In reference to the initial act of separation based on the suspicion of leprosy he declares, "les loix divines et humaines ont toujours autorisé cette séparation." ("Recherches sur les gahets de la ville de Bordeaux", 128) However, with the end of the scourge of leprosy in Europe in the fifteenth century, the perpetuation of popular hatred and prejudice on no justifiable and rational basis transformed the precautionary arrangement into an injustice. (Ibid., 142)

25. Cited in Francisque-Michel, Histoire des races maudites, 226.

26. The text of the correspondence of Bois de Baillet relevant to this matter can be found in the appendix of Fay's Lépreux et cagots du sud-ouest, 477-81.

27. This financial incentive, however, could not be used to explain on its own the act of enfranchisement for there were areas of the south-west, such as Labourd, where the whole general population continued to exercise exemption from la taille as a regional privilege, but where the new policy regarding the cagots was

declared just as emphatically.

28. Ibid., 480.

29. Fay, Lépreux et cagots du sud-ouest, 148.

30. Ibid., 149-50 and 488 for the text of the ruling concerning la taille.

31. The text of this protest is cited in Francisque-Michel, Histoire des races maudites, 234.

32. For outlines of these incidents see Fay, Lépreux et cagots du sud-ouest, 126-27.

33. The major source for personal details of Montesquieu's judicial career is Jean Dalat's Montesquieu magistrat. As Dalat notes, despite the ownership of a judicial charge, Montesquieu was unable to preside sessions and sign court rulings until 1723 when he finally received special dispensation waiving the age requirement for presiding officers (set at forty years of age).

34. A.D.G., série B, fonds du parlement de Bordeaux, arrêts de l'année 1723. The criminal rulings of the Tournelle chamber of this period are unclassified and mixed in with the general case rulings of the other chambers.

35. A.D.G., série B, fonds du Parlement de Bordeaux, arrêts de l'année 1724. A printed copy of this ruling can also be found in Archives historiques du département de la Gironde 19(1897), 284-87.

36. Some have argued that the central role of women in popular protest and the consequent recourse to a practice of transvestism was related in part to a strategy to avoid prosecution, with the presumption that women were deemed to be under the responsibility of their husbands, as well as building on the popular conceptions of the female person which granted them greater licence in their behaviour. [See Natalie Zemon Davis, "Women on Top." In Society and Culture in Early Modern France (Stanford: Stanford University Press, 1975), 149.] However, such logic would diminish the very significance of the act as a protest. In fact, while women in early-modern France had limited civil responsibility given that their material resources were usually limited, the courts made no practical distinction between men and women in questions of criminal responsibility. Certainly, on conviction, women would be spared from service on the galley ships and from some of the most gruesome forms of capital punishment, but this was not any reflection of a more limited sense of criminal responsibility. The concept of limited responsibility applied only to those cases where the criminal intent (or dol) was diminished for reasons such as imbecility, youth or drunkenness. See Jean-Marie Carbasse, Introduction historique au droit pénal, p. 168.

37. As such, then, again the process of forgetting can be seen as having been an integral part of the fight for equality, not just on the part of the cagots who sought a form of assimilation, but on the part of the rest of the local population whose communal identity was in part bound up with their own practices of subjection.

The sacrifice of local liberty in the pursuit of equality is also recognised in later revolutionary politics in the Basque provinces. See James E. Jacob, "The French Revolution and the Basques of France," In Basque Politics: A Case Study in Ethnic Nationalism, ed. William A. Douglass (Reno, Nevada: Associated Faculty Press and Basque Studies Program, 1985), 51-101.

38. L'Esprit des lois, XIV, xi. In the same chapter, he offers a defense of the policies to restrict the free movement of people and goods to prevent the spread of the plague. This is an allusion to the policies of the central government in 1720 with the out-break of the plague in Marseille, and the refusal by the king's council to give in to demands of the southern merchants that their trade be re-routed through Bordeaux.

39. L'Esprit des lois, XV, ii. Justinian's Institutes offers three legitimate grounds for slavery: being born into slavery, voluntary submission to another (often for reasons of debt), or an alternative to the death penalty in cases of military defeat. Montesquieu addresses and dismisses each one of these reasons in the chapter cited.

40. L'Esprit des lois, XX, xxii. Brethe de la Gressaye in his critical commentary on this passage and Muriel Dodds [Les Récits de voyages, sources de l'Esprit des lois de Montesquieu (Paris: Champion, 1929)] trace the undisclosed reference to a custom of the Mogol empire (presumedly taken from the travel accounts of François Bernier and noted by Montesquieu in his Geographica II) whereby the women would not marry if they could not find a husband of the same profession as their father. However, as is evident, this custom is not fully relevant for the case Montesquieu describes. Its relevance to the case of the cagots is enhanced with the recognition that this example is given in the context of a discussion of the need for certain social mobility and a defence of venality. As we have seen, some cagots themselves had noble pretensions.

41. L'Esprit des lois, XXVI, xxiii.

42. L'Esprit des lois, XIX, xiv.

43. L'Esprit des lois, I, iii and VIII, iii.

44. He does not, however, address directly the extreme forms of inequality on which these ancient republics depended, except indirectly through his later indictment of the institution of slavery.

45. These criteria help to account for the flexibility underpinning the acceptance of venality (the purchasing of title), combined with more rigid prescriptions which denied to the nobility rights to engage in commerce (although this practice was being progressively eroded in the eighteenth century). It also meant that in the goal of promoting public order and administering justice, public officials were able to invoke the loss of status as one important weapon in punishing and deterring crime (la peine infamante).

46. L'Esprit des lois, V, iv.

47. Pensées, n. 785, p. 349.

48. L'Esprit des lois, V, v.

49. Ibidem.

50. L'Esprit des lois, VIII, ii and iii.

51. L'Esprit des lois, V, iii.

52. "Ainsi les distinctions y naissent du principe de l'égalité, lors même qu'elle paraît ôtée par des services heureux, ou par des talents supérieurs." L'Esprit des lois, V, iii.

APPENDIX 2: Copy of a judgement signed by Montesquieu, regarding the convicted Jean Tourneau, dit Tintourlin, in which he is sentenced for life to serve on the galleys, 1716.

Et ouy sur ce ledit Jean Tourneau ou [illegible]
par la dicte [illegible]

Il sera dit que la Cour
a declaré et declare ledit Tourneau dit Tintourlin
atteint et convaincu des crimes a luy mis sus
pour reparation desquels la condamné et
Condamne de servir le Roy dans ses galeres
Comme forçat pendant sa vie, Luy fait
Inhibitions et deffances d'en sortir a peine
de la hart, le condamne en outre en
Cinquante livres d'amande envers le Roy
Et aux depens de la procedure envers ceux
qui les ont faits

[illegible] [illegible]

Montesquieu
raporteur du 26 may 1716

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A.D.G., fonds du parlement, Registre des arrets rendus par Raport a la chambre de la Tournelle commancée en janvier 1710 et finy le mois de decembre 1762.
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