LEGISLATING MORALITY:
MONTESQUIEU’S CASE FOR
THE REGULATION OF SEXUAL MORALS

A Dissertation

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One of the pressing questions of our day is whether the laws of governments dedicated to liberty may regulate sexual behavior by legislating sexual morality. Although contemporary liberal theorists often argue that it is illegitimate to regulate private sexual behavior, the early modern liberal theorist, Montesquieu, takes the opposite view. In *Spirit of the Laws*, he argues that governments dedicated to liberty ought to legislate sexual morals according to the standards of natural laws and rights.

That Montesquieu is a natural law and natural rights thinker is itself a debated claim. Chapter two argues that Montesquieu appeals to a non-perfectionist, justice based, liberty oriented, natural law and natural rights theory. On the subject of his sexual morals, his essential view is that sexual behavior should be reserved for marriage between one man and one woman, and that sexual practices outside of
marriage are violations of natural laws, rights, and the political and civil needs of free societies.

In order to understand how he legislates sexual morals, one must first answer which of the three government forms most conforms to the requirements of natural laws and rights. Chapter three establishes that monarchy is that form by appealing to his teaching that the condition, moral character, and liberty of women in a given society are key indicators of the degree of liberty and morality generally practiced there. Monarchy is the most hospitable to the female’s nature, natural laws and rights.

Chapter four studies how the civil laws of Montesquieu’s monarchy regulate marriage and procreation, divorce, adultery, homosexuality, polygamy, and modesty, and shows that his laws do regulate sexual behavior according to the requirements of his natural law, natural rights sexual morality.

The final chapter assesses the relative merits of Montesquieu’s position by comparing his recommendations to those of the contemporary liberal theorist, Richard Posner, who also aims to show how the laws can regulate sexual behavior, but from a morally neutral standpoint. Montesquieu’s position is internally more coherent, persuasive, and desirable for thinking about how the laws of a government dedicated to liberty ought to regulate sexual behavior.
For Diego
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CHAPTER 1

INTRODUCTION

This dissertation responds to a question that everyday people confront in private conversations and in public debates, namely whether it is permissible to legislate sexual morality in modern democratic societies. Discussions are often contentious and difficult to resolve, with two valid concerns frequently arising: the protection and promotion of liberty and equality.

Most citizens have a sense that the laws should leave people as free as possible to pursue their interests and live their private lives without being singled out as unusual, immoral, or less civil than other persons in the community. People fear that if the laws legislate sexual morality, then the laws will infringe upon personal freedoms and rights to equality, especially the rights of those of individuals or groups of people who do not behave in the ways that the majority behaves. From this perspective, the concerns for liberty and equality call for legislators to show restraint and resist using the laws to regulate sexual morals.

Alongside these concerns to respect liberty and equality, however, the last ten years have seen an increased demand in the United States that legislators regulate sexual morals so as to maintain public order and protect minorities and other vulnerable members of society. For example, the gay-marriage and traditional
marriage movements have both appealed to the rights of minorities or underage persons, be they homosexuals or young children; the movement against child pornography on the internet has sought to protect the innocence of childhood; the growing objections to the use of artificial reproductive technology for questionable purposes have centered on the ways that ART seems to disregard the needs of the conceived and the mothers themselves (as the “Octo-mom” case made famous); concerns over polygamy in our country have focused on the rights of young women in plural marriages (as the raids on the Texas Fundamentalist Church of Latter Day Saints ranches renewed); and public fears about the sexual lawlessness in prisons have sought to protect prisoners from sexual abuse (such as the Abu Grahib scandal exposed). All of these incidents have heightened the public’s fears that attacks upon the sexual freedoms and equality of minorities and the vulnerable are on the rise, and that the laws are not doing enough to preserve order and protect people from harm. From this perspective, then, the concerns for liberty and equality call for legislators to use the laws to regulate sexual morals so as to protect minorities and the vulnerable citizens from abuse.

Today, the need is as urgent as ever for political theorists to address whether and how a modern democratic society can legislate morality, particularly sexual morality, in ways that promote liberty and equality. This need is not a new one. Over the past fifty years, a number of political and legal theorists have addressed the broader question of what role the laws may have in promoting public morality. This dissertation will argue that it is instructive to look even further back to the moral and
legal thought of Montesquieu for answers to this question. First, however, let us
survey the response from some scholars of the past fifty years.

Contemporary liberal thinkers such as Isaiah Berlin, John Rawls, Richard
Rorty, Richard Posner, and Stephen Macedo advance anti-perfectionist arguments
that the government and laws should not promote a particular view of the moral
good.¹ In their view, if the laws do this, in paternalistic fashion, they would deny
some persons the ability to act according to their own ideas of the moral good based
upon arguments that only some (other) citizens could understand or accept. This
would be a violation of people’s individual freedom (conceived as autonomy) as well
as fundamental aspects of their equality.

Other scholars, however, have been critical of the response by contemporary
liberal theorists. The so-called communitarians, loosely associated with Alasdair
MacIntyre, Charles Taylor, William Galston, Mary Ann Glendon, Jean Bethke
Elshtain and Michael Sandel, propose a common criticism that contemporary
liberalism assumes an individualistic idea of the human person that fails to adequately
address the dependence of each person upon the community, and so, the importance
of the community itself.² Furthermore, they insist that liberalism’s concept of liberty
as autonomy contributes to the atomization of community, which leads to other social

¹ Posner is unique in this group because, without abandoning anti-perfectionism or a
commitment to neutrality, he tries to show how liberalism can regulate sexual behavior from an
economic perspective.

² Galston is different from these other communitarians because he believes that contemporary
liberalism can defend itself from the charges of communitarians if it abandons its anti-perfectionist
neutrality and embraces a unique conception of the human good. Montesquieu’s liberal project (as this
dissertation will describe it) probably would appeal to him because Montesquieu affirms a limited
conception of the human good, which the civil laws are to promote.
ills. As a result, a number of these scholars call for a greater use of the laws to protect the well being of the family and local communities, which itself requires the regulation of some moral positions, such as the moral value of preserving marriages and families intact (and calls to ban laws that permit no-fault divorce, for example). Communitarians, therefore, are not as hesitant as contemporary liberal theorists to call upon the laws to regulate public morals.

Communitarians and liberals do not, however, exhaust the contemporary possibilities. Scholars such as John Finnis and Robert George criticize contemporary liberalism by appealing to natural law theories. These theorists argue that contemporary liberalism promotes an impoverished understanding of human reason as unable to identify moral truths, which results in an impoverished understanding of the human good. They argue that human beings have the capacity to reason and identify moral truths without the aid of revelation and that this capacity should be used in public arguments and debates. Furthermore, these scholars believe that free democratic societies depend upon a moral and virtuous citizenry, and so they insist that, with prudence, the laws ought to promote public morality and virtues as necessary to good government. This is to say that they defend “perfectionism” (of a pluralistic variety) in politics. Of all three groups of scholars, this third group has been the most outspoken in favor of regulating sexual morality.

In this dissertation, I argue that it is instructive and rewarding to study Montesquieu’s moral, political, and legal theory for ideas and answers to the question of what role the law can have in legislating morality, particularly sexual morality. Montesquieu does not depart from the liberal tradition, but argues that because the
primary goal of government and the laws is to promote liberty, legislators ought to legislate a limited conception of the good, especially so as to defend the most vulnerable members of society.

At the same time, his liberal theory does not have the drawbacks of contemporary liberal theory, which natural law and communitarian theorists have rightly identified. Montesquieu embraces a natural law and natural rights system that appreciates the complexity of the human being as an animal gifted with a capacity to reason and identify absolute moral truths, with free will to choose one action over another, but also a being dependent upon the family and society in order to properly survive and develop. Aside from being a liberal theorist, then, he is a natural law theorist who shares contemporary communitarian values.

Yet Montesquieu agrees with liberalism and disagrees with the contemporary natural law view that free government depends upon a virtuous citizenry in order to function well. Here he differs in two distinct but interrelated senses, in a moral sense and in a political sense.

In the moral sense, Montesquieu’s natural law and natural rights theory sets aside human virtue or full human flourishing as the aim and seeks instead the basic preservation of the self and the species. But unlike more focused and individualistic understandings of self-preservation (like that of Hobbes), his understanding of self-preservation is broad because his concept of the self is broad. Aside from his concept of the human person as having reason, free will, and a dependence upon others, he understands each person to have valid physical, social, sexual, intellectual and
spiritual needs. The preservation of the self and the species aims to preserve the completeness of being human in all of these respects.

To that end, he identifies an array of natural rights and obligations that protect this complex, or holistic, understanding of the human person. This is to say that he embraces a limited conception of the human good, and a moral program to achieve that good. However, he does not argue further that each human being ought to strive to perfect that nature, or to cultivate higher virtues. In fact he tolerates and even encourages a number of minor vices, and argues that it is beyond the scope of the political to incorporate virtues into law, or to promote perfectionism. He is not a perfectionist, and has no virtue theory.\(^3\)

In the political sense, Montesquieu’s primary goal is to promote political liberty, which consists in the security of each person, or the preservation of each person from harm. Political liberty (or the security and preservation of each person) means that government must not harm persons, and that persons must not harm other persons. However, since his moral theory establishes that “each person” is a complex being with natural rights and obligations, the security of “each person” requires the enforcement of natural rights and obligations. Therefore his political project to promote liberty necessarily entails his moral project, which embraces a limited

\(^3\) I describe Montesquieu’s theory as “non-perfectionist”, or as “not perfectionist”, rather than as “anti-perfectionist” because he embraces a limited conception of the moral good unlike contemporary anti-perfectionists who (aside from Galston) abstain from doing so. He takes a middle position between perfectionism and anti-perfectionism. Montesquieu’s liberal project (as this dissertation will describe it) probably would appeal to Galston because Montesquieu affirms a limited conception of the human good, which the civil laws are to promote.

Montesquieu does not have a moral virtue theory, though he does have a political virtue theory, which is different from, though often confused with, the former.
concept of the good. He does not agree that free government depends upon a virtuous citizenry, but rather upon a government and citizenry who comply with natural laws and natural rights. Altogether, he is a liberal, non-perfectionist, natural law and natural rights thinker.

Montesquieu’s moral theory is valuable because it provides a new (to us) answer to the long-standing question of how the laws of the government may regulate morality, and in particular sexual morality, in a way that promotes liberty and equality while protecting the most vulnerable members of society. It avoids the pitfalls of contemporary liberal theory, and does not go along with the perfectionism of natural law theories, but embraces the best aspects of each side.

In the next chapter, I develop and defend Montesquieu’s moral theory in more detail, so as to establish its main characteristics and prepare to show how his moral views influence his civil law recommendations in chapter 4. Before we can turn to those civil law recommendations, however, chapter 3 must address Montesquieu’s political science. If we wish to understand how Montesquieu regulates sexual morals in a way that promotes political liberty and natural rights, we must first answer which regime form he believes best achieves this. I argue that the monarchy is the government form which best promotes liberty and abides by the requirements of his natural law, natural right theory. I make this case by studying the nature and the condition of the woman in this society, as compared to her counterparts in the despotic and republican societies.

Having established that the monarchy ought to be the focus of our attention, chapter 4 studies how the civil laws of Montesquieu’s monarchy regulate marriage,
divorce, adultery, homosexuality, polygamy and modesty. This chapter argues that there is a clear and, for the most part, consistent connection between Montesquieu’s moral views and his legal recommendations—that he does, in other words, legislate morality in a non-perfectionist manner. Montesquieu also shows himself to be highly conservative by modern standards.

Chapter 5 compares the merits of Montesquieu’s natural law, natural rights approach to the regulation of sexual morality to Posner’s libertarian economic approach. Like the previous chapter, the argument will proceed by analyzing Posner’s response to marriage, divorce, adultery, polygamy, homosexuality, (and since he does not deal with modesty) incest and bestiality.

I conclude that Montesquieu’s thought is both a valuable resource and a challenging, not fully appropriate, resource for thinking through the question of what role the law should have in regulating sexual morals.

On the one hand, Montesquieu’s liberal, non-perfectionist, natural law and natural rights theory offers a highly appealing basis from which to think about moral dilemmas. He offers a holistic, experience-based approach to the study of human nature, and a rationally accessible method of deriving moral obligations, which is convincing. Moreover, his legal recommendations are valuable because they provide concrete examples of the ways in which views about the moral good may become laws. They are also sobering legal recommendations because Montesquieu argues that the promotion and protection of the liberty and equality of the most vulnerable members of society requires considerable regulation of the sexual morals of all members of society.
On the other hand, Montesquieu’s work is not fully appropriate for thinking about American dilemmas on this question. His major work, and the main resource for this dissertation, *Spirit of the Laws*, focuses the most attention upon the government form of the classic monarchy and the civil laws that ought to rule there. Although Montesquieu outlines a political science applicable to all nations and places, and famously discusses the political laws of the English monarchy (the form of government closest to our own), he does not study the civil laws of the English monarchy in great detail. He had a personal interest in thinking about what laws should govern his own French nation, so Montesquieu focuses upon the civil laws of the classic (French) monarchy. This does not prevent us from inferring what the civil laws of the English would look like, but even these are still a leap away from the kinds of civil laws appropriate for the United States, which is not a monarchy but a democratic republic. Altogether, there is a divide between the political and civil laws Montesquieu recommends and the political and civil laws the United States could consider. And yet, there is still much about the civil laws of Montesquieu’s classic monarchy that the United States ought to consider.

In light of the advantages and disadvantages of turning to Montesquieu for ideas about how the laws of the United States might regulate sexual morality, it is best to approach Montesquieu’s work in the same way that the American founders did, as a point of departure rather than a point of arrival, to take what is correct and leave behind what is not.
CHAPTER 2

MONTESQUIEU’S
NATURAL LAW, NATURAL RIGHTS
SEXUAL MORALITY

Introduction

In order to see how Montesquieu legislates sexual morality, we must study his moral theory first. Then it is possible to examine in subsequent chapters how there is a connection between his moral theory and his laws. To that end, this chapter has four main goals: The first is to defend Montesquieu as a natural law, natural rights thinker. The second goal is to describe the outlines of his natural law, natural right theory, including the methods he employs to identify natural laws and natural rights. Given the little Montesquieu says about his methods, the aim here is not to prove his methodology beyond a doubt, but to establish it as a reasonable hypothesis. The third goal is to focus upon the aspects of his moral theory that regard sexual behavior, so as to limit and focus the analysis. The fourth is to address how Montesquieu’s moral theory promotes his liberal project.

Not all Montesquieu scholars agree that he is a natural law, natural rights thinker, and the current academic consensus seems to be that he is not. There are
three main schools of interpretation on the issue of Montesquieu’s moral theory. The first argues that there is a real tension in *Spirit* between Montesquieu’s moralism and his non-moralism, or between his universal rights mentality and his relativist, value-neutral mentality, and that this tension is unresolved. This school includes Leo Strauss, Isaiah Berlin, and David Lowenthal.

Strauss lectured on Montesquieu while at the University of Chicago, and a transcription of his 1966 seminar on *Spirit* exists.\(^1\) He notes the conflicting elements of Montesquieu’s moral theory: that Montesquieu preserves nature as a standard of normativity, while at the same time advancing a materialistic philosophy of history in “germ” form; that he appeals to the authority of natural right — and so cannot be a convinced moral relativist— but that there are elements of sociological relativism in *Spirit*, where Montesquieu is content to describe a variety of political and social institutions, identify their causes in nature (the climate, the terrain) or history (past convention) and other forces outside of human control. These latter elements seem to imply moral relativism, and inexplicably cohabit with his commitment to natural right. “In other words, there is relativism, and there is rationalism in Montesquieu, and there is no clarity as to how the two are related.”\(^2\)

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1. In *Natural Right and History*, he mentions Montesquieu at the end of the chapter on “Classical Natural Right”, and before embarking on the chapter about “Modern Natural Right”, to signal Montesquieu’s unique position in history, at the dawn of liberalism but in dialogue with classical Thomist natural right theory, which Strauss believes Montesquieu left behind. In his later lectures at Chicago, Strauss reveals that he saw Montesquieu to adhere (uniquely, and perhaps inexplicably) to both a philosophy of Nature and one of History, the latter in rudimentary form, which also explains Montesquieu’s place in Strauss’s book. Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), 164.

2. “The discussion of individual political liberties seems to locate the anchor around which Montesquieu’s analysis floats, reason, i.e., not relativism. To accent that, Montesquieu emphasizes the desirability of political liberty, the tone of the essay changes for he has departed form the area of fact…to the area of values, i.e. that political liberty is ultimately desirable. Now of course you see the connection. Rationalism means values and relativism means no values….. Now Montesquieu is…on
Berlin agrees. On the one hand, Montesquieu does humanity the “great historic service” of overthrowing the notion that one can discover universal truths applicable to all men in all places, but on the other hand, leaves no doubt that he still believes in the idea of absolute justice as a transcendent standard. Berlin concludes that: “The contradiction remains unresolved.”

The second group of scholars acknowledges the tension, but argues that Montesquieu truly adheres to a value-neutral, relativist approach, notwithstanding his way towards present day enlightenment by being to some extent a sociological relativist. But then, he is kept back by some “Thomistic” or other things, mainly rationalist” (Lecture XII, p. 5). Also Lecture XV. p. 3-6. Lecture XIII. p. 6. Lecture XV. p. 2-4. Lecture XI. p. 5-6. ———, "Seminar on Montesquieu," (Chicago University of Chicago, 1966).

3 “[Montesquieu’s] whole aim is to show that laws are not born in the void, that they are not the result of positive commands either of God or priest or king; that they are, like everything else in society, the expression of changing moral habits, beliefs, general attitudes of a particular society, at a particular time, on a particular portion of the earth’s surface, played upon by the physical and spiritual influences to which their place and period expose human beings. It is difficult to see how this doctrine, which is the foundation of the great German school of historical jurisprudence, of French post-revolutionary historiography, of the various modern sociological theories of law, can be reconciled with belief in universal, unvarying, everlasting rules, equally valid for all men, in all places at all times….“ Isaiah Berlin, "Montesquieu," in Against the Current: Essays in the History of Ideas, ed. Henry Hardy (New York: Viking Press, 1980), 154-55, 57.

David Lowenthal is less forceful that a contradiction persists in the work, but stresses that Montesquieu never fully develops his moral theory, or presents it systematically enough to see how it applies to his political reflections, leaving the tension unresolved. “The philosophical morality Montesquieu alludes to is not developed in [the Spirit of the Laws] or any other work of his. Whatever it tells men about themselves, about the right or best way to live, about the virtues that reason determines to be such is never systematically presented to his readers and rarely even glimpsed. The relation between morality and political affairs, or between the philosophical moralist and the legislator is never explicitly clarified” p. 516. David Lowenthal, "Montesquieu," in History of Political Philosophy, ed. Leo Strauss and Joseph Cropsey (Chicago: The University of Chicago Press, 1963), 516, David Lowenthal, "Montesquieu and the Classics: Republican Government in the Spirit of the Laws," in Ancients and Moderns: Essays in the Tradition of Political Philosophy in Honor of Leo Strauss, ed. Joseph Cropsey (New York, NY: Basic Books, 1964), 258, 82-83.

Julia Simon is also of this mindset. She argues that Montesquieu is value-neutral on a number of levels, although he never manages to leave universal values behind. Montesquieu “goes a long way towards resuscitating an attenuated version of universalism. His methodological relativism stops short of nihilism to invoke universal values that do not suffer from ethnocentrism…he points the way out of a cultural relativism that cannot draw important distinctions….Thus, Montesquieu…achieves a blend of relativism and universalism that still resonates today ….“ Julia Simon, "Value Neutrality and the Virtue of Tolerance: Montesquieu's Contribution to Liberalism," in Beyond Contractual Morality (Rochester, NY: University of Rochester Press, 2001), 112.

moralist moments. This group includes Judith Shklar, Pierre Manent, and Celine Spector.

In her book *Montesquieu*, Shklar acknowledges that Montesquieu’s moralism is inconsistent with several aspects of his political theory, including his physical determinism and the sociological relativism this entails, but she dilutes both extremes of Montesquieu’s thought to argue that the determinism is not the extreme physical materialism of Hobbes, for example, but rather the cultural, historical determinism of a budding sociologist and that Montesquieu’s moralism is not the absolute moralism of a natural law thinker, but rather the moralism of the moment, which evolves in every culture as circumstances change.\(^5\) She is thereby led to see Montesquieu’s moral pronouncements as dependent upon human conventions. No universal moral norms pre-exist civil law or government, and a moral relativism underpins *Spirit*.

In *The City of Man*, Manent makes this argument more strongly. He focuses the analysis on Montesquieu’s ancient republic of virtue, and stresses that Montesquieu understands “virtue” not as Christian virtue, or as the philosophical virtue of Plato or Aristotle, but as a political passion for the homeland only possible in the context of the Greek city-state. Manent interprets this unconventional use of virtue as an

\[^5\] “Montesquieu’s theory of climate was morally completely out of keeping with the entire burden of *The Persian Letters* and the universalism implicit in the political judgments, such as those on slavery, throughout the *Spirit of the Laws*….The physiology of social development had all the attractions of a hard science for Montesquieu, but it was morally inconsistent, politically incoherent, and factually false. In spite of the manifest difficulties that it presented, Montesquieu never abandoned the theory of climates, but he subordinated it to a far more flexible theory of culture. We are not, after all, the supine victims of temperature.” She then argues that Montesquieu believes mankind is influenced by both physical and moral causes, and explains the sense in which she understands moral causes: “Each century, in fact, has a spirit of its own….The modern world is a culture in which politics, not the climate, matters most (Pensees, 1581, 1584)….Moral causes have their *origin* with civil law and government….Society is a system of norms which are related to each other and can be understood historically and as functioning to maintain the social whole.” Judith Shklar, *Montesquieu* (Oxford: Oxford University Press, 1987), 97-101.
underhanded rejection of Christian and philosophical virtue, of the authority of
nature, morality, and reason itself. Furthermore, he argues that Montesquieu is
deliberately insincere in his appeal to reason and nature, that it “reeks of bad faith,”
because he wishes to make his new, historically malleable, concept of morality more
appealing to his traditionally-minded audiences. If Manent is right, then one should
not be fooled by Montesquieu’s moralist moments, but take him most seriously when
he speaks about the need to craft legislation in accordance with the local physical,
political, historical, and cultural circumstances, and those alone.

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6 “The movement of The Spirit of the Laws unfolds between the two poles of Ancient and
Modern. The one is the ancient world of republican “virtue”, the other is the England of “commerce”
and “liberty.” Manent, p. 12. The primary intent of The Spirit of the Laws is thus to weaken decisively
the authority of the Ancients, of the idea of the ‘best regime,’ the idea of virtue, in order to replace it
with the authority of the present moment, of the modern experience, summed up in the notions of
‘commerce’ and ‘liberty’. Manent, p. 15. “Montesquieu, by letting it be seen that the English regime
cannot be integrated even into the radically new classification he devised, asserts ‘before our very
eyes’ that the realm of politics can no longer be exhaustively and thus adequately covered by any
classification of regimes whatever…Nothing less than the rule of reason was being overturned.”
“This new regime of reason has been called the Age of Enlightenment, a glorious phrase that reverberates
with the words Reason and Nature. In reality, however, the Age of the Enlightenment deals a decisive
deathblow to both. Its active principle, its sovereign notion, is neither Reason or Nature, but the
‘present moment.’ The authority of the New is still too recent, too new to be precise, to have found an
appropriate and commonly accepted conceptual expression, and so it enlists in its service the

7 “No doubt Montesquieu’s approach reeks of bad faith, however hidden it is. He allows himself
such bad faith because it is indispensable to his enterprise at a critical stage in order to weaken or even
do away with the attraction the venerable notion of virtue can still hold for the contemporary reader.”
Manent, p. 18.

8 Celine Spector’s position is the same as Shklar and Manent’s, though more nuanced. She
argues that Montesquieu occupies a unique position among moderns, neither adhering to juridical
positivism nor to a transcendental concept of justice. Instead, Montesquieu grounds his objective
notion of justice in “the nature of things”—understood as the particular things, here and now, rooted in
history, and not the transcendental “nature” of things understood as the classics did. Allegedly, this
allows Montesquieu to ground his objective notion of right in history. This is a unique argument, but
which ultimately confuses what ‘objectivity’ means. For, Spector argues that this concept of justice
depends upon how a particular people at a particular time value and understand justice. It is closely
related to the economic concept of justice as the just price based upon the current market price, or
valuation, of what is in demand and supply. This is tantamount to saying that Montesquieu grounds his
objective notion of right in the subjective, historical sensibilities of a people, which is not an objective
grounding but the “moralism of the moment”, which Manent also interprets Montesquieu to endorse.
Therefore, her reading is a denial of objective morality and universal natural right. Nevertheless, later
The third and final school of thought, to which I ally myself, takes the position that Montesquieu is sincere in his appeals to nature, reason, and the laws of morality. Among others, Robert Shackleton, Mark H. Waddicor, and Thomas Pangle take this position, though they disagree as to the particulars of his natural law theory. My interpretation will differ from theirs in four main ways.

First, I will insist upon the distinction Montesquieu makes between the order of natural law and the order of natural right. These three scholars treat “natural law” and “natural rights” as either interchangeable concepts, or as closely related by derivation, whereas I will argue for a greater difference, as two different orders of law. Secondly, and to underscore this difference, I will argue that Montesquieu employs different methods to identify the order of natural law and the order of natural right. The first method is empirical but the second appears to be rationalist, though again I offer this


as a hypothesis that seems to fit the data better than the explanations these three theorists have offered. Thirdly, following the example of Shackleton and Pangle, but aiming to go further, I will catalogue as far as possible the natural laws and the natural rights Montesquieu identifies in *Spirit*.\(^\text{10}\) That catalogue will be my main effort to sketch the outlines of his natural law, natural rights system in view of the evidence. Fourthly, and based upon that catalogue, I will disagree with Pangle that Montesquieu’s natural law theory says very little about the right way to live. Montesquieu’s natural law, natural right system provides a substantive, though limited, moral theory, which is compatible with his liberalism. These four contributions will advance our understanding of Montesquieu as a sincere moralist, who was a part of the natural law tradition of the seventeenth and eighteenth centuries, but at the same time, a liberal thinker who sought to promote liberty and understood moral behavior to be in the service of that liberty.

To show how my interpretation will differ from the interpretations of Shackleton, Waddicor, and Pangle, I will pause here to summarize the most relevant aspects of their views.

A substantial part of the disagreement within this third school surrounds the methods Montesquieu uses to identify natural laws and natural rights. Does he employ empirical methods? Rationalist methods? Or both? Does he violate the is-ought problem raised by Hume? That is, does he derive normative claims from descriptive statements, or does he respect the difference?

\(^{10}\) Pangle identifies only about seven mentions in *Spirit* of either natural law or right. Pangle, p. 309-310.
Shackleton makes three basic claims about the character of Montesquieu’s natural law theory: First, he argues that his concept of justice is *a priori* because it pre-exists political society, and is in keeping with the rationalist school of natural law of the seventeenth century represented by Grotius, Pufendorf, Burlamaqui, and Domat.\(^{11}\) Second, Shackleton argues that as soon as Montesquieu introduces the laws of nature, he adopts an empirical, *a posteriori*, method of moral reasoning, because the laws of nature are descriptive of human behavior, not normative.\(^{12}\) However, Shackleton further argues that although the natural laws are descriptive, Montesquieu treats them as normative.\(^{13}\) Therefore, Shackleton sees Montesquieu as consciously moving away from an *a priori* to an *a posteriori* based moral system. On this account, therefore, Montesquieu derives prescriptive norms from empirical observations in violation of the is-ought distinction.\(^{14}\)

Waddicor also focuses upon questions of methodology. He agrees with Shackleton that for Montesquieu justice is an *a priori* concept, but disagrees that Montesquieu sees his laws of nature are merely descriptive. The first natural law to

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\(^{11}\) “As early as 1721 Montesquieu had asserted that justice is eternal and is independent of human conventions.” “He is seen to be at one with the theorists of natural law. His language is their language. His opposition to empirical doctrines of natural law is their opposition.” Robert Shackleton, *Montesquieu: A Critical Biography* (Oxford: Oxford University Press, 1961), 248.

\(^{12}\) Shackleton, p. 252.

\(^{13}\) “What Montesquieu attempts to do…by means of his descriptive laws of nature, is systematically to characterize the activities of man in relation to nature, to reduce them to certain simple principles. Having done this, he proceeds in the rest of the book to take these descriptive principles and treat them as normative principles, insisting, albeit often tacitly, that they should constitute the basis of social activity and of positive laws.” p.251, 254.

\(^{14}\) Shackleton, p. 260-61. Shackleton also points out that in the field of moral philosophy the procedure of moving from descriptive to normative propositions was not rare, and had already been criticized by Hume. However, in Montesquieu’s field of legal and political philosophy, where the reigning natural law theory was based strictly on a priori abstractions, Montesquieu’s method was seen as highly innovative. Shackleton, p. 252.
“seek peace,” he argues, employs normative language. After an analysis of similar word usage, Waddicor concludes that Montesquieu remains a rationalist, *a priori* natural law thinker through and though, even though he incorporates elements of empiricism into his rationalist theory.\textsuperscript{15} On Waddicor’s account, Montesquieu does not violate the is-ought distinction.

Finally, Pangle does not focus upon questions of methodology, but disagrees with the first two schools of thought that Montesquieu’s descriptive (empirical) moments undermine his moralism. Pangle argues that *Spirit* resembles Aristotle’s *Politics* in its tolerant discussion of a variety of legitimate political regimes.\textsuperscript{16} He also suggests that Montesquieu’s method is deductive and rationalist: “[Natural law] comprises the rules deducible from the relation men have to one another prior to, and underlying, any established community.”\textsuperscript{17}

More significant than this methodology question, however, is the question of the scope of Montesquieu’s natural law, natural right theory. All three schools of thought argue convincingly that Montesquieu rejects the idea of moral perfectibility,

\begin{footnotesize}
\textsuperscript{15} In this, he is not only like the seventeenth century jurists, but also like Thomas Aquinas. “Natural law, in the moral sense, is, in the last analysis, an *a priori* concept, but it is not exclusively *a priori*. Grotius and Pufendorf were not, as certain scholars make out, unaware of the facts of life, and nor was St. Thomas: they all used those facts as a basis for their normative natural laws, just as Montesquieu was to do.” Mark H. Waddicor, *Montesquieu and the Philosophy of Natural Law* (The Hague: Nijhoff, 1970), 59.

\textsuperscript{16} Thomas Pangle, *Montesquieu's Philosophy of Liberalism: A Commentary on the Spirit of the Laws* (Chicago: University of Chicago Press, 1973), 42-44. “Montesquieu’s turn to something like Aristotle’s study of regimes is not inconsistent with his natural right theory because it is part of his conscious modification of modern natural right theory; it is not inconsistent with his sociology because he has no sociology.” Pangle, p. 45.

\textsuperscript{17} Pangle, p. 260, 269. An example of the way in which Pangle understands natural laws and natural rights as interchangeable concepts or somehow derivative of each other is on p. 42: “...Montesquieu would proceed to show how those natural laws lead to natural laws or natural rights useful as guides in civil society.”
\end{footnotesize}
teleology, and virtue in politics. However, Pangle in particular, argues that the prescriptions of natural law are quite minimal, limited to the most basic need of man, those surrounding self-preservation. And so, he interprets Montesquieu’s natural law theory to say very little about the moral way to live. I will agree that Montesquieu sets aside moral perfectibility, or a summum bonum for man, and that the ground of his moral theory is the preservation of the self and the species, but I will disagree that this moral theory says very little about the right way to live. As we will see, Montesquieu’s natural law, natural right system says a great deal about how the average man or woman, with a variety of passions and interests, ought to behave in order to be a basically moral person. While Pangle is right that Montesquieu’s moral theory aims to secure the preservation of each person, I will argue that the preservation of each person involves a complex and wide-ranging endeavor to preserve the full humanity of each person, according to the richness of human nature and the variety of natural rights that follow from that nature.

The first task is to study Montesquieu’s natural laws, his method of identifying the natural laws, and whether the method violates the is-ought distinction. The next task will be to study the order of natural right, the method Montesquieu employs to derive natural rights, how this order might relate to the order of natural law, and whether this method violates the is-ought distinction. After these tasks are completed, we will have accomplished the first two goals of the chapter, to defend and describe

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18 On this issue, Pangle is in agreement with Strauss, Berlin, Manent, and Shklar but he does not go so far as Manent and Shklar to interpret this as a rejection of nature and of morality in the name of history or convention.

19 “[T]he only higher law is the natural law, and this is of very limited scope….being confined to ‘natural defense’….natural law does no more than set the lowest requisites, or the distant outer bounds, for political and civil law.” Pangle, p. 267.
the main outlines of Montesquieu’s natural law, natural right morality, and will be able to turn to the question of how this moral theory relates to his liberal project.

The Natural Laws and the State of Nature

In Book I of *Spirit*, Montesquieu appeals to a state of nature analysis so as to identify the five natural laws that operate upon man independently of political society. This analysis is a tool he employs to identify the natural laws that direct human behavior by nature. Like Hobbes, he explains that the first natural law is for man to seek peace with those around him. However, unlike Hobbes, Montesquieu argues that this law is inspired by feelings of weakness, timidity, fear, and frailty in the state of nature. The second is a desire to seek nourishment, which is inspired by feelings of hunger and weakness. The third is a desire to approach other members of his species, especially of the opposite sex, which is inspired by feelings of “pleasure” at seeing other members of the species and of being “charmed” by sexual differences. The fourth natural law is a desire to unite and live in society with others, inspired by the same social pleasure “one animal feels at the approach of an animal of its own kind.” And the fifth is an impulse to seek and know god, which Montesquieu says would make itself felt last, after primitive man attained a certain measure of speculative knowledge.  

First, the natural laws are strongly emotional and appetitive. What stand out are the desires and passions that move primitive man to behave in certain ways.

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However, Montesquieu also notes that the last three laws (the third through fifth) eventually involve the intellect in some way. Primitive men “succeed in gaining knowledge” which also serves to unite them, be it in sexual union or in society. The fifth law explicitly “impresses” man with the “idea” of a creator and leads man towards him. Therefore he presents a picture of man as passionate and rational, with a progressively greater capacity to employ reason as time advances.

Second, as Shackleton argues, Montesquieu’s natural laws are descriptive of human behavior first and foremost. Here it is helpful to keep in mind Montesquieu’s scientific approach to the study of animals. In Part 3 of *Spirit*, Montesquieu reports the results of his analysis of a sheep tongue under a microscope. (Montesquieu conducted a number of experiments on animals and plants at his home in La Brède, even to the point of having his servants drown ducks so as to observe their reactions before death.) In the same way that he studied animals in the wild or under a microscope so as to identify the natural laws by which the animals behave, Montesquieu also aims to identify the “primitive laws” by which the human animal, a being with emotions and intellect, behaves. Since he cannot study human animals “in the wild,” however, he employs the tool and lens of the state of nature. Contrary to Waddicor’s position, this is an empirical approach because it uses the tools available to observe man in his natural condition. However, it is also a phenomenological

21 *Spirit*, I.2, 6.


23 One might object that the state of nature seems to be a mental construct, so that he does not make empirical observations. However Montesquieu suggests that the state of nature did in fact exist and still did does exist for some people during his time in other parts of the world. While describing the natural timidity of the man in the state of nature, Montesquieu cites a historical event: “Witness the savage who was found in the forests of Hanover and who lived in England in the reign of George I.”
approach. For Montesquieu has personal experience of the way in which the human animal behaves and feels, and so the natural laws describe that experience, what it feels like, to be a human animal, from the internal point of view. But in both cases, external and internal, the laws are descriptive of human behavior first and foremost.

Third, although the natural laws describe human behavior, there are two ways in which they are normative. First, the natural laws direct behavior. The natural laws are programmed, as it were, into man’s nature and are able to direct the behavior, sometimes without man’s conscious knowledge. This is especially true for the earliest stage of nature, when primitive man is focused upon survival and has little speculative knowledge and mostly desires and passions. As primitive man “acquires knowledge” and focuses less upon survival and more upon “speculative ideas”, however, primitive man will question his behavior and employ reason to act along with or against the natural laws (especially after society is established, when new social ideas circulate, and warfare arises). Particular individuals, even particular groups, may reject the natural laws, and may not “consistently follow” them, but as a

Montesquieu was reading the travel literature of his time, reports from America, Africa, and Eastern nations. He believed parts of Africa and America were in the state of nature, or very close to it. He refers to the American “savages” in Spirit, and their primitive conditions, and compares the savages of Africa to wild beasts, Spirit, XXI.11, 376. See also, Spirit XVIII.9, 289; XVIII, 1, 284; XXV.3, 482. (Moreover, Montesquieu’s suggests that primitive life extends beyond, or after the state of nature. The first political societies are normally savage and barbarian societies (XVIII.11, 290). It takes a long time for civil society to develop and progress so that a non-despotic, well-policing, gentle, moderate, and “enlightened” nation may emerge. See: XVIII.18, 294 and VI.9, 83.) That said, in Book I, Montesquieu also seems to employ the state of nature as a mental tool or lens, though which he, as scientist, may distinguish between those aspects of human experience and life that depend upon social influences, and those that do not, but which a part of man’s natural condition.

\[24\] The picture Montesquieu sketches of primitive man is dynamic; it is not static. At first, primitive man would have little intellectual ability, but this would change over time. This is why the fifth natural law is “the first of the natural laws in importance, though not the first in the order of these laws. A man in the state of nature would have the faculty of knowing rather than knowledge. It is clear that his first ideas would not be speculative ones; he would think of the preservation of his being before seeking the origin of his being.” Eventually, however, the fifth natural law would be effective, and man would think of the origins of his being. I.2, 6.
species, and especially in primitive times, men behave instinctively according to the natural laws.\textsuperscript{25} This is to say that there is a sense in which the natural laws are normative, from the internal point of view.\textsuperscript{26}

There is a second sense, however, in which the natural laws are normative: from an external point of view. Shackleton is correct that, later in \textit{Spirit}, Montesquieu does not limit himself to employing the natural laws to describe human behavior. There are a number of moments when he understands them to be \textit{binding}, prescriptive, to be obeyed, from an external viewpoint. For example, in Book XVI: “Natural law orders \{la loi naturelle ordonne\} fathers to feed their children.” Or when speaking about the sexual license found in very hot climates, Montesquieu states that:

\begin{quote}
Therefore, it is not true that incontinence follows the laws of nature; on the contrary, it violates them. It is modesty and discretion that follow these laws….Therefore…it is for the legislator to make civil laws that forcefully oppose the nature of the climate and reestablish the primitive laws.\textsuperscript{27}
\end{quote}

In this passage, Montesquieu has moved away from the internal point of view and makes the claim that objectively, from an external point of view, each rational animal \textit{should} follow his natural laws and inclinations when he does not properly feel or understand them.

\textsuperscript{25} Montesquieu notes that “particular intelligent beings…do not consistently follow their primitive laws” I.1, 5. See also, XXVI.14, 508.

\textsuperscript{26} See the language of X.III, 139 as well: “the law of nature, which makes everything tend toward the preservation of the species” \{la loi de la nature, que fait que tout tend à la conservation des espèces…\}.

\textsuperscript{27} \textit{Spirit}, XXVI.6, 499; XVI.12, 273. Or for another example, “…the natural law and the laws of all the peoples teach [children] to respect [their parents] like gods….” XXV.13, 490.
Does this violate the is-ought distinction? Yes, because Montesquieu seems to assume that humans ought to behave like human beings, according to the basic laws of the species, and also, that everyone agrees about this assumption. He does not consider the possibility that any well-informed person would sincerely wish to deny their natural laws. However, as we will see in the next section, he does not depend upon the dictates of natural law for the main thrust of his moralizing, but looks to the order of natural right for this main task, which makes this violation of the is-ought distinction less major.²⁸

Fourth, Montesquieu explains that the natural laws make “everything tend toward the preservation of the species.”²⁹ This claim is not difficult to understand as regards the first, second, and third natural laws to seek peace, nourishment, and conjugal society, as these evidently advance either the preservation of the self, or the preservation of the species as a whole. However, the claim is not as obvious as regards the fourth law to seek society, or the fifth law, to seek and know god.

As for the fourth natural law, Montesquieu explains in an earlier work (c.1722) that man is an utterly dependent animal; he cannot survive or develop properly by himself, be he an infant or a grown adult.³⁰ Society, first parental and secondly a more

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²⁸ It is interesting to note that Montesquieu and David Hume were in correspondence, but I have not, to date, found any evidence that they exchanged ideas about the fact-value distinction or that Montesquieu was aware of it.
²⁹ *Spirit*, X.III, 139.
³⁰ “Man was not made to live alone, but to be in society with those similar to him. That is why language has been given to him to communicate his thoughts to others, and this is also for the same end why he has received numerous beautiful talents which would be buried, or which would not develop but very imperfectly, if he passed his days in solitude. But if the qualities of man take us to this truth, then his natural weakness will demonstrate it to us. Barely does he see the light of day that invincible needs besiege and press upon him; incapable of remedying them by himself, he would perish if no one took care of him. At a later age, he would contract a ferocious humor, he would not know how to pronounce any articulate word, his thoughts would be confused, and he would ignore all
extended society, is necessary for man’s proper development and preservation. This is true on the instinctive and biological level, in that man cannot survive by himself, but also true on rational and social levels. As he states in that earlier work:

Man was not made to live alone, but to be in society with those similar to him. That is why language has been given to him to communicate his thoughts to others, and this is also...why he has received numerous beautiful talents which would be buried, or which would not develop but very imperfectly, if he passed his days in solitude.\(^{31}\)

As for the fifth natural law, Montesquieu states in Book I that: “God is related to the universe as creator and preserver; the laws according to which he created are those according to which he preserves.”\(^{32}\) According to this view, it is necessary for god to sustain the world in existence even after creating it. The fifth natural law draws man not only to the creator, but also to the being who preserves man from death and maintains him in existence. Montesquieu does not clarify the extent to which man needs to be conscious of this dependence and seek it with all his heart or mind. He simply asserts that it is human to seek and know god out of a desire for self-preservation, and he does not cast doubt upon the existence of a creator. Unlike Hobbes, Montesquieu argues that, from an external point of view, this invisible

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\(^{32}\) *Spirit*, I.1, 3.
creator created and preserves the universe.\textsuperscript{33} Thus all the natural laws “tend toward the preservation of the species.”\textsuperscript{34}

So far, then, the natural laws describe human nature. They operate as the emotions of primitive man at first (since man is presumed to have little knowledge in the beginning) but eventually, when primitive man “acquires knowledge,” the natural laws operate through his intellect with greater force, especially the third through fifth natural laws. These descriptive natural laws are normative in two ways. First, they are normative from the internal perspective, insofar as they are written into man’s nature and often direct his behavior without his conscious assent.\textsuperscript{35} Second, they are normative from an external point of view, insofar as Montesquieu asserts that men \textit{ought} to “follow their primitive laws” even when their force is not felt instinctively (emotionally or rationally). Finally, the natural laws tend towards the preservation of the self \textit{and} the species. The preservation of the individual is not the only aim, but also the preservation of humanity as a whole. The natural laws operate upon the individual but they preserve more than the individual.

Montesquieu also says something about the state of nature itself. First, he notes that it is dynamic, composed of stages. In the first, peaceful, stage men are timid and

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\item \textsuperscript{33} “Those who have said that \textit{a blind fate has produced all the effects that we see in the world have said a great absurdity; for what greater absurdity is there than a blind fate that could have produced intelligent beings?...God is related to the universe, as creator and preserver...” I.1, 3
\item \textsuperscript{34} \textit{Spirit}, X.3, 139.
\item \textsuperscript{35} This assertion seems premised upon the assumption that primitive man does not have intellectual development yet, that he does not yet have more speculative ideas but is focused upon survival. Under these conditions the natural laws direct his behavior most strongly. As primitive man establishes his security and survival, and turns to more speculative thinking, he begins to question his ways of behaving. After the first phase of the state of nature, in the second phase of society, primitive man has social influences that introduce new ideas, which further challenge effectiveness of the primitive laws, for instance as regards peace.
\end{itemize}
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fearful but also sociable, out of need and desire. Primitive man approaches other members of his sex and species, and forms a larger social circle. He does not say, as Rousseau would later propose, that in the beginning men roam the earth alone.

Montesquieu envisions the society of the family to be a part of the first stage. At this point, however, the second stage begins. Life becomes violent, for when men associate with other men outside their original clan, some lose their original feelings of weakness. Ideas of “empire” and “domination” enter their minds, replacing those

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36 As C.P. Courtney has noted, Montesquieu’s analysis of the state of nature is original in that it describes not a static but a dynamic picture of human development. “Anticipating Rousseau…he transformed the implications of the theory of the state of nature by introducing the dimension of time and the concept of development.” C.P. Courtney, "Montesquieu and Natural Law," in Montesquieu's Science of Politics, ed. Michael A. Mosher David Carrithers, Paul A. Rahe (New York: Rowman and Littlefield Publishers, Inc., 2001), 51.

37 In Book I he does not mention marriage or the family in the state of nature, though Montesquieu says nothing that would preclude their existence, like one finds in Rousseau. Primary evidence for the family in the state of nature is found toward the end. When explaining the roots of the rule against marrying one’s cousin, Montesquieu notes that: “In earliest times, that is, in holy times, in the ages when luxury was unknown, all the children stayed in the house and settled there; this was because a large family needed only a small house” (XXVI. 14, 507-08. That reference to the earliest, “holy times” can only be, in my view, to that first phase of the state of nature, the sole period in Montesquieu’s history when peaceful feelings dominate social life.

Secondary evidence comes from Persian Letters, where Usbek notes that: “Every discussion of international law that I have ever heard has begun with a careful investigation into the origin of society, which seems to me absurd. If men did not form societies, if they separated and fled from each other, then we should have to inquire the reason for it, and try to find out why they lived apart from each other: but they are all associated with each other at birth; a son is born into his father’s home, and stays there: there you have society, and the cause of society.”Montesquieu, Persian Letters, trans. C.J. Betts (New York, New York: Penguin, 1973, 1993), Letter 94, 175. The story of the Trogloxytes also shows that Montesquieu conceived primitive societies to begin with the family. See also Waddicor, p. 79, and Montesquieu, Persian Letters, Letters 12-14, 56-60. On this issue, therefore, Montesquieu agrees with Locke rather than Rousseau. John Locke, Two Treatises of Government, ed. Peter Laslett, 2nd ed. (Cambridge: Cambridge University Press, 1963), II.77-78, 362.

Regarding Persian Letters, and any other essays I cite of Montesquieu’s, I will appeal to evidence outside of Spirit only when it supports and further sheds light upon a teaching that Montesquieu makes in Spirit. At this stage of my studies, my view is that Montesquieu’s most reliable opinions are found in Spirit, his most mature work, and the fruit of many long years of work. Aside from the exegetical difficulty of knowing exactly when Montesquieu is voicing his own views through the voice of a given character in Persian Letters, these were the work of his youth, and present ideas that are not always in harmony with later views in Spirit. As an additional principle of exegesis, moreover, anytime there is a conflict between a teaching in Spirit and a teaching of another writing, I will give greater authority to Spirit.
old feelings of mutual attraction based on seeing their similarity and equality with other human beings.\textsuperscript{38} Self-interest drives some to improve their lot at the expense of others, which produces quarrels and even a state of war within the group. Distinct groups come to feel the same disordered self-interest and strength towards other tribal groups, which produces states of war among them. Thus, Montesquieu brings to life the fact that the natural laws are not adequate or sufficient to preserve the peace among men. Men do, in fact, deny their binding force.

So, in an effort to escape the state of war, men establish laws and society. This marks the third stage and the end of the state of nature. The \textit{Right of Nations} is laid down to regulate the relations of men as members of the same planet, and concerns the behavior that societies should display towards other societies.\textsuperscript{39} \textit{Political Right} establishes the government for each society and addresses the relationship between those who govern and those who are governed. \textit{Civil Right} addresses the relationship between citizens, and regulates their daily interactions. As an aside, civil right is the most important for this dissertation, because it includes (among other categories) marriage laws, which regulate sexual behavior, and criminal laws, which include the category of crimes against mores, which also regulate sexual behavior. With the establishment of these laws, men transition into political society.

What is noteworthy about the account Montesquieu gives of the establishment of positive law is that he does not mention “natural rights.” In fact his silence about natural rights is very noticeable. The laws that men establish to save themselves from

\textsuperscript{38} \textit{Spirit}, I.2, 3.

\textsuperscript{39} \textit{Spirit}, I.3, 7.
the state of war appear to be driven exclusively by considerations of self-preservation. What Montesquieu emphasizes is that the laws should be custom-made for the precise circumstances under which the people live.\textsuperscript{40} The laws must be related to the terrain and the climate of the place, to the way in which the people support themselves (are they farmers? hunters?), to their religion, degree of wealth, population size, trade practices, and several other factors Montesquieu takes the time to list.\textsuperscript{41} He does not take the time to list considerations of morality or of natural rights. The impression one gets is that there is no higher moral code for primitive men to follow, but that morality is a human artifact that must be established relative to time, place, and people. Scholars like Berlin, Shklar, and Manent place attention on these sections of the work to argue that Montesquieu did not take absolute truths as morally binding.

This impression is only heightened by the fact that Montesquieu refers to the three categories of positive law which men establish in terms of “right” \textit{\{droit\}}, and not simply “law” \textit{\{loi\}}, as he used to denote the five original natural laws. As Michael Zuckert has noted, “\textit{Droit} has a necessarily normative element that \textit{loi} lacks. \textsuperscript{42} Loi can be used to describe the regular relations among physical bodies…whereas \textit{droit} cannot.” It seems that the source of moral obligation comes from the positive law, by human fiat, rather than from a prior notion of justice.

However, Montesquieu purposefully sets to the side the real existence of a pre-positive source of morality. Montesquieu says explicitly in Book I that moral

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\textsuperscript{40} \textit{Spirit}, I.3, 8.\\
\textsuperscript{41} \textit{Spirit}, I.3, 9.\\
\end{flushright}
obligations exist prior to the positive law that establishes them. “Before laws were made, there were possible relations of justice. To say that there is nothing just or unjust but what positive laws ordain or prohibit is to say that before a circle was drawn, all its radii were not equal.” This cryptic statement is the main revelation he makes in *Spirit* about the method he will use to identify obligations of justice, which I will argue in the next section pertain to the order of natural right. For now, it is necessary to try to answer why he does not, in Book I, argue that a higher code of moral law is relevant the moment men first establish the positive laws.

The first reason is that, from the internal point of view, that is, from the perspective of the primitive men caught up in the state of war, there is no clear awareness of the obligations of justice or a pre-positive source of morality. Such laws *exist* but men are not conscious or enlightened about them. The stage of their enlightenment will come later in history. Secondly, and related to the first reason, I have argued elsewhere that Montesquieu has design reasons to de-emphasize the existence of obligations of justice and natural rights in Parts I and III, without denying their existence or importance. So for structural reasons as well as historical reasons, Montesquieu de-emphasizes, without omitting entirely, the existence of

43 I.1, 4.

44 In Books I and III, Montesquieu sets out to emphasize the ways in which men are determined by the three different spheres: the physical realm (environmental, climactic, terrestrial, and biological laws); the sub-rational realm of the passions (emotions, prejudices, and false religious beliefs that challenge the rule of reason); and finally the social realm of (uncooperative) co-existence with other men, who challenge man’s freedom by violating justice. These three orders present the main challenges to human freedom, which must be overcome throughout the work. In Books II, IV-VI, Montesquieu emphasizes (without omitting determination problems entirely) the ways in which men are free and can overcome those challenges. One important way is by their capacity to follow enlightened reason and identify the order of natural rights. Ana Samuel, "The Design of Montesquieu's the Spirit of the Laws: The Triumph of Freedom over Determinism," *American Political Science Review* 103, no. 2 (2009).
obligations of justice in Book I. However, that order exists and Montesquieu suggests that it is derived by a precise method. Now we can turn to that question.

**Relations of Justice, Equity and the Order of Natural Right**

The main revelation he makes about the method of identifying obligations of justice is in Book I:

Particular intelligent beings can have laws that they have made, but they also have some that they have not made….Before laws were made, there were possible relations of justice. To say that there is nothing just or unjust but what positive laws ordain or prohibit is to say that before a circle was drawn, all its radii were not equal. Therefore, one must admit that there are relations of equity prior to the positive laws that establish them, so that for example, assuming that there were societies of men, it would be just to conform to their laws; so that if there were intelligent beings that had received some kindness from another being, they ought to be grateful for it, so that if one intelligent being had created another intelligent being, the created one ought to remain in its original dependency; so that one intelligent being who has done harm to another intelligent being deserves the same harm in return, and so forth.

There are four clues in this passage: 1) that relations of justice and equity exist, 2) that these exist independently of the positive law (they are pre-positive), 3) that their existence is analogous to a mathematical law like the relationship between a circle and its radii and 4) that there is a hypothetical aspect to this method of moral reasoning, if something takes place, then, something should be done. Given these few

45 And I would argue that if Strauss, Berlin, Shklar, Manent and others had been aware of the design of *Spirit*, they would have seen how to resolve the tension in a way that favored human freedom and moral rationalism without denying the existence of limitations to human freedom.

clues, I offer the following explanation as a hypothesis, or one way to explain what method Montesquieu may be using to derive moral obligations.

The first clue is about “relations” and brings to mind Montesquieu’s definition of law, with which he opened the work: “Laws, taken in their broadest meaning, are the necessary relations deriving from the nature of things.” This suggests that the relations of justice and equity are some sort of laws, most likely, moral laws. Therefore, let us pause to understand Montesquieu’s concept of law.47

Montesquieu’s concept of law is a meta-concept of law insofar as it aims to be broad enough to describe what a law is in any discipline: mathematics, physics, politics, ethics, etc.48 It is a definition inspired by the scientific spirit of the age, especially by the work of Newton, who revolutionized man’s understanding of the material world by arguing that the universe was governed by rational, natural laws that could be demonstrated mathematically.49 Inspired by this mathematical outlook, Spirit aims to account for the many kinds of laws that govern human beings.50 Although there are a variety of laws, he claims that they always involve: (a) necessary relations (b), which derive from the nature of things. Let us look at an example from

47 Spirit, I.1, 3.
48 “…all beings have their laws: the divinity has its laws, the material world has its laws, the intelligences suprior to man have their laws, the beasts have their laws, man has his laws.” Spirit, I.1, 3
50 Some of these are natural laws, such as the natural laws of the state of nature (explained above), or the natural laws of biology, or the natural laws of the climate. Some are not natural, but man-made laws, such as political and civil laws, commercial laws, and canon laws. Spirit, XXVI.1, 494.
mathematics, as the third clue suggests, to better understand how laws are (a) and (b) and also to see if by analogy we can draw some inferences about the laws of morality.

Let us start with Montesquieu’s example of a circle and its radii. The nature of a circle is its definition: a plane curve generated by one point moving at a constant distance from a fixed (center) point. The plane curve is in a relationship with its center point by way of a straight line that stays the same length (its radius), and there is a mathematical law, or a formula, that describes that relationship: \( r = \frac{c}{2\pi} \). This is a relationship (a), which is derived from the nature of circular things (b), and exists independently of any particular (drawn) circle, as the second clue from the passage states. However, one must draw the circle for this law to have a practical, one might say, tangible presence to men.

\[ r = \frac{c}{2\pi} \]

Figure 1. Relationship between a Circle and its Center Point

The example of the circle involves the relationship that circle has to its (radial) parts and shows that Montesquieu’s definition of law is plausible as regards definitions of things. However, since justice is a concept that normally involves what one person owes to another person, let us look for another example of a law, which involves more than one object. By doing so we depart from Montesquieu’s third clue, but we also try to identify an analogy that better approximates what relationships of justice seem to involve.
Take Newton’s third law of motion, “to every action there is an equal and opposite reaction.” This law describes a relationship between two bodies. When a body exerts a force (F) on another body, the second body simultaneously exerts the same force (F) of the same magnitude in the opposite direction.

![Diagram of two connected circles with arrows showing the direction of force and action-reaction](image)

**Figure 2. Relationship between Bodies in Motion**

In Montesquieu’s language, Newton saw that there was a necessary relationship (a) deriving from the nature of physical bodies (b). Newton identified this relationship to be one of proportion, and he expressed it with a law.

My hypothesis is that Montesquieu’s relations of justice and equity also can be conceived as right relations, or proportional relations, between persons, analogous to Newton’s third law of motion. Justice and equity require that one give a proportionate “harm for harm,” or “good for good.” It is moral “reaction” or response that is proportionate to a given circumstance. A necessary relation exists between persons, which is derived from the nature of being humans. Moreover, one derives natural rights from this necessary relation.
Celine Spector has studied Montesquieu’s use of the word “justice” in Spirit and Persian Letters, and concludes that the concepts of justice and equity can be thought of as moral proportions, the due measure that ought to exist between two persons in a relationship.\(^{51}\) She notes that this is similar to Aristotle’s view of justice as “taking or giving what is due,” what is equal, or fair.\(^{52}\) While this is a fair comparison, Montesquieu’s idea of justice is more narrow and focused, and also draws from the scientific ideas discovered in his time. At the end of the Book I passage cited earlier, he gives examples that describe these relations, or moral proportions, such as being grateful for a kindness received, or remaining in original dependence to one’s creator.

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\(^{51}\) Spector, "Quelle Justice? Quelle Rationalite? La Mesure Du Droit Dans L’esprit Des Lois," 227, 31. As Spector point out, Persian Letters presents precisely this sort of understanding of justice. Usbek explains that: “Justice is a relationship of suitability, which actually exists between two things” Persian Letters, Letter 83, p. 162. Spector, p. 222, and p. 229-30. Montesquieu provides other examples in Spirit of justice understood as a moral proportion: The title of Book XII, chapter 4, for instance, is: “That liberty is favored by the nature of penalties, and by their proportion.” He then argues: “It is the triumph of liberty when criminal laws draw each penalty from the particular nature of the crime. All arbitrariness ends...” XII.4, 189. As regards crimes and punishments, penalties must be “derived from the nature of the thing ...from reason and the sources of good and evil.” Spirit, XII.4, 189.

\(^{52}\) Montesquieu uses the terms “equity” and “justice” as closely related, like Aristotle. Aristotle, Nicomachean Ethics, trans. H. Rackham (Cambridge, Massachusetts: Harvard University Press, 1934), V.x, 1-5.
So, my hypothesis is that the “relations of justice and equity” are moral laws, and that these moral laws establish a due measure, they identify what one owes to others. From here, Montesquieu derives natural rights and obligations. Furthermore, these moral obligations of justice pre-exist the positive law, as his second clue states. They are analogous to a math formula because these abstract concepts and relations of justice and equity only have a tangible presence, or practical import, once persons actually come into contact with each other and the need and thought to render a specific moral obligation arises. One needs to know the circumference of the circle at hand so as to discover what its actual radius is. Similarly, one needs to understand the circumstances at hand in human interactions, what sort of activity a particular person wishes to execute, and the nature of the person himself or herself (his or her natural laws) in order to derive relations of justice for those particular circumstances.

This is a rationalist approach to the identification of moral laws. Montesquieu is following the deductive methods of mathematics. However, he also ensures that moral laws are related to the nature of things and empirical reality. The fourth clue helps us to see further how this is so. Montesquieu employs hypothetical language to signal how this method of moral reasoning takes into account the actual circumstances. “If there were intelligent beings that had received some kindness from another… [then] they ought to be grateful for it… if one intelligent being had created another intelligent being, [then] the created one ought to remain in its original dependency.” As Zuckert has noted, these statements have the character of hypothetical imperatives.53

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My hypothesis is that the formula Montesquieu provides is hypothetical because it begins with an observation of empirical reality. If in fact, X has occurred, and/or it is in the nature of these concrete things Y to do,\textsuperscript{54} then [in light of the principles of justice and equity] this Z relationship of justice exists, and it follows that Z ought to be done. The epistemic movement is from empirical observation to an \textit{a priori} normative principle of justice to a relation of justice (a moral law) to a normative command. Therefore, this method of moral reasoning does not violate the is-ought distinction because the source of normativity is an \textit{a priori} principle, and not empirical reality, even though empirical reality (\textit{a posteriori} knowledge) alters the way in which the principles are applied and the moral laws formed. (I agree with Shackleton, in other words, that Montesquieu assumes the existence of \textit{a priori} principles of justice and fairness, but I disagree that he violates the is-ought distinction when identifying natural rights.)\textsuperscript{55} Natural rights and obligations are derived from this process of moral reasoning.

Putting it all together, natural rights and obligations are hypothetical imperatives derived from relations of justice and equity. These relations of justice and equity, or moral laws, are themselves derived from the nature of things, they exist

\textsuperscript{54} Montesquieu studies empirical reality with the help of different disciplines. Each sort of being has its own natural laws with its own corresponding science. After the legislator or moralist understands the nature of things with the help of the relevant discipline (physics, biology, environmental studies, economics, theology, political science, social studies...) then s/he can apply principles of justice and equity and make normative judgments and pronouncements. This way in which Montesquieu incorporates empirical reality is sensitive to, and aims to synthesize, the information that a number of different disciplines can uniquely provide to shed light upon the circumstances at hand. This sensitivity shows not only the breadth of Montesquieu’s mind and method, but its modern character as well. He aims to keep pace with the natural sciences and the latest social facts.

\textsuperscript{55} The ideas or principles of justice and equity seem to be self-evident. Montesquieu does not provide further explanation for, or a prior method of identifying, the principles of justice and equity.
between things as the right relations, or due measure, that ought to exists between persons.

Finally, natural laws are distinct from natural rights and obligations. Natural laws are induced by more straightforward observations about the nature of things. Natural rights and obligations involve a more sophisticated reasoning process, a deduction, about what one human being owes to another human being in a specific circumstance, which itself requires a previous understanding of the natural laws of human beings. In order for men to see and understand the order of natural right, they must have greater enlightenment and education than it takes to understand the natural laws of preservation. So, when Montesquieu refers to the laws of “natural enlightenment,” in Book X.3, we can understand him to mean those moral laws that describe the order of natural right, as opposed to the order of natural laws.

When a people is conquered, the right of the conqueror follows four sorts of law: the law of nature, which makes everything tend toward the preservation of the species; the law of natural enlightenment, which wants us to do to others what we would want to have done to us; the law that forms political societies....lastly, the law drawn from the thing itself.

To conclude, then, there is rationalism here, and there is empiricism here, but the two methods are related without contradiction.

If this chapter were concerned exclusively with the subject of Montesquieu’s moral theory, I would explain in more detail the many natural rights Montesquieu derives by this process, as well as the additional natural laws he identifies. However, since our present purpose is to discuss his sexual morality, the following figures will
suffice for now to account for and organize as many of those laws and rights as I have identified to date. These lists are not exhaustive. 56

56 Montesquieu uses the word “right” in pre-modern and early modern usages, in the Roman law notion of right understood as “what is fair” or “the just thing”, as well as early modern uses of right as a “moral power” {facultas} that enables each person to have or do something justly: a right to X (See XV.4, XI.6, and I.3 for examples of both uses). John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 205-10.
ORDER OF NATURAL LAW
The “Nature of Things” “Primitive Laws” (XV.12, 273)
The natural laws make “everything tend toward
the preservation of the species” (X.3, 139)

1. Seek Peace
   Natural law of self-defense (XXVI.3, 496)
   Natural law that children respect their parents (XXV.13, 490)

2. Seek Sustenance
   Men are made to “preserve, feed, and clothe” themselves (XXIV.11, 466)
   That mothers and fathers are to nourish and guide their children (XXIII.2, 428)
   That nature has given milk to mothers to provide for children’s nourishment (XV.2, 248)
   Natural law orders fathers to feed their children (XVI.6, 499)

3. Approach Others, Including the Opposite Sex
   Males demonstrate a natural temerity, or impetuosity, towards sexual activity (XVI.12, 272)
   Females demonstrate a natural shame, modesty, and discretion (XVI.12, 272-73)
   Natural law orders modesty and continence of both sexes (XVI.12, 273)
   Natural law of heterosexual attraction (XII.6, 193) (XXIII.17, 438) (IV.8, 41)
   Natural law to propagate the species (XXIII.2, 428) (XVI.12, 272)
   Natural laws of reproduction (that mothers and infants depend upon support) (XXIII.2, 428)
   Natural law prohibitions of incest (XXVI.14, 506-510)
   Natural law prohibitions of beastiality (XII.14, 200)

4. Unite to Live in Society with Others

5. Seek and Know God

Figure 4. The Order of Natural Law
THE ORDER OF NATURAL RIGHT

"Laws of Natural Enlightenment"

"Laws of natural enlightenment want us to do to others what we would want done to us" (X.3, 139)

1. Natural right of self-defense (X.2, 138)
   Natural right to defend innocent life; wage (just) wars of preservation (X.2, 138)
   Natural right of self-ownership, prohibitions on slavery (X.2, 138)(XV.2, 247)
   Natural obligations to: observe justice toward men, do no harm to innocent persons, cause no displeasure to fellow men, dislike unjust men, keep faith with everyone, take the side of truth, flee illicit gain. (XIV.8.9, 465)
   Natural obligation to show gratitude (I.1, 4)
   Natural obligation of children to respect their parents (I.1,4)

2. Natural right to feed and clothe oneself (XXIV.11, 466)
   Natural right to use provisions from the natural community of goods for self-preservation (XVI.15, 510) (Lettres Persannes,12)
   Natural obligation of fathers to feed their children (XXVI.6, 500)
   Natural right of fathers to have stewardship over their families as property (XXIII.4, 429)

3. Natural obligations of continence (XXIII.2, 428)
   Natural obligation of the father to marry the mother of his children and support them (XXIII.2, 428)
   Natural right to marry (That the natural faculty each one has to marry and have children is inalienable) (XXIII.22, 449)
   Natural right of modesty (XXVI.3, 496)(XXIV.8, 465)
   Natural right prohibitions on sexual slavery (XII.21, 206)
   Natural right prohibitions on polygamy (XVI.6, 268) (XVI.1, 264)(V.14, 63)
   Natural obligation to protect the modesty of children (XXVI.14, 507)(XXVI.5, 498)
   Natural prohibitions of incest (XXVI.14, 500-507)

4. Obligation of citizens to obey the rule of laws (I.1) (XXVI.20, 514)
   Obligation to provide procedural justice and security for citizens (XII.2, 188)
   Obligation of the laws to provide proportionate punishments for crimes (XII.4, 189)
   Natural right to private property within the context of civil society (XXVI.15, 510)(XX.14, 346)
   Economic rights: right to be taxed only what is just and necessary (XIII.1-2, 213-14).
   Right to accrue interest while lending money (XXI.20, 387-89) (XXII.19, 420)

5. Natural obligations to the divinity: to affirm his existence, to affirm that god takes an interest in human affairs; to understand that god is not appeased by sacrifices. (XXV.7, 486) (XII.4, 190)
   Natural obligation to remain in dependence upon god (i.e. not to seek independence) (I.1, 4)
   Natural obligation to show religious toleration and respect the rights of conscience (XXV.13, 490-91)

Figure 5. The Order of Natural Right
So far then, we have accomplished the two first goals of this chapter, to argue that Montesquieu is a natural law, natural rights thinker with a conceivably sound methodology, and to describe the outlines of his moral theory with the aid of two lists. Now we can turn to our third goal and focus more closely upon the aspects of his moral theory that involve sexual behavior.

**The Natural Laws and Rights of the Sexes**

Starting with his descriptive observations about the third law of nature in Book I, Montesquieu identifies three main aspects of human sexual behavior: First, that it is heterosexual. The opposite sexes feel an attraction, or “charm,” which is based upon sexual difference, and which is different and unique from the (asexual, social) attraction the species feels towards others of its kind, which is based upon similarity.\(^57\)

I have said that fear would lead men to flee one another, but the marks of mutual fear would soon persuade them to approach one another. They would also be so inclined by the pleasure one animal feels at the approach of an animal of its own kind. In addition, the charm that the two sexes inspire in each other by their difference would increase this pleasure, and the natural entreaty \(\textit{prière}\) they always make to one another would be a third natural law. Besides feelings, which belong to men from the outset, they also succeed in gaining knowledge; thus they have a second bond, which other animals do not have.\(^58\)

\(^{57}\) *Spirit*, XII.6, 193, XXIII.17, 438, IV.8, 41. Montesquieu believes that homosexual attraction is not in accordance with the heterosexual nature of human animals, and so he declares it to be a “crime against nature.” In so doing, he shows that he understands the (descriptive) third natural laws to have normative force. This makes it seem that the order of natural law and order of natural right are not really distinct. When Montesquieu treats the natural laws as normative, he seems to elide the differences between the two different orders of law (natural law, and natural right). The methods are still distinct (empiricism versus rationalism) but the conclusions are far closer together.

\(^{58}\) *Spirit*, I.2, 7.
Second, that although the implied purpose of sexual attraction is reproductive, it is only implied. Montesquieu brings out the pleasure-seeking aspects of the behavior, in accordance with his phenomenological approach. It is a pleasure-seeking act, which involves the passions, and in due course, a rational, or intellectual bond. Third, that Montesquieu notes that human beings make a “mutual entreaty” or a “prayer” to each other. The sexes ask permission to come together and their union involves free consent of both; it is not violent but peaceful and respectful of the rational and free assent that human beings can give to this act.

Later in *Spirit*, Montesquieu makes a fourth observation about the natural law of the two sexes, namely, that men and women carry it out differently. Whereas males have a natural instinct to live it in terms of “attack” or sexual assertion, females have an instinct to live it in terms of “defense,” or resistance:

All nations are equally agreed in attaching scorn to the incontinence of women; this is because nature has spoken to all nations. She has established defense, she has established attack; and having put desires into both sides, she has placed temerity in the one and shame in the other. She has given individuals long periods of time to preserve themselves and only brief moments for their perpetuation. Therefore, it is not true that incontinence follows the laws of nature; on the contrary, it violates them. It is modesty and discretion that follow these laws.  

Here is a clear example of a descriptive natural law, which Montesquieu interprets to have normative force. The instinct of women to live modestly is a

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Although in *Spirit*, Montesquieu changes his course, and tacitly consents that polygamy yields large numbers of offspring. *Spirit*, V.14, 63; XVI.6, 268. In both *Persian Letters* and *Spirit* Montesquieu argues that natural law requires a slower rate of reproduction so as to maximize the chances of bearing healthy children who can be properly attended and cared for.

59 *Spirit*, XVI.12, 272.
reflection of the natural law that governs the female’s posture towards reproduction, but Montesquieu will later argue that it pertains to the order of natural right as well.\textsuperscript{60}

In other words, looked at from the internal point of view, male-female sexual attraction is a pleasure-seeking act, premised upon sexual difference, which involves both passion and knowledge, urgency and modesty, and an emotional and rational request for sexual union. In Book XXIII, Montesquieu focuses upon the male-female-progeny (family) unit, and studies the laws that govern reproduction from an external point of view. Here he goes beyond the internal point of view and studies the natural laws of propagation from the external viewpoint, which involves children. That discussion about the natural laws of reproduction quickly turns into a discussion about what the male and female owe to each other and to their resulting children. Implicitly, it is a discussion about the obligations of justice, and so unlike the account in Book I, the descriptive analysis of human sexual behavior in Book XXIII quickly turns into one about natural rights and obligations.

Chapter 1 of Book XXIII is entitled “On men and animals in relation to the multiplication of their species.” Montesquieu begins in accordance with his scientific, empirical approach by comparing the human species with the rest of the animal kingdom. He is a poetic scientist, though, so he cites Lucretius’s encomium to Venus, and notes that in the animal kingdom, Venus “lures [every creature] lustily to create their kind,” and that beasts are “prisoned” by the “charms” of sexual attraction, so that they reproduce without offering resistance. However, he promptly distinguishes

\textsuperscript{60} See Rosso, p. 560-571.
the female human animal from other female animals in two ways. First, he notes that women often resist the natural laws of propagation by the force of their passions and ideas. Second, and more importantly for our immediate purposes, he notes that whereas in the animal kingdom, the mother alone can usually meet the needs of her offspring, in the human animal kingdom, the mother is not capable of raising her young alone and depends upon support. Thus, the natural laws of propagation are such that mother and child are dependent animals on two levels. The child is dependent upon the mother, and the mother is dependent upon others.

To this natural law, Montesquieu brings to bear considerations of justice and equity to conclude that marriage is a requirement of natural right. It is not a phenomenon always found in nature, but it is a requirement of “enlightened” reasoning for a father to fix himself to the mother of his child to support them:

The natural obligation of the father to nourish his children has established marriage, which declares the one who should fulfill this obligation…. Among animals this obligation is such that the mother can usually meet it. The obligation is much broader among men: their children partake of reason, but it comes to them by degrees; it is not enough to nourish them, they must also be guided; even when they can sustain their lives, they cannot govern themselves.

Illicit unions [non-married unions] contribute little to the propagation of the species. In them the father, whose natural obligation is to nourish and raise the children, is not fixed, and the mother, on whom the obligation falls, meets thousands of obstacles: in shame, in remorse, in the constraints her sex imposes, in the rigor of the laws, and she generally lacks means of support….

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61 “The fertility of female animals is virtually consistent. But in the human species, the way of thinking, character, passions, fantasies, caprices, the idea of preserving one’s beauty, the encumbrances of pregnancy, that of too numerous a family, disturb propagation in a thousand ways” (XXIII.1, 427).
It follows from all of this that public continence [restricting sexual behavior to marriage] is joined naturally to the propagation of the species.  

Thus, after reasoning about the natural laws of reproduction in the human species, Montesquieu thinks about what is due to a dependent mother and child, and derives natural obligations of the male to marry his chosen woman, and support her in raising his children. He also derives a natural right obligation to avoid sexual union outside of marriage because of the gravity of the possible consequence and the uncertainty of support for mother and child. Therefore, based upon an acute consciousness of the (dependent) nature of human beings, their natural laws, and the obligations of justice that arise from those particular circumstances of need while reproducing the species. Montesquieu argues that the civil laws should protect this natural right, a topic to which we will return in chapter four.

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62 *Spirit, XXIII.2, 428.*

63 Because of this natural obligation of fathers to feed their children and support the family, Montesquieu derives for fathers the privilege of heading the family as their property. The reasoning seems to be that the father has stewardship over the family, as well as responsibilities associated with ownership, and hence a kind of ownership of the family. Although one might say that the father simply fulfills his duty to support his family, Montesquieu also believes that wife and children have a obligation to be grateful for that support, and give him great respect for this support. This unique position gives him the privilege of passing along his family name and social status to his wife and children (XXIII. 3-4, 429), to consent to the marriages of the children (XXIII.7, 431), and to serve as the ceremonial head of the family.

64 Montesquieu praises the old Roman laws, the Lex papia et Julia, for defending the natural right to marriage. “By the old laws, the natural faculty [la faculté naturelle] that each one has to marry and have children could not be taken away; thus…when a patron made his freed man swear that he would
In light of the natural obligations of continence and marriage, one can see why Montesquieu also argues that modesty \textit{pudeur} pertains to the order of natural right. Aside from the natural \textit{instinct} women have to be sexually modest and guarded, he argues that it is an obligation of natural right for females as well as males to exercise sexual activity with restraint. “The laws of modesty are a part of natural right and should be felt by all the nations in the world.”\textsuperscript{65}

Furthermore, Montesquieu stresses the importance and dignity of the right of modesty by comparing it to the right of self-defense. He notes that a law passed during the reign of Henry VIII required every girl who had had “illicit commerce” with a man to declare this to the king before she married. He responds that “this violated the natural defense of modesty; it is as unreasonable to require a girl to make this declaration as to ask a man not to seek to defend his life.”\textsuperscript{66} Montesquieu grasps the that, for a woman, the desire to defend modesty can be as great, if not greater, than the desire to defend her own life. (He remembers Lucretia).\textsuperscript{67} For women, modesty seems to be closely connected to self-preservation. Therefore, Montesquieu draws attention to this feeling, which seems unique to woman, and emphasizes the not marry and that he would not have children, the Papian law annulled both this condition and this oath.” \textit{Spirit}, XXIII.22, 449. And at another place, Montesquieu laments that later Romans deprived their slaves of the right of marriage \textit{droit des marriages}, so that masters could be incontinent with their slaves (XV.12, 255). Montesquieu affirms that the right of marriage is grounded in the order of natural right. It pre-exists positive law, and the civil laws should protect it.

\textsuperscript{65} \textit{Spirit}, XV.12. In a manner that sounds Platonic, Montesquieu argues that modesty is the proper reaction to our imperfections. “Besides, it is in the nature of intelligent beings to feel their imperfections; therefore nature has given us modesty, that is, shame for our imperfections.” (My emphasis). Montesquieu invokes the idea that we have a rational nature that is aware of sub-rational tendencies that go against reason. Modesty, then, is the proper reaction a person should have after realizing that in the area of sexuality, we have imperfections, and sub-rational forces tend to take over right reason.

\textsuperscript{66} \textit{Spirit}, XXVI.3, 496.

\textsuperscript{67} \textit{Spirit}, XI.15, 176 and XII.21, 206.
need to respect it as a right.\textsuperscript{68} To my knowledge, this is the only time that modesty has ever been formulated as a natural right.\textsuperscript{69}

So far, Montesquieu’s sexual morality can be described to center around the importance of marriage. He argues that sexual union should take place within marriage conceived between one man and one woman. However, he also studies the phenomenon of polygamous marriage, particularly the polygamous arrangements of Eastern societies. His aim is first descriptive, to study the nature of things there, and whether different natural laws might cause polygamy in Eastern societies. His second aim is to address whether the nature of things in those places changes the manner in which principles of justice and equity apply, and thereby changes the normative conclusions about marriage there.

Montesquieu argues that there are different natural laws at work in hotter climates than in temperate ones. He identifies what he understands to be the two natural causes of polygamy, both of which are rooted in the climate. The first effect

\textsuperscript{68} As with all the natural laws, any particular woman or group of women can reject their natural laws, including their natural instinct to live modesty, as we see today. Montesquieu makes claims about the species in general and the natural laws that derive from their natures. He does not deny that social conditions can carry people away from their natural laws by emotional or rational means of dissuasion. \textit{Spirit}, XVI.10, 271-72.

\textsuperscript{69} In Montesquieu’s \textit{Essay on Taste}, the last work of his life, he wrote about the value of modesty for increasing the charm of the opposite sexes. “A general rule of conduct established between the two sexes in all nations, whether savage or civilized, requires, that the first proposal of conjugal union should be made by the men, and that the fair should have nothing more to do than to grant or to reject the tender demands of love; and this very circumstance is a source of graces peculiar to the sex. As they are always obliged to be upon the defensive, they are consequently obliged to conceal their passions, and many of their charms. Under this necessary restraint, the least word, look, or gesture, that breaks loose from its confinement, without violating the natural and primitive law of the shame-faced modesty, becomes a grace, and produces a delicious kind of surprise. Such is the wise and excellent constitution of nature, that those things which, without the sacred law of modesty, would have been indifferent and insipid, are rendered most agreeable and interesting, in consequence of that law, which is a source of delicate sensations and refined pleasure to all rational beings.” Montesquieu, \textit{An Essay on Taste: To Which Are Annexed Three Dissertations on the Same}, trans. D.D. Alexander Gerard (Edinburgh: A Millar, A Kincaid, and J.Bell, 1764), 285.
of the hot climate is biological in that it alters female development. In hot climates, he concludes, women become nubile at a younger age (8-10 years), and lose their beauty also at a young age (about 20 years). Therefore, men are attracted to women when they are fertile and beautiful but not when they are mature or intelligent. The difference in age, maturity, and rational development between the male and the female creates a natural inequality between them because the husband must marry a woman far less intelligent than he. (In Europe, by contrast, women are most beautiful when they are also intellectually mature, so that the natural equality between husband and wife is preserved). Therefore, Montesquieu concludes that in very hot climates: “it is very simple for a man to leave his wife to take another and for polygamy to be introduced.” Notice that Montesquieu does not deny that principles of justice obligate the Eastern male to be faithful to his (less intelligent and immature) wife. Rather, he suggests that the laws of nature make it more difficult in these nations for men to obey the obligations of justice. It is also more difficult to see (or to be enlightened) that monogamous marriage is the right course.

The second effect of the hot climate is demographic. Montesquieu reads travel literature from the East reporting that more girls than boys are born in Asia and Africa. He compares such numbers to European demographics, where more boys are born than girls, and concludes that, “the law permitting only a single wife in Europe and the one permitting several in Asia and in Africa had a certain relation to the climate.” He reasons that if the physical laws of nature (the climate) cause there to

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70 *Spirit*, XVI.2, 264.

71 *Spirit*, XVI.4, 266.
be an insufficient number of males for the females, procreation would be stalled unless polygamy were established. Now, Montesquieu believes that the demographic disproportion would have to be very great indeed for this argument to be persuasive, and even in extreme cases of demographic need, he questions the utility of polygamy for procreating the species well because he doubts that a husband can properly support so many wives and children. But in truly extraordinary circumstances, Montesquieu concedes that polygamous marriage would not be against the third natural law.

Notwithstanding these climactic circumstances, which make polygamy “somewhat tolerable,” Montesquieu argues that polygamy is against natural right. He declares it to be “domestic slavery” for women, a violation of human equality. The relationship violates justice and equality because polygamy requires multiple...

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72 “I do not believe that there are many countries where the disproportion is so great that it requires the introduction of a law permitting several wives or one permitting several husbands. It means only that having many wives or even many husbands is not as far from nature in certain countries as in others.” Spirit, XVI.4, 266-67. As a general rule, Montesquieu denies the reproductive utility of polygamy. In Spirit, he states: “Considering polygamy in general, independent of the circumstances that can make it somewhat tolerable, it is not useful to mankind or to either of the sexes....Nor is it useful to the children; and one of its major drawbacks is that the father and mother cannot have the same affection for their children; a father cannot love twenty children as a mother loves two. It is much worse when a woman has several husbands, for then paternal love depends only upon the opinion which a father can believe if he wants, or which others can believe, that certain children belong to him. Spirit, XVI.6, 268. The implication is that the responsibility to care for the children (and not simply generate them) is too difficult to carry out when there are so many. Nature imposes a natural spacing of children when reproduction is confined to two persons. This is the argument Usbek makes in Persian Letters when he complains about the religious burden of having multiple wives, the pressure to generate many children: “Nature always acts slowly, and with economy...She never operates violently; even when producing she demands restraint; she always moves regularly and temperately; if she is hurried, she soon becomes sluggish, using all her remaining strength for self-preservation, and completely losing her productive abilities and powers of generation. It is to this state of debility that we are always reduced by the large number of wives we have, which is more likely to wear us out than to satisfy us. It is very common with us to see a man with a vast seraglio and a minute number of children. In most cases the children themselves are weak and unhealthy, having been affected by their father’s lethargy. Persian Letters, Letter 114, 207.

73 Spirit, XVI.6, 268.

74 Spirit, XVI.2, 264-65.
wives to give themselves exclusively and faithfully to one man, but it does not require
the same commitment or sacrifice from the male. However, aside from this essential
inequality, polygamy brings about the abuse of women, because males treat their
women as instruments of procreation or objects of pleasure, not as persons worthy of
companionship independent of these motives. Therefore, although he hesitantly
concedes that polygamy can, in rare circumstances, be in accordance with the nature
laws of the climate and the natural need to reproduce, he nevertheless does not give it
his moral approval.

There are two final issues to which Montesquieu does not pay as much
attention, but which must be noted since they arise at the end of this dissertation in
the chapter on Posner’s legal approach. Those issues are incest and bestiality, acts
which Posner struggles to condemn. Montesquieu advances two arguments against
incest worth highlighting. The first is aimed at incest between a parent and child,
and appeals to the obligations of natural right. He argues that children have

75 Montesquieu notes the law of the Prophet Mohammed, which tries to provide “equality of
treatment in the case of multiple wives”. However, the law only seeks to ensure that the wives are
treated as equals amongst themselves, and not as equals with their husband. Spirit, XVI.7, 269.

76 Spirit, XVI.6, 268; V.14, 63.

77 For more about the intellectual context of the polygamy in the eighteenth century, see
Jeannette Geffriaud Rosso, Montesquieu Et La Feminite (Pisa, Italy: Libreria Goliardica Editrice,
1977), 538. And Roger Oake, "Polygamy in the Lettres Persannes," The Romantic Review (1941): 56-
62.

78 The third and least powerful of his arguments against incest appeals to the dissimilar
biological clocks of fertility found between mother and child: “[N]ature has set the time earlier for
women to have children; it has set it later for men; and for the same reason, the woman ceases earlier
to have this faculty and the man later. If marriage between a mother and a son were permitted, it would
almost always happen that, when the husband was able to take part in the aims of nature, the wife
could no longer.” In the interests of space I focus upon the other two.

79 However, in this discussion about incest, Montesquieu seems to elide the distinction between
natural law and natural right. They seem to merge together. This passage would be one way to object
to the distinction I believe Montesquieu makes between natural law and natural right.
obligations of justice to give their parents unlimited respect, since they are beholden to them for their survival and education.\textsuperscript{80} Likewise, wives have obligations of justice to give unlimited respect to their husbands, who support them and their children in their needs.\textsuperscript{81} However, marriage between a mother and son would make impossible for a son to give his mother the unlimited respect he owes her, or for the mother to give her husband the unlimited respect she owes to him. This argument is not his strongest, and Montesquieu admits that it does not provide good grounds to condemn incest between father and daughter.

The second, and stronger, argument against incest is grounded in the natural obligations of modesty. Montesquieu argues that mothers and fathers, in particular, have a natural responsibility to protect the modesty of their children, the “purity of their mores:”

It has always been natural for fathers to watch over the modesty of their children. As fathers are charged with the care of settling them in life, they have had to preserve in them both the most perfect body and the least corrupt soul; all that can better inspire desires and all that most properly produces tenderness. Fathers, ever occupied in preserving the mores of their children, should be at a distance that is natural from everything that could corrupt them. One will say that marriage is not a corruption, but before marriage one must speak, one must make oneself loved, one must seduce; it is this seduction that should have inspired horror.\textsuperscript{82}

Montesquieu argues that this argument extends to any members of the immediate household, and he designates it to be a \textit{principle} of natural right: the “principle that

\textsuperscript{80} The marriage of a son with his mother confuses the state of things: the son owes an unlimited respect to his mother, the wife owes an unlimited respect to her husband; the marriage of a mother to her son would overturn the natural state of each of them. \textit{Spirit}, XVI.14, 506-07

\textsuperscript{81} For a fuller explanation of why Montesquieu believes this is an obligation of natural justice, see footnote 63 above, on the father’s a right of property in the family.

\textsuperscript{82} \textit{Spirit}, XXVI.14, 506-07.
marriages between fathers and children, brothers and sisters, are forbidden in order to preserve a certain modesty in the house.”

Montesquieu’s hesitates to speak about bestiality directly, as it is one of the subjects that “makes modesty tremble.” However, it is not difficult to infer his argument against bestiality. The first is that bestiality is against the natural law of the human species to interact sexually with an animal of its own kind. Montesquieu would say that bestiality violates one’s humanity, and is prohibited upon natural law grounds. However, he also notes that bestiality violates modesty. This act fails to observe the restraint all humans should demonstrate towards sexual behavior, and gives into inhuman indulgence instead.

Thus, in both the cases of incest and bestiality, Montesquieu grounds natural right prohibitions upon obligations of modesty. His thinking on modesty is probably the richest part of his sexual morality because of its many implications. Modesty reinforces the obligations of continence due to the opposite sex; it encourages individuals to marry; it obligates parents to protect their children from sexual corruption; and restricts sexual activity to the human species.

On the subject of sexual morality, therefore, Montesquieu shows himself to be conservative in contemporary terms. His essential view is that sexual behavior should be reserved for marriage between one man and one woman. Sexual practices outside of marriage go against the obligations of justice. These obligations are derived from thinking about the natural laws of the human species (especially the dependence of

83 Spirit, XII. 14, 200-02

84 And as noted earlier, although Montesquieu does not speak about what humans might owe to other animals in justice, I believe his methodology provides principles that allow us to deduce that bestiality would be in violation of what humans owe to other animals as well.
women and children upon support) and what the two sexes owe to each other as they pursue a sexual relationship. Given his morally conservative character, it is necessary to address, even if only briefly, how his moralism is compatible with his liberal project, the final goal for this chapter.

Liberty as Security

There are two main places where Montesquieu speaks about his concept of political liberty, in Books XI, which treats political liberty in relation to the constitution, and XII, which treats political liberty in relation to the citizen. In the interests of space and in the interests of studying his more immediately relevant (for this dissertation) concept of political liberty, I focus this analysis upon the Book XII discussion, on political liberty in relation to the citizen. There he writes:

Philosophical liberty consists in the exercise of one’s will or, at least (if all systems must be mentioned), in one’s opinion that one exerts one’s will. Political liberty consists in security or, at least, in the opinion one has of one’s security.

This security is never more attacked than by public or private accusations. Therefore, the citizen’s liberty depends principally on the goodness of the criminal laws.

First, Montesquieu mentions that philosophical liberty is a power rooted in the will to act or not to act, to perform deliberate actions. It is the same power he attributes to human beings in Book I. Unlike the physical world and its material beings, which do not have a power to act independently of the physical laws, of

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85 His idea of political liberty in relation to the constitution is closely related to his idea of political liberty in relation to the citizen, insofar as they both aim to preserve the security of each person from harm, which itself requires that all persons obey the laws, including the natural laws and obligations of natural rights.

86 Spirit, XII.2, 188.
intelligent beings he says that: “it is in their nature to act by themselves.” Second, he mentions other “systems” of thought, presumably systems like that of Hobbes, which deny human freedom and assert a deterministic philosophy of human behavior instead. Although Montesquieu takes the opposite view from Hobbes on this question, he does not refute him, but refers to his system. Montesquieu aims to present an idea of political liberty that does not depend upon philosophical agreement on this question, a concept of political liberty that even a Hobbesean would be able to accept. He also has design reasons to mention this view because there is a dialectical tension in *Spirit* between human freedom and determinism.

Third, he argues that political liberty consists in the security of each person. Here Montesquieu follows Hobbes, who understands liberty as an “absence of external impediments” and sees the primary danger to human liberty to be the alleged right that every human being has to everything, even to others’ bodies. According to Hobbes, there is no security when others have this right and ability to harm one’s person. While Montesquieu does not agree that every man has a right to another’s body, he does agree that liberty consists in the security of each person, or from the internal point of view, the *opinion* that each one enjoys security of his person.

Fourth, Montesquieu explains that the security of each citizen depends primarily upon the goodness of the criminal laws, which are divided into four categories: 1) crimes against religion, 2) crimes against mores, 3) crimes against tranquility, and 4) crimes against security. The criminal laws are the primary means

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87 *Spirit*, I.1, 4.


89 Hobbes, I.14, 189-90.
by which natural rights and obligations are enforced, especially by the second, third, and fourth categories.\footnote{As noted above in the figure that listed the order of natural rights, there are natural obligations human beings have towards the creator, namely, to acknowledge his existence and remain in original dependence upon him. However, Montesquieu does not argue that these particular natural obligations should be made into law. “In the things that disturb the tranquility or the security of the state, hidden actions are a concern of human justice. But in those that wound the divinity, where there is no public action, there is no criminal matter; it is all between the man and god who knows the measure and the time of his vengeance.” XII.4, 190.}

The second category, crimes against mores, regards less severe violations of moral sexual behavior like adultery or violations of public continence.\footnote{“The second class is of crimes against mores: these are the violation of public or individual continence [sexual intercourse outside of marriage], that is, of the police concerning how one should enjoy the pleasures associated with the use of one’s senses and with corporal union.” XII.4, 190} More serious sexual crimes, such as rape, belong in the fourth category. The third category of crimes penalizes acts that do not directly or seriously attack the security of citizens but which threaten it enough to cause alarm and “run counter to citizens’ tranquility.” For example, Montesquieu notes that the less serious attacks upon the free exercise of religion belong in this category. When it involves a serious attack upon the security of the individual, then it belongs in the fourth category.\footnote{“I include in the class of crimes concerning religion only those that attack it directly, such as all cases of simple sacrilege. For crimes of disturbing the exercise of religion are of the nature of those that run counter to the tranquility or the security of the citizens and should be shifted to these classes.” \textit{Spirit}, XII.4, 189} The fourth category of crimes punishes crimes that take, or attempt to take, a person’s life or goods. Whereas the former are crimes committed against the security of persons, the latter are “crimes committed against the security of goods.”\footnote{\textit{Spirit}, XII.4, 191}
Altogether, Montesquieu provides enough information about these categories of crime to conclude that the criminal laws incorporate a substantial part of the natural rights and obligations listed in the figure earlier in this chapter. One might object that the criminal laws do not embrace all of the natural rights described in the figure above. However Montesquieu also explains that while the security of the citizen depends primarily upon the goodness of the criminal laws, other factors also influence that security. “[I]n relation to the citizen, mores, manners, and received examples can give rise to [political liberty] and certain laws can favor it.” In the fourth chapter, I will show how other categories of the civil law, such as marriage law, also promote the natural rights and obligations surrounding sexual behavior when the criminal laws are not the proper means to do so.94

Montesquieu’s natural law and natural rights theory is not only compatible with his liberal project, but it is essential to it. The main purpose of the civil laws is to promote political liberty of the citizen, understood as the security of each person.95 However the security of each person is premised upon an understanding of the human person as complex or holistic, as a being with bodily, material, social, sexual, intellectual and spiritual needs and inclinations. In order to protect and preserve that being properly, the civil and criminal laws must defend the natural rights of each individual.

94 In other words, the civil law includes not only criminal laws, but also marriage laws, education laws, sumptuary laws, and commercial laws, among other sub-categories.

95 The purpose of the political (or constitutional) laws is also to advance political liberty, so that the government will not abuse power and harm the security of persons. So as to keep the discussion at a minimum, however, and since the discussion of Book XII is consistent and analogous to that of Book XI, I omit that from study here.
On these grounds, I disagree with Pangle that Montesquieu’s natural law theory says very little about the right way to live. Although Montesquieu clearly sets aside moral perfectibility or a *summum bonum* for man as beyond the scope of the political or civil laws, and although his moral theory aims at the preservation of the self and the species, this aim involves a wide-ranging endeavor to preserve the full humanity of each person, according to the richness of the human nature and the variety of natural rights that are deduced from thinking about what justice requires in light of that nature.

**Conclusion**

There is sufficient evidence in *Spirit* that Montesquieu endorses a natural law and natural rights moral theory, which employs empirical methods to induce the nature and natural laws of human beings, and rationalist methods to deduce the requirements of natural right. On the subject of his sexual morality, Montesquieu shows himself to be conservative in contemporary terms. His essential view is that sexual behavior should be reserved for marriage between one man and one woman, and that sexual practices outside of marriage are violations of public continence and modesty.

His natural law, natural rights moral theory is not perfectionist. Unlike Aristotle, Montesquieu sets aside moral perfection, virtue, or happiness, as an end (he reserves these matters for philosophy and theology)\(^96\) and, like Hobbes, embraces the

\(^96\) “The laws of perfection, drawn from religion, have for their object the goodness of the man who observes them, more than that of the society in which they are observed; civil laws, on the other hand, have for their purpose the moral goodness of men in general, more than that of individuals” (XXVI. 9, 502). Montesquieu’s choice to set aside what is perfect in order to require what is just is not
preservation of the self and the species as the goal of politics. However, unlike Hobbes, Montesquieu defends a richer understanding of the human person, as a free being with moral choices available to him, and a capacity to reason about those choices in ways that are not exclusively dependent upon the passions or other deterministic influences. In disagreement with Hobbes, Montesquieu argues that (pre-positive) principles of justice and equity ought to inform the manner in which each behaves, and the way the civil laws ought to accomplish that preservation.

This is also to say that Montesquieu’s understanding of human reason is closer to the one contemporary natural law theorists endorse. It is a view of human reason as able to identify absolute moral truths without the aid of divine revelation. He also affirms an understanding of the human person that contemporary communitarians would agree with, since each human person is dependent upon the family and society for survival and proper development. These aspects of Montesquieu’s thought manifest the Aristotelian influences on his moral theory.

Finally this non-perfectionist natural law, natural rights moral theory is an essential part of Montesquieu’s liberal project, because, like Hobbes, he understands liberty as the security of each person, but this security requires the protection of each person’s natural laws and natural rights. Everyone is secure, or free, when everyone obeys the laws of nature and the requirements of natural right, and when the civil (and

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a prudential judgment, as it was for pre-moral philosophers before him, but a principled stance. Aquinas had previously argued that political laws should not restrict all moral vices because “many things are permissible to men not perfect in virtue which would be intolerable in a virtuous man” (ST I-II. Q. 96. A.2). Montesquieu similarly argues that the laws should not restrict all moral vices because “perfection does not concern men or things universally” (XXIV.7, 464). However, whereas Aquinas arrives at this maxim from a virtue theory sensitive to prudence, Montesquieu arrives at this non-perfectionist maxim because he does not desire his political morality to reach so far, to encourage aims other than what justice requires for human preservation, procreation, socialization, and piety.
political) laws themselves promote this project, since natural rights preserve the integrity and security of each person. In the following chapters, we will study how this non-perfectionist, natural law, natural right theory informs the way in which Montesquieu legislates sexual morals.
CHAPTER 3

THE MORAL SUPERIORITY OF MONARCHY:
MAKING WOMEN MORAL

Introduction

Before turning our attention to the laws Montesquieu crafts to regulate sexual morality, it is necessary to address the apparent disconnection between Montesquieu’s moral theory and his political science. Lowenthal expresses the problem well: “The relation between morality and political affairs, or between the philosophical moralist and the legislator, is never explicitly clarified.” On the one hand, Montesquieu expresses the idea that “the highest kind of legislator must be a philosopher”; on the other, he argues that it seems that “philosophical morality is not obligatory on the mass of men.”

One example of this problem is Montesquieu’s analysis of despotism. His political science outlines the pernicious mechanics necessary to rule a government according to despotic ways, and yet although he acknowledges it to be contrary to natural right, he does not state that it should not exist. This difficulty is also evident in his writings about republic and monarchy, the two other main forms of government.

he identifies, where legislators permit or condone evident immoralities in the
operations of political and civil society as well.²

The aim of this chapter is to argue that there is a coherent relationship between
Montesquieu’s moral theory and his political science. That he understood the
existence of immorality in the civil or political behavior of the government forms
does not prove that he is a moral relativist in his political science, or that his
understanding of the relationship between these two orders of law is not coherent. Not
only do they generally cohere, but he shows that monarchy is the only form of
government able to operate in such a way that it respects the order of morality. The
first part of this chapter sketches my hypothesis as to how his political science
influences his moral theory in a compatible way. The aim is not so much to prove this
hypothesis beyond any doubt, but to defend it as a reasonable interpretation.

In order to bring the thesis to life, in the second part of the chapter, I study the
place of the woman in each government form. Montesquieu suggests that the
condition and character of women in society indicate the degree of liberty and
morality lived in that regime. Therefore, we will look at his understanding of the
female by nature, independent of political or legal influences, and her subsequent
transformation in the context of despotism, republic, and monarchy. As we will see,
he believes that the laws and culture of each government do have a profound effect on
woman’s condition and character, that only monarchy exhibits the conditions
necessary to respect her nature, liberty, and natural rights and obligations. Based upon
this evidence, it becomes clearer why monarchy is of the three main forms the only

² For example, see Spirit, III.5-6, 25-26, for monarchy and IV.6, 36-37, or XXIX.13, 610 for
republic. All citations are to the Cohler edition, to Book, chapter, and page.
government that provides the right conditions for the citizens and civil laws to adhere
to principles of justice, natural law, and natural right.

The Encounter Between Moral Theory and Political Science

In order to understand how Montesquieu’s moral theory and his political
science cohere logically, it is helpful to begin with a comparison of the methodology
he uses in each discipline, for the methods he uses in political science are similar to
the methods he uses in moral theory.

Similarly to the way in which Montesquieu identifies the nature of the human
animal and the five natural laws that “derive uniquely from the constitution of our
being,” he identifies the nature of each government form and the laws that “derive
directly from the nature of the government” (or political laws). Similar to the way
in which he identifies the principles that dictate how the human being ought
to behave, he identifies principles of each government that indicate how each political
form ought to behave. And similarly to the way in which he passes human behavior
through principles of justice and equity (as if through a filter) to derive the order of
natural right, so he indicates that the legislator must consider the circumstances and

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3 *Spirit*, I.2, 6 and II.1, 10. His appeal to the observations of “the least educated of men” to
understand the nature of each government form also suggests an empirical approach. He states that the
three definitions of government are “three facts”, which also suggests an empirical method of
identifying the natures.

4 “Such are the principles of the three governments: this does not mean that in a certain republic
one is virtuous, but that one ought to be; nor does this prove that in a certain monarchy, there is honor
or that in a particular despotic state, there is fear, but that unless it is there, the government is
imperfect.” *Spirit*, III.11, 30.
needs of his society in light of the demands of his government’s particular principle so as to derive the order of civil right:

Figure 6. The Relationship between Moral Theory and Political Science

Viewed in light of these comparisons, one way to pose Lowenthal’s question is: how do the order of natural law, the principles of justice and equity, and the order of natural right (represented in the first row) influence the nature, laws, and principles of each political form (represented in the last three rows)? Or: how do the laws of morality shape the political and civil laws of each regime? However, Montesquieu does not approach the question in this way. The encounter between morality and political science takes a different sequence in his thought.
In accordance with his empirical method, Montesquieu first studies the
government forms as they are found in the political histories. He discovers that there
are three main forms, each with its own unique nature and principle. He also sees that
it is very difficult to find a form of government that provides sufficient liberty for
men to seek peace and a moral life. Such governments are “masterpiece[s] of
legislation that chance rarely produces and prudence is rarely allowed to produce.”

Historically, humanity tends to establish repressive forms of government first.
Over time, however, humanity acquires knowledge: knowledge of life without
political society (in nature, which becomes violent), knowledge of life within political
society when the government has unchecked power (despotic), and finally knowledge
of the benefits of commercial activity, which brings about material rewards, greater
cooperation within society, greater cooperation with other societies, and encounters

5 “After all we have just said, it seems that human nature would rise up incessantly against
despotic government. But, despite men’s love of liberty, despite their hatred of violence, most peoples
are subjected to this type of government. This is easy to understand. In order to form a moderate
government, one must combine powers, regulate them, temper them, make them act: one must give
one power a ballast, so to speak, to put it in a position to resist another; this is a masterpiece of
legislation that chance rarely produces and prudence is rarely allowed to produce. By contrast, despotic
government leaps to view, so to speak; it is uniform throughout; as only passions are needed to
establish it, everyone is good enough for that.” Spirit, V.14, 63.
that enable men to become enlightened about new truths and discover free
government. Montesquieu is attentive to the need to respect that social, political, and
intellectual development. Legislators must be philosophers and moralists, yes, but
they must also understand what their society is capable of bearing and work from
their state’s particular place in history, in a manner that respects the general spirit
(customs, mores, laws, religion, climate) and does not change society before it is
ready. Therefore, political science takes priority over moral theory insofar as it
determines the manner in which morality can successfully be legislated. So, rather
than ask how the laws of morality shape the political and civil laws of each regime,
the question should be: Does this particular historical regime provide the necessary
conditions for obedience to the laws of morality, and if so, to what extent? Or more
broadly: Which of the government forms create conditions that are compatible with,
and permit obedience to, the laws of morality that promote liberty?

It turns out that only one of the three main government forms provide adequate
conditions for adherence to the laws of morality and liberty: monarchy. Montesquieu
argues that the natures and principles of the despotic and republican forms of
government require that these states operate according to repressive principles, either
fear or virtue, which are frequently, if not always, in conflict with the demands of
natural law, justice, and natural right.  

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6 Montesquieu claims repeatedly that he has “read all the histories”, and that what he says is
“confirmed by the entire body of history and is in conformity with the nature of things.” Spirit, III.3,
22; and III.5, 25.

7 “Democracy and aristocracy are not free states by their nature. Political liberty is found only
in moderate governments.” Spirit, XI.4, 155.
This claim may be easy to accept as regards despotism, which is repressive and immoral at every turn, but more difficult to accept as regards republic, which operates according to the principle of political virtue, which demands a seemingly innocent sentiment of “love of the republic.” However, as we will see more clearly through the condition of the woman in republic, in practice obedience to the republican principle brings about significant violations of natural laws and natural rights.

Monarchy with its principle of honor, on the other hand, has two advantages over despotism and republic. First, its principle does not necessitate a disregard for natural laws or natural rights, although it does influence deeply the way in which morality is practiced. Second, monarchy is able to favor liberty.

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8 *Spirit*, V.2, 42. Some concrete examples of the way despotism violates the moral laws: it disregards the natural right to private property, it abuses marriage, and discourages the natural obligations fathers have towards their wives and children. Despotism does not rule according to written laws, nor does it provide procedural justice for citizens. There is no regard for economic rights of any sort, or the religious rights of conscience and toleration. *Spirit*, V.14, 59-63.

9 *Spirit*, IV.8, 41, V.3, 43. Montesquieu does not indicate that republics violate the moral laws as much as despotisms do, but that there are a number of “extraordinary” institutions in republics, which do violate natural law and natural right. For instance, republics establish laws that disregard and aim to suppress the natural laws, and affections of the family, so that mother, child, husband, and wife love each other less than they love the republic, and fulfill obligations to each other only insofar as these do not conflict or compete with the obligations owed to the republic. Republics also disregard the natural rights to property, since they must instill the equality of fortunes as far as possible. It is in light of these violations that Montesquieu writes: “Lycrugus, mixing larceny with the spirit of justice, the harshest slavery with extreme liberty, the most heinous feelings with the greatest moderation, gave stability to his town. He seemed to remove all its resources, arts, commerce, silver, walls: one had ambition there without the expectation of bettering oneself; one had natural feelings but was neither child, husband, nor father; modesty itself was removed from chastity. In these ways, Sparta was led to greatness and glory...” *Spirit*, IV.6, 36. See also: XXIX.13, 610.

10 “Honor, meddling in everything, enters into all the modes of thought and all the ways of feeling and even directs the principles. This eccentric honor shapes the virtues into what it wants and as it wants: on its own, it puts rules on everything prescribed to us; according to its fancy, it extends or limits our duties, whether their source be religion, politics, or morality.” *Spirit*, IV.2, 33. When Montesquieu speaks about the laws of education in monarchies, he notes that: “The virtues we are shown here are always less about what one owes others than what one owes oneself; they are not so much what calls us to our fellow citizens, as what distinguishes us from them” (IV.2, 31). This is to say that in monarchy, claims of justice towards other men take second place to considerations of honor, to what one owes oneself. However, this is not to say that the claims of others have no place, or that they are held in disregard. On the contrary, one must please others and give them their due, but not in a humble manner that serves the other but in a manner that gives oneself more glory.
First, Montesquieu notes that the principle of honor teaches three main things: “a certain nobility must be put into the virtues, a certain frankness in the mores, and a certain politeness in the manners.”\(^\text{11}\) This is to say that the behavior of the nobility must show greatness of spirit, their speech and mores must show truthfulness and daring, and they must exemplify polite manners so that, by pleasing others, they might give greater distinction and credit to themselves. These norms are not derived from principles of justice, or morality, but are derived from the political need of monarchy to preserve itself by preserving the noble class, particularly their distinction of rank and place below the monarch but above the lower class. This noble class is politically necessary because it checks the power of the monarch and prevents monarchy from becoming despotism. But the important point to note here is that the demands of honor are not inherently in conflict with the demands of Montesquieu’s moral theory. Monarchy operates according to a political principle that is compatible enough with the demands of justice that the order of morality may co-exist with and influence the orders of political and civil right in monarchy.

The second factor that makes monarchy hospitable to the laws of morality is its ability (and in Montesquieu’s view, its obligation) to pursue liberty. As noted in the last chapter, Montesquieu does not conceive liberty as autonomy, but as the security of each person, which requires that the government and citizens obey and respect the natural laws and natural rights of all people. This concept of liberty limit the choices available to people, but it also tries to maximize moral choices insofar as it does not regulate behavior that goes beyond what justice requires. Monarchy’s pursuit of

\(^{11}\) Spirit, IV.2, 31 (emphasis original).
liberty takes this form, insofar as it permits immoralities that do not go against the requirements of justice, natural law, or natural right. In order to better prove and explain this thesis, we will compare the characters of the women in each government form.

Here it is worth addressing the English constitution described in Book XI. Although Montesquieu speaks about the English constitution separately from (classic) monarchy that has honor as its principle, the English monarchy is more closely related to the monarchical form than any of the other main government forms, due to the common ability of both the classic monarchy and the English constitution to foster liberty. After explaining the English form of government, Montesquieu notes that legislative-craft also can achieve in monarchies a “spirit of liberty that can, in these states, produce equally great things and can contribute as much to happiness as liberty itself.”

In Part 6, moreover, he reveals how legislative-craft can achieve in the (classic) French monarchy a division and balance of powers on a vertical plane (between monarch and the noble class) similar to the division and balance of powers that the English monarchy achieves on the horizontal plane (between the legislative and executive branches).

Now, the civil laws of the English monarchy have the advantage over traditional monarchy that these are not constrained by a single political principle. Unlike the other government forms, the English constitution is able to preserve its political nature by its own political laws. The effect of divided and competing

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12 *Spirit*, XI.7, 166. Moreover, the form of the English monarchy is probably more hospitable to the moral law because it does not require that its institutions reflect the principle of honor.

government powers is to create a self-sustaining constitution, which does not require a sub-structure of civil laws to maintain and preserve it. This frees the legislator of the English monarchy to institute civil laws without a need to pass them through the filter of a political principle. In other words, the legislator of the English regime is able to craft civil laws that mirror even more closely the requirements of justice, natural laws, and natural rights than the legislator of the classical, or French, monarchy is able to do.\footnote{Book XXVI of \textit{Spirit} is the primary place where Montesquieu indicates how the legislator ought to respect the orders of natural law and natural right in his legislation. For the freedom of the English constitution from constraints of a single principle see: Samuel, "The Design of Montesquieu's the Spirit of the Laws: The Triumph of Freedom over Determinism."}

Yet, the focus of this dissertation is upon the (classic) monarchy rather than the English monarchy because Montesquieu himself writes much more about the civil laws of monarchy than he does about the civil laws of the English. He is personally interested and vested in the subject of what laws should govern his own country, so he focuses upon those.\footnote{He does mention a few things in Book XII, where he states clearly that there ought to be a category of “crimes against mores”, which pertain to the union of the sexes and the use of the senses, but he does not get into the necessary details.} From the perspective of American readers, it would have been very helpful for him to have studied and commented upon the civil laws governing sexual mores in Britain more closely, because the English constitution is more closely related, though still a leap away, to the United States Constitution. However, it is still worth studying the way in which he legislates sexual morality in the context of monarchy because he provides an example of the way in which his natural law, natural rights theory influences the civil laws, and because, as we will
see, the principle of honor does not always have a strong influence upon the civil laws governing sexual morals in monarchy.\textsuperscript{16}

With the necessary caveat that the principle of honor will be a consideration for legislators to take into account in the civil laws of the (classic) monarchy, more so than in the English context, and much more so than in a United States government (which aims to eliminate entirely distinctions of rank), one still may identify the connection between Montesquieu’s sexual theory and his civil laws of monarchy in such a way that one can draw some valuable lessons for thinking about how a legislator of a modern republic like ours could begin to consider such a task. By doing so, we would be following the example of the American founders, who looked to Montesquieu for inspiration for the political laws of the United States, even though they abandoned or adapted some of his specific recommendations to the requirements of the new republicanism they created.\textsuperscript{17}

To conclude this first part, on the question of the relationship between Montesquieu’s moral theory and his political science, Montesquieu has a coherent and realistic approach. He gives priority to political science insofar as only knowledge of the natures and principles of political realities will allow the legislator to determine the degree to which he can incorporate the laws of morality, but does not reject the existence or importance of incorporating the demands of moral laws into politics. As Pangle and others have noted, Montesquieu’s discussion of the

\textsuperscript{16} Again, see Book XXVI, and XVI.12, 273

government forms is reminiscent of Aristotle’s discussion of the regimes in the
*Politics*.\(^{18}\)

Let us turn now to Montesquieu’s writings on woman, her function and character in nature, and the way in which she is transformed in each regime.

**Woman by Nature**

Montesquieu boldly argues in Book XIX that the condition and character of woman in society are key indicators of the degree of liberty and morality practiced there.\(^{19}\) We can determine if in fact monarchy is more hospitable to the practice of morality than despotism or republic by studying woman’s nature and character in each context.

Montesquieu’s understanding of woman by nature is that she is a rational, passionate, and beautiful being, with natural tendencies to be morally flexible, vain, communicative, and sexually modest, who has a natural desire for companionship in marriage and a unique role in reproduction.

Starting with reason, Montesquieu indicates that women are rational like men. Although feminist interpretations of *Spirit* accuse Montesquieu of portraying woman as an irrational animal, or a less rational animal than man, there is more evidence for the view that he saw women to be gifted with rationality like men. The laws of nature

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\(^{18}\) However, I disagree with Pangle that the government forms are all legitimate—from the moral point of view Montesquieu would say that they are not equally legitimate. Pangle, *Montesquieu’s Philosophy of Liberalism: A Commentary on the Spirit of the Laws*, 42-44.

\(^{19}\) He also boldly argues that if a legislator wishes to undertake cultural and legal changes, he should engage the women of his society to change their mores first because women are able to trigger broader social changes by their behavior. Ibid. *Spirit*, XIX.5, 310.; XIX.8, 311; XIX.14-15, 315-16.
describe the human race as rational, and Montesquieu gives no indication that women are excluded (whereas he does give indication that other animals are excluded).20 Moreover, the third and fourth laws of nature suggest that woman enjoys a unique attraction and social bond with man because she shares with him the ability to reason. Recall that both sexes seek each other due to pleasure-seeking, but also for rational and social reasons. Woman also desires a sexual companion and grants permission to man’s “prayer.” However, Montesquieu also believes that woman is more passionate than man by nature, and this passionate element can cloud the degree of reason she enjoys.21

20 He states that, “It is not known whether beast are governed by the general laws of motion or by a movement particular to themselves [i.e. whether they are determined or free beings]. Be that as it may, they do not have a more intimate relation with god than the rest of the material world has….Beasts do not have the supreme advantages that we have; they have some that we do not have. They do not have our expectations, but they do not have our fears; they suffer death as we do, but without recognizing it; most even preserve themselves better than we do and do not make such bad use of their passions.” (I.1, 5)

Feminist scholar Jeannette Rosso interprets certain passages of Spirit to suggest that Montesquieu sees woman as a lesser rational animal. When speaking about the obligation of fathers to marry their wives and support the children, for example, Rosso has interpreted Montesquieu to mean that the fathers are necessary because only they can do the real educating, since they are the rational ones. (Spirit, XXIII.2, 428). Rosso, Montesquieu Et La Feminité 465. However, her interpretation contradicts passages where Montesquieu affirms the intelligence of women and mothers. Although it is true that Montesquieu believes fathers are ultimately responsible for the education of their children, he also believes that wives and mothers are capable of reasoning and educating. Spirit, IV.4, 35. For instance, when explaining the natural reasons for polygamy, he laments that the women of southern climates marry when they are beautiful but not when they are intellectually mature. He expresses relief that in temperate climates women can marry when they are both beautiful and intellectually mature: women “have more reason and knowledge there when they marry…[and so] a kind of equality between the two sexes has naturally been introduced….” (Spirit, XVI.2, 265). Not only does Montesquieu assert the rationality of women, but he also explains that it is ground for their equality with their spouses. Spirit, XVI.2, 264. Montesquieu further argues that women exhibit a greater use of reason than men when modesty is at stake. “In cold countries…the use of strong drink establishes intemperance among the men; so women, who have a natural reserve in this respect because they must always defend themselves, again have the advantage of reason over the men” Spirit, XVI.2, 265. See also: Rosso, Montesquieu et la Feminité, 550. Therefore, Montesquieu’s meaning about the need for the father in the matter of raising the children is more likely that both the mother and father are necessary to guide and govern their children, since the task is too difficult for the mother to achieve alone.

21 In Spirit, XIX,14. Montesquieu portrays women as heralds of change partly because one can appeal to their passions so easily to change their habits. When Peter the Great of Russia invited women
When one thinks of female passion in the writings of Montesquieu, one thinks first of *Persian Letters*, where Montesquieu portrays the inner workings of the seraglio of a Muslim man named Usbek. The women of the seraglio are full of passion, and one of Usbek’s many wives, Zelis, suggests that passion is fundamental to their nature.\(^{22}\) In another work, the *Essay on the Causes that Can Affect the Spirit and Character*, he explains why woman is more passionate by nature than man by the differences between male and female bodies, which are the fundamental cause of their character differences.\(^{23}\) Women, he argues, undergo a menstrual cycle, whereas men do not, and so women suffer greater emotional revolutions, which cause them to be more passionate.\(^{24}\)

From similar observations, Montesquieu also suggests that women are more flexible than men, more willing to adjust to new circumstances and give way to compromise, but by the same token, tend to be less courageous, and show less fortitude and greater weakness in the face of moral challenges. This is due to the structure of the female body, especially her uterus, which must physically adapt itself to court and invited them to use Western dress, “They [the women] immediately appreciated a way of life that so flattered their taste, their vanity, and their passions, and they made the men appreciate it.”

\(^{22}\) As Diana Schaub explains: “Nature grants women, as well as men, desires, but apparently it is not an equal grant. Zélis implies that the desires of women are greater or deeper, or in some other sense, insatiable.” Diana Schaub, *Erotic Liberalism: Women and Revolution in Montesquieu’s Persian Letters* (Lanham, Md.: Rowman & Littlefield, 1995), 52.

\(^{23}\) Montesquieu, *Essai Sur Les Causes Qui Peuvent Affecter Les Esprits Et Les Caractères*, ed. Daniel Oster, Oeuvres Complètes (Paris: Editions du Seuil, 1964), 1109-10. All translations from this work will be my own. This *Essai* was written sometime between 1732-1745, more than a decade after the publication of *Persian Letters*, and it cites Book XIV of *Spirit of the Laws*. Substantively, I find that it shows complete compatibility with the ideas Montesquieu expresses in *Spirit*.

\(^{24}\) “The difference between the sexes should also diversify spirits. The periodic revolution that takes place in women has its own very pointed effects. It should attack the very spirit. One knows that its cause is a fullness, which augments continually during a month or so; after which, the blood, which is found in very great quantity, forces the passages. Since that quantity changes each day in them, their humor and their character should likewise change.” *Essai Sur Les Causes*, 488.
to childbirth, labor, and delivery.\textsuperscript{25} The woman’s physical ability to undergo such physical changes has the psychological effect, he argues, of conditioning her psyche to be more adaptable to different situations than men are.\textsuperscript{26} Montesquieu sees this female flexibility and malleability as both a moral weakness and a strength. On the one hand, woman tends to have less strength or fortitude than man when situations call for strength, but on the other hand, she is more gentle and moderate by nature when flexibility and compromise are called for.\textsuperscript{27}

In addition to woman’s rationality, passion, and moral flexibility, Montesquieu also notes that woman is endowed with greater beauty than man, which leads her to be naturally vain and communicative. He seems to agree with eighteenth century philosophy, and the broader tradition of the metaphysics of beauty in general, that

\begin{quote}
\textsuperscript{25} “The fibers of women are softer, looser, more flexible, more delicate than the men. The reason is that a part of their vessels are less compressed, since the cavity formed by the sacral vertebrae, the coccyx, the pubic bones, and the untitled bones, is much larger in them. The uterus and the infinite vessels that compose it can better dilate. In the same way that veins have less strong a texture than arteries, so that they can better dilate, so it is for their vessels.” \textit{Essai Sur Les Causes}, p. 488.
\end{quote}

\begin{quote}
\textsuperscript{26} It is also worth noting the methodology Montesquieu employs to identify the nature of the woman. He studies her physiology, so as to better understand her psychological tendencies. For Montesquieu, spiritual phenomena are rooted in physical phenomena, and are causally connected. As he explains in the \textit{Essai Sur Les Causes}, p. 489: “The soul is, in our body, like a spider in its web. She cannot move without moving one of the threads stretched out, and, likewise, one cannot move one of the threads without moving her. One cannot touch one of the threads without stirring another, which responds to her. The more the threads are stretched out, the better the spider is informed. If some of them are loose, communication will be less from that thread to the spider, or from that thread to another thread, and the salvation of that spider will be practically hanging by its own web.” Therefore, body and soul are separate but integrated entities, and his attention to physiology and biology in the context of his moral philosophizing is justified. However as noted earlier, Montesquieu does not thereby assert that humans are determined by natural causes alone. The biological inclinations one has are just that—natural inclinations—which can be overcome, or developed further, with effort and free will. See also: Samuel, p. 305, 313.
\end{quote}

\begin{quote}
\textsuperscript{27} This explains why Montesquieu affirms in \textit{Spirit} that: “It is against reason and against nature for women to be mistresses in the house, as was established among the Egyptians, but not for them to govern an empire. In the first case, their weak state does not permit them to be preeminent; in the second, their very weakness gives them more gentleness and moderation, which, rather than the harsh and ferocious virtues, can make for a good government.” \textit{Spirit}, VII.17, 111.
\end{quote}
held that nature adorned important bodily functions with beauty. The idea is that since woman is entrusted with greater reproductive responsibilities than man, her body is more beautiful. The article on “Beauty” in l’Encyclopédie expresses this view. In Spirit, Montesquieu also associates female beauty with sexual maturity: In hot climates, he notes, “Women are marriageable in hot climates at eight, nine, and ten years of age….They are old at twenty: thus reason in women is never found with beauty there.” And woman’s physical beauty seems to last as long as her fertility: “Nature, which has distinguished men by strength and by reason, has put no term to their power but the term of their strength and their reason. She has given women charms and has wanted their ascendancy to end with these charms.”

This physical gift of beauty has the psychological effect of making woman more naturally interested in the subject of beauty, the arts and fashions, more likely to form good taste, and makes them more prone to vanity than men. Since women are spoken of as more beautiful, they spend more time than men thinking about the

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28 A more thorough study of Montesquieu’s writings would be necessary to defend this point well, particularly Le Temple de Gnide. See also: Edwin Preston Dargan, "Dissertation: The Aesthetic Doctrine of Montesquieu: Its Application in His Writings" (University of Baltimore/ Johns Hopkins, 1907).

29 “Man, woman…each occupy a rank in nature: but in nature, this rank determines the duties to perform; duties determine organization; and organization is more, or less, beautiful or perfect, according to the more, or less, convenience that the animal receives before performing its functions. But this convenience is not arbitrary, and neither are the forms that constitute it, nor the beauty that depends on these forms.” (my ephasis) Denis Diderot, "Beauty," The Encyclopedia of Diderot and d'Alembert Collaborative Translation Project (2006), http://hdl.handle.net/2027/spo.did2222.0000.609 (Accessed July 2009)

30 Montesquieu, Spirit, XVI.2, 264. He also comments upon the beauty of eastern versus western women in Persian Letters, Letter 34, and at length upon the beauty and charm of the female sex in his Essai sur le Gout, p. 849.

31 Montesquieu, Spirit, XVI.2, 265. Whereas Rosso interprets this latter passage to grant women beauty instead of rationality, Kra concludes more convincingly that Montesquieu’s meaning is rather that: “Nature gave man physical strength and reason; it endowed woman with beauty and reason.” Kra, Montesquieu and Women, 279.
subject of beauty, especially their own. They become more attentive to social perceptions and attitudes, which makes them inclined to be both vain and more communicative beings.\textsuperscript{32} He also credits women with teaching men how to have good taste, to be conscious of proper dress and behavior, and to learn how to be a “spectacle for another.”\textsuperscript{33} Thus, woman’s natural beauty, inclinations to vanity, and communicativeness all go together, and these qualities enable woman to be the unique catalyst for social change that Montesquieu thinks she is.

To these qualities, Montesquieu adds a natural inclination to modesty. The natural modesty woman has by nature is a sexual modesty \{\textit{pudeur}\}, because, as we have just seen, she does not excel naturally at other forms of modesty. In the last chapter, I noted that Montesquieu’s ideas on modesty are the richest part of his sexual morality because of the many implications modesty has for moral sexual behavior. Modesty reinforces the obligations of continence due to the opposite sex; it encourages individuals to marry; it obligates parents to protect their children from sexual corruption; and restricts sexual activity to the human species. In this chapter, it is worth noting the way female modesty has an impact on society.

Montesquieu praises the woman who acts modestly in her dealings with men.\textsuperscript{34}

In the \textit{Essai Sur le Gout}, he explains:

\begin{itemize}
\item \textsuperscript{32} Montesquieu speaks about the female desire to “call attention to oneself by small things,” especially by fashions and ornamentation. \textit{Spirit}, XIX.14, 316. XXIII.21, 442. VII.1, 97.
\item \textsuperscript{33} He also adds: “The society of women spoils mores and forms taste; the desire to please more than others establishes ornamentation, and the desire to please more than oneself establishes fashions.” Montesquieu, \textit{Spirit}, XIX.8, 312.
\item \textsuperscript{34} Even Pauline Kra, who denies that Montesquieu defends moral absolutes, concedes that: “The one traditional universal norm Montesquieu upheld is that of the chastity of women….The loss of virtue in a woman is a major flaw that entails overall psychological degradation and corruption (E.L. VII, 8, XXVI, 8).” Pauline Kra, “Montesquieu and Women,” in \textit{French Women and the Age of Enlightenment}, ed. Samia I. Spencer (Bloomington: Indiana University Press, 1984), 279-81.
\end{itemize}
The law of the two sexes ordains, in civilized and in savage nations, that men should do the asking and women should only grant what is asked of them. This causes charm to be more particularly a feminine quality. Since women have to defend everything about them, it is to their interest to conceal everything. The least word, the least gesture, everything they reveal without infringing on their first duty, every action that throws off constraint becomes an element of their charm. Such is the wisdom of nature that things which would be of no value without the law of modesty acquire infinite value, thanks to this fortunate law on which rests the happiness of the universe.\footnote{Jean Le Rond d' D'Alembert, Denis Diderot, Montesquieu, Voltaire, "Taste," in The Encyclopedia of Diderot & d'Alembert Collaborative Translation Project (Ann Arbor: Scholarly Publishing Office of the University of Michigan, 2003). In French: Montesquieu, "Essai Sur Le Gout," in Oeuvres Complètes, ed. Daniel Oster (Paris: Du Seuil, [1757] 1964), 849.}

Montesquieu makes the sweeping claim that the “happiness of the universe” depends upon observance of the law of modesty. First, modest women increase the joy of men, who find happiness in small signs of affection that otherwise would have had little or no value. More importantly, however, modest women teach men to tame their natural instincts to “attack” \textit{attaquer} them sexually. The natural temerity \textit{témérité} of the male can easily turn into an act of sexual domination or abuse. A woman’s tactful and charming acts of sexual self-defense \textit{une defense naturelle} entice the male, by a sweet bribery, to treat her with the reverence and peace that she is due (in justice) as a rational equal. A society full of charming and modest women, therefore, has a significant impact upon the moral character of the men in society, and this contributes towards an environment that is less impulsive and aggressive, more peaceful and just.\footnote{Montesquieu draws harsh criticism for his views on female modesty from Rosso, who believes Montesquieu has a double standard here, demanding that women be modest but not requiring modesty of men. She interprets Montesquieu’s requirement of modesty as “a notion that is essentially repressive and contributes to propose to woman an image of herself as mythical and alienated.” Rosso, \textit{Montesquieu et la Féminité}, p. 565. She even argues that, contrary to the Montesquieu of Persian...} Montesquieu gives an example of these social effects in his praise for the Samnites.\footnote{Montesquieu draws harsh criticism for his views on female modesty from Rosso, who believes Montesquieu has a double standard here, demanding that women be modest but not requiring modesty of men. She interprets Montesquieu’s requirement of modesty as “a notion that is essentially repressive and contributes to propose to woman an image of herself as mythical and alienated.” Rosso, \textit{Montesquieu et la Féminité}, p. 565. She even argues that, contrary to the Montesquieu of Persian...}
Altogether, Montesquieu’s portrait of the woman by nature is that she is rational, equal to man, gifted in beauty, passion, has a kind of moral flexibility, is communicative, and has a natural tendency towards sexual modesty \(\text{pudeur}\). Her weaknesses include a propensity towards vanity, the clouding of reason by emotion, and a lack of fortitude in difficult situations that call for steadfastness. The laws of nature also indicate that she has a natural desire for companionship, a social and affective bond with her sexual partner, which is a different from her unique reproductive desires in the sexual act. These traits and tendencies are universal to woman because they are grounded in her biology, which are determinative of her character to a great degree.\(^{38}\) Now we can turn to study how this female nature fares...

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\(^{38}\) See footnote 26 above.
under the laws and institutions of the different regime forms to get a better idea of the
degree of liberty and morality present in each society.

**Woman in Despotism**

The two institutions that most influence the condition of the woman in
despotism are polygamy and the separation of the sexes or the woman’s enclosure. In
*Spirit*, Montesquieu explains how these institutions abuse the female nature by
denying her rationality and equality with man, and by encouraging her to have an
unbridled passion, which leads her to lead an immoral life.

First, Montesquieu argues that polygamy and the enclosure of women create
domestic slavery. The males feel that they must not only protect their women from
the snares of other men, but also prevent their wives from defecting from the harem,
so they enclose them behind lock and key.

In despotic states women do not introduce luxury, but they are themselves
the object of luxury. They should be kept in extreme slavery. Each man
follows the spirit of the government and brings to his home what he sees
established outside of it. As the laws in these states are severe and
executed on the spot, one fears that women’s liberty could be a cause for
bringing suit.\(^{39}\)

Despotic household government violates the human equality of the woman,
since it treats women as objects of luxury rather than as equal persons. However, their
inequality is also connected with the denial of their rationality. Husbands rule their
homes in the same way the despotic prince rules his kingdom, as a master over slaves,

\(^{39}\) *Spirit*, VII.9, 104-05.
not according to reason, but only in a manner that engages the emotions.\textsuperscript{40} This has a particularly acute effect on women, who are passionate by nature already, and as described in the last chapter, in hot climates must marry when they are not rationally mature. These conditions nurture the sort of woman with unrestrained passions, a description \textit{Persian Letters} brings to life.

As Montesquieu portrays it, polygamous marriage prevents a wife from satisfying her natural desire for companionship with her husband because he does not have an exclusive attachment to her. Moreover, polygamous marriage in the Eastern style further represses the natural maternal, and aesthetic inclinations of women. He notes that in Eastern harems eunuchs rule over women and do not allow them to develop their own sense of fashion and beauty, or even to dress themselves.\textsuperscript{41} Such paternalistic rule makes it unlikely that women can be freely engaged and attentive to the needs of their children because they are treated like children. This is a source of great moral loss because Montesquieu argues that a woman’s moral character depends upon her ability to be engaged in her children’s (and husband’s) needs.

Women’s entire practice of morality, modesty, chastity, discretion, silence, peace, dependency, respect, love, derives from this [attention to her family]; in sum here her feelings are universally directed to that which is best in the world by its nature, which is one’s exclusive attachment to one’s family.\textsuperscript{42}

\begin{footnotes}
\item[40] \textit{Spirit}, V.16, 66. “Everything comes down to reconciling political and civil government with domestic government, the officers of the state with those of the seraglio” Montesquieu, \textit{Spirit}, V.14, 59-60. And III.9, 28.

\item[41] One changes wives in the East so frequently that the domestic government cannot be theirs. Therefore, the eunuchs are put in charge of it; they are given all the keys, and they arrange the business of the house. ‘In Persia’, says M. Chardin, ‘wives are given their clothing as it would be give to children.’ Thus that concern which seems to suit them so well, that concern which everywhere else is the first of their concerns, is not theirs.” \textit{Spirit}, XVI.14, 273-74.

\item[42] \textit{Spirit}, XVI.10, 271.
\end{footnotes}
Altogether, polygamy necessarily violates the woman’s nature to desire a relationship with her husband that is equal, exclusive, and companionate. And polygamy has the potential to violate the nature of the woman in additional ways, especially if it takes a more repressive form like that of the Eastern harems, where women cannot cultivate their own sense of fashion and beauty freely, or be occupied in the care of their children and development of their moral character.

Aside from these acts that do violence to the nature of woman, however, Montesquieu makes the stronger claim that polygamy encourages women themselves to be immoral. In Spirit he argues that seraglios become places where all morality is lost, where “artifice, wickedness, and deceit reign in silence and are covered by the darkness of night.”

He describes this claim in more detail in Persian Letters, where the husband and master of the household, Usbek, abuses his wives, conditions them to lose their sense of modesty, and provokes them to be unjust in their vengeance towards him.

The most striking form of abuse they suffer involves their sexual modesty. In one episode, Usbek conducts a beauty contest between his wives. Each must walk before him while removing her clothes and pose in obscene positions. As Schaub notes, this “is not the noble nakedness of a Greek statue—the bodying forth of the soul’s character—that Usbek requests….This is the nudity of Hugh Hefner’s Playboy, not Praxiteles’ Aphrodite.”

The effect of this contest on the wives is morally

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43 Spirit, V. 14, 63, VII.9, 104.

44 Schaub, Erotic Liberalism, p. 46.
corrosive. The winner of the beauty contest is Zachi, the most degenerate of the wives. As Schaub continues:

In recollecting the lewd poses she and the other contestants assumed for his delectation, Zachi tells Usbek, ‘I counted modesty as nothing’; and she expects that confession to please. It is not just Usbek’s absence that endangers virtue; the virtue of the women is undermined and outraged by Usbek himself.\textsuperscript{45}

The one wife who wishes to remain modest, Roxane, suffers the greatest abuse of all. Usbek finds her resistance appealing and overcomes her by rape. In turn, Roxane develops a deep hatred for Usbek, and hiding behind a false veil of modesty, secretly turns to adultery to provide her with the escape and vengeance she desires. Therefore, not only a lack of modesty violates morality in the harem. Sexual abuse leads the women to turn to adultery and other acts against natural laws and natural rights, such as murder, lesbianism, and suicide.\textsuperscript{46}

In sum, the institutions of despotism, polygamy and the enclosure of women, lead to the abuse of women and their moral corruption. This is a form of living that is contrary to woman’s nature and corrupts her natural character deeply, and in turn reflects the liberty and immorality of the regime. The women’s rationality is denied, their liberty is lost, their equality is ignored, their propensity for being passionate is fostered rather than moderated, their natural weakness and flexibility is turned into subjugation and slavery, and their natural beauty becomes a reason for their objectification. Furthermore, the unique sexual companionship women seek by nature

\textsuperscript{45} Schaub, \textit{Erotic Liberalism}, p. 46

\textsuperscript{46} Letters 4, 20, 161. Montesquieu, \textit{Persian Letters}. See also Shaub, Erotic liberalism, p. 47-49.
is not satisfied in polygamous marriage, where the wives must compete for the attention of their husband.

**Woman in Republic**

If despotism abuses the woman and causes her to violate the laws of morality, republic abuses the woman’s nature but causes her to live a life of heroic selflessness and purity that goes far beyond the requirements of natural law and natural right. There are three main ways in which republic molds the character of the woman to this end: in her acquisition of material things, in her sexual behavior, and in her family affections.

First, since republic requires that citizens love the homeland above all else, it detaches citizens from material things and promotes frugality. Sumptuary laws regulate luxury and female extravagance by prohibiting altogether or setting limits on the luxurious clothing, foods, and domestic items women may have. They also set limits on the size of dowries, and make restrictions on women’s land and property rights. Whereas morality (as Montesquieu understands it) only demands that one respect the property rights of others (e.g., that one not steal), the laws of republic require much more: a spirit of frugality, so that women learn to acquire only what is necessary. “Love of frugality limits the desire to possess to the mindfulness required by that which is necessary for one’s family….The laws wanted frugal mores so that

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47 *Spirit*, V.2, 43; IV.5, 35; and Foreword, xli.

48 *Spirit*, VII.15,110.
one could give to one’s homeland. As a result of this frugality, the woman’s natural interest in beauty, fashions, and in attracting vain attention is curtailed in republic. The women of republics are conditioned to modify their natural interests and desires for beauty so as to promote frugality and self-restraint.

Second, since love for republic depends upon maintaining the modesty and chastity of women, the laws establish the perpetual guardianship of women, either by paternal authority and domestic tribunals as in Rome, or by the use of public magistrates as in Greece. These institutions work to ensure that the women are under strict observance and punished for offences against purity of mores. Montesquieu calls attention to the fact that in republics it is insufficient for women to behave in morally decent ways. Whereas his requirements of sexual morality demand that modesty be observed and that sexual behavior be reserved for marriage, it permits (for example) friendliness and playfulness between the sexes outside of marriage. Republic depends so much upon the chastity and sexual purity of women that it demands a seriousness and reserve of women that go well beyond Montesquieu’s moral requirements.

So many imperfections are attached to the loss of virtue in women, their whole soul is so markedly degraded by this, and when this principal point is removed so many others fall, that in a popular [republican] state one can regard public incontinence as the last misfortune and as assurance of a change in the constitution. Thus good legislators have required a certain gravity in the mores of women. They have proscribed from their republics not only vice but even the appearance of vice.

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49 *Spirit*, V.3, 43.

50 *Spirit*, V.7, 50. VII.12, 107.

51 *Spirit*, VII.8, 104.
The meekness and sobriety of expression of the republican woman goes against her natural communicableness, and is a strong contrast to the dramatic character of the women of despotism.\textsuperscript{52}

Furthermore, Montesquieu notes, the perpetual guardianship of women in republics was such that “the women were very hemmed in by it.”\textsuperscript{53} It restricts the woman’s liberty and subjects them to inequality of treatment so as to secure their virtue above all else. The woman of republic is, as Rosso concludes, either superior to man, like a goddess or a muse, or inferior to man, subject to his paternalistic rule, but she is never his equal.\textsuperscript{54}

The third way in which republic molds the character of the woman is in her family affections. Montesquieu mentions a number of times that love for republic interferes with the natural affections and obligations of the family. Although he does not mention republics that abolish the natural family altogether, and only mentions republics that affirm monogamous marriage, he does note that in republics, “only friendship was to be found within marriages,” and quotes Plutarch to say that: “As for true love, women have no part in it.”\textsuperscript{55} Erotic affection did not have a place in republican marriages. He notes that some republics encouraged males to turn to

\begin{footnotes}
\item[52] Montesquieu remarks that in the Greek republics, “women’s virtue, simplicity, and chastity were such that one has scarcely ever seen a people who had a better police in this regard.” \textit{Spirit}, VII.9, 105.
\item[53] \textit{Spirit}, VII.12, 107
\item[54] Rosso argues that this is Montesquieu’s view of women in general, but I think it is an accurate depiction of the way in which republics view women. Rosso, \textit{Montesquieu et la feminite}, p. 462.
\item[55] \textit{Spirit}, VII.9, 105
\end{footnotes}
homosexuality to gratify their natural desires, which means that in those republics, women did not have an outlet and would have had to suppress their own passions considerably. But, even in republics that did not promote male homosexuality, the principle of republic requires husbands and wives to have a greater allegiance to and love for the state than to spouse and children, and this requirement alters the kind of affections and obligations that can be carried out in the family.\textsuperscript{56} The principle of republic then, contradicts the basic requirements of justice as Montesquieu sees them to exist for the family, and it abuses the woman insofar as it asks her to suppress her natural sexual desire for her husband and her motherly attachment to her children.

Therefore, although the republican woman is not enslaved as is the woman of despotism, she does not have liberty either, and the laws do not comply with her nature or natural inclinations. She has the advantage over the women of despotism of having monogamous marriage, of finding greater respect for her sexual modesty and the safety of her person, but she cannot have sexual affection for her husband, or be greatly attached to her children, as Montesquieu believes is natural, and a source of moral development for woman.

Although she does not commit acts of immorality, as the woman of despotism is led to do, and although she shows heroic virtue in some important respects, especially as regards her modesty and self-restraint, these virtues come at the expense of suppressing her natural passions and desires, her love for the opposite sex, her attachment to her children, her interest in beauty and fashions, and her natural communicableness with others. Extreme virtue is built upon an abused nature, and

\textsuperscript{56} Montesquieu notes, for example, that in Sparta: “One had natural feelings but was neither child, husband, nor father.” \textit{Spirit}, IV.6, 36.
this is why it is not in accordance with Montesquieu’s moral theory—which requires a basic respect for the nature and natural rights of persons, though it does not require virtuous character traits. Republic has it backwards.  

Thus, the picture we have of the women in despotisms and in republics is one of extremes. Both provide a radically unnatural context for woman, one that results in her total moral corruption and the other that results in her total sacrifice, an extreme selflessness. As an alternative to these choices, Montesquieu presents monarchy, a legal and cultural milieu that is more hospitable and encouraging towards the woman’s nature, allows her more liberty, and does not abuse her natural rights. It requires her to respect the rights of others, but does not force her to be any more moral than basic justice requires.

**Woman in Monarchy**

As noted earlier, the nature of monarchy requires that it operate according to the principle of honor, a feeling of great love for self and class. This principle preserves the political place and function of the noble class, which is to check the power of the monarch and prevent the government from becoming despotic. The primary means to inspire this feeling of honor in the noble class is through material possessions, the protection of private property, and the engagement of the aristocrats in the commerce

57 Republic must suppress all acts—even minor acts—that show greater love for the self than for the state. “It is not only crimes that destroy virtue, but also negligence, mistakes, a certain slackness in the love of the homeland, dangerous examples, the seeds of corruption, that which does not run counter to the laws but eludes them, that which does not destroy them but weakens them: all these should be corrected by censors.” *Spirit*, V.19, 71. By contrast, Montesquieu’s moral theory requires the fulfillment of basic duties of justice, and acts of self-indulgence, which do not violate justice are considered to be minor and permissible. It is a limited concept of the moral good.
of luxury. Therefore, the main way monarchy molds the character of the woman is through her acquisition of material things.

Monarchies require extravagance. Montesquieu explains that: “[L]uxury is singularly appropriate in monarchies…they do not have sumptuary laws…. If wealthy men do not spend much, the poor will die of hunger.” Therefore, this regime needs acquisitive women to be out in society, influencing fashions, and acquiring luxuries for their homes and persons, so as to spur the economy and the branches of commerce. This means that monarchy must give women the liberty to circulate freely in society so they can give their tone to it.

The effect of these conditions upon the woman’s character is to make her acquisitive, vain, fashionable, communicative, sociable, and playful. The typical aristocratic woman of monarchy exemplifies the spirit of the French, “lively, pleasant, playful, sometimes imprudent, often indiscreet.” She reveals a “vivacity capable of offending,” which is apt to make her “inconsiderate.” She is also likely to have difficulty being faithful to her marriage bed. When writing about public incontinence, Montesquieu states: “We have spoken of public incontinence because it is joined to

\[58\] Spirit, VII.4, 99.

\[59\] “Fashions are an important subject; as one allows one’s spirit to become frivolous, one constantly increases the branches of commerce.” Spirit, XIX.8, 312. “Vanity is as good a spring for a government as arrogance is a dangerous one….one has only to imagine for oneself, on the one hand, the innumerable goods resulting from vanity: luxury, industry, the arts, fashions, politeness, and taste, and on the other hand, the infinite evils born of the arrogance of certain nations: laziness, poverty, the abandonment of everything…. Laziness is the effect of arrogance; work follows from vanity: the arrogance of a Spaniard will incline him not to work; the vanity of a Frenchman will incline him to try to work better than the others. Spirit, XIX.9, 312.

\[60\] Spirit, VII.4, 100.

\[61\] Spirit, XIX. 5-6, 310-11.
luxury; it is always followed by luxury, and always follows luxury.”⁶² Although he does not directly say that aristocratic women are immodest, the political laws and principle of honor need the noble class to live a luxurious lifestyle, which will indirectly provoke them to be immodest. As we will see in the next chapter, the civil laws of monarchy do all they can to discourage women from adultery.

Therefore, monarchy is hospitable to the woman’s passionate nature and her natural interests in beauty, sociability, and communication, but does not spur her to moral excellence. Aside from her tendencies to be immodest and unfaithful in marriage, which are violations of natural law and right, the woman of monarchy shows other vices: She will have a tendency to be vain, inconsiderate, self-indulgent, and overly emotional.⁶³ Yet, these vices are not violations of natural laws or rights. With the exception of her immodesty and infidelity, which the civil laws of monarchy will combat considerably, the woman of monarchy is a basically moral woman by the measures of Montesquieu’s moral theory. These vices are not contrary to his moral theory because it embraces a limited conception of the good. He acknowledges that

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⁶² *Spirit*, VII.14, 109. See also XXIII.21, 441.

⁶³ Montesquieu explains that the spirit of luxury leads to over-indulgence: “a soul corrupted by luxury has many other desires” *Spirit*, VII.2, 98. And he stresses the self-interested and indulgent character of the typical woman of monarchy: “In monarchies women have so little restraint because, called to court by the distinction of ranks, they there take up the spirit of liberty that is almost the only one tolerated. Each one uses her charms and her passions to advance her fortune, and as their weakness allows them not arrogance but vanity, luxury always reigns there with them” (my translation) *Spirit*, VII.9. The Cohler edition mistranslates this passage. See: Montesquieu, *Oeuvres Completes De Montesquieu*.

In another revealing passage, Montesquieu thinks about what would happen if the typical woman of monarchy were placed in a despotic context: “Let us assume for a moment that the fickleness of spirit and indiscretions of our [monarchy] women, what pleases them and displeases them, their passions, both great and small, were transferred to an eastern government, along with the activity and liberty they have among us: what father of a family could be tranquil for a moment? …the state would be shaken and one would see rivers of blood flowing.” *Spirit*, XVI. 9, 270.
such vices are far from the “heroic virtues we find in the ancients and know only by hearsay” but he does not condemn them as contrary to natural law or right. His tacit acceptance of these vices is a manifestation of the non-perfectionist quality of his moral theory.

As far as woman’s natural sexuality and her role in marriage and reproduction, the laws of monarchy establish monogamous marriage. Unlike the marriages of republic, which are arranged in a spirit of guardianship over the women, or the polygamous marriages of despotism, which are made in a spirit of possession, marriages in monarchy are made with a greater respect for the equality of women, though considerations of class and wealth play an important part, and will limit their freedom to marry considerably.

Montesquieu explains that the women of monarchies marry at an age when they have more reason and knowledge; they are given a greater degree of governance over their homes and children by their husbands and society and more opportunity to develop their rational capacities. Although the woman owes an unlimited respect to her husband, she is not his domestic slave, nor is he to guard her as a child. In monarchies, “a kind of equality between the two sexes has been introduced.”64 Therefore, love is more possible in the marriages of monarchy than in the other governmental forms, although love is not a primary consideration or a guarantee in the making of aristocratic marriages, since the unification of goods, property, and distinctive rank of the families must be preserved.65

64 *Spirit*, XVI.2, 265

65 And Tocqueville notes that because of this, in aristocracies, “it sometimes happens that the husband is picked while in school and the wife at the wet nurse. It is not surprising that the conjugal
Outside of marriage, the mores of monarchy allow women to interact with the opposite sex, and encourage them to be loyal to their spouse. While the political laws and principle of honor incite women towards immodesty, it appears that the mores encourage women to abide by the basic requirements of sexual morality, insofar as they encourage modesty and sexual continence, without the need to separate the sexes. However, a side effect of this social liberty and status is to draw the woman away from her home and to make the idea of pregnancy and the fulfillment of domestic roles problematic for her as well.

When writing about the fertility of women, Montesquieu makes a comment that seems to best describe the women of monarchy. He writes that although women’s biological fertility is fairly consistent, women’s psychological openness to pregnancy is not:

…the way of thinking, character, passions, fantasies, caprices, the idea of preserving one’s beauty, the encumbrance of pregnancy, [and] that of too numerous a family, disturb propagation in a thousand ways.

Women experience powerful enticements to seek entertainment and society outside of the home and have the leisure to pursue them. This makes them feel ambivalent about

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66 “One is fortunate to live in these climates that allow communication between people, where the sex with the most charms seems to adorn society and where women, keeping themselves for the pleasures of one man, yet serve for the diversion of all.” Spirit, XVI.11, 272.

67 And Montesquieu warns that romantic communication with women can have bad political effects. Men constantly enamored by women become indolent. They engage in a: “commerce of gallantry that produces laziness and causes women to corrupt even before being corrupted, that puts a high price on every trifle and reduces the price on what is important, and that makes one no longer conduct oneself by any but the maxims of ridicule that women understand so well how to establish. Spirit, VII.8,104. It is therefore the polite society of women and not the romantic involvement with them that Montesquieu encourages.

68 Spirit, XXIII.1, 427.
the sacrifices involved in bearing and raising children, and so the irony is that in the regime (of the three) most hospitable to her maternal capacities, which establishes the marriage style most likely to yield a sexually affective companionship with her husband, and which gives the woman the most freedom to bear and take care of her own children, she also experiences powerful deterrents from enjoying and submitting to these natural tendencies, liberties, and responsibilities. The aristocratic woman of monarchy is prone to flee from her reproductive and domestic roles.

As an aside, in light of the cumulative tendencies of the woman of monarchy to moral weaknesses like vanity, self-indulgence, emotional drama, and to abandon her marital, maternal and domestic responsibilities, one wishes monarchy could better inspire women to develop their natural talents in a manner that was not so self-interested. It would have been interesting for Montesquieu to have said something about the women in the lower classes of the French monarchy, or the women of the British constitution, since these women were not influenced (or as influenced) by considerations of honor, class, and property as the aristocratic women of the French monarchy. Perhaps these women would fulfill the requirements of natural law and right without the added layer of self-interest. More interesting still would have been observations of the mores of the women in America fifty years later, as fortunately Tocqueville provides in the spirit of Montesquieu.

Tocqueville describes the “superior quality” of the women of America, women who live in a society where honor and class distinctions are absent, and where divided

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69 He notes that in the nation that has liberty as its purpose, “women should scarcely live among men. Therefore, women would be modest, that is, timid; this timidity would be their virtue….“ *Spirit*, XIX.27, 332.
and free government is operative. He finds feminine but “virile” women, who exhibit a manly reason, courage, and energy, practically “men in mind and heart” although they preserve a feminine appearance and manners. The women of the free republic of America demonstrate an ability to submit their passions and will to the demands of “cold and austere reason,” which gives them an “independent spirit.”\textsuperscript{70} They marry freely and choose their spouses well, and after marriage, embrace their domestic and motherly responsibilities with loyalty.

They do, however, seem to lose an element of the charm, playfulness, vivacity, and gaiety that women of monarchy have. For in America, the need of married men and women to be fully engaged in their professions or domestic responsibilities so as to survive and support the family tends to separation of the sexes and social isolation, such that there is not the leisure nor opportunity for the opposite sexes to intermingle or develop friendships once they cross the threshold of marriage.\textsuperscript{71} The American context encourages a seriousness of purpose and gravity of mores in the psyche of the married American woman, so that they generally do not develop their aesthetic interests in beauty and fashion, or yield to their passions for a communicative and lively social life as their counterparts in monarchy are able to do. However, it is more open and encouraging of women to develop a less indulgent, stronger, moral character in accordance with their nature.

Even though the woman of Montesquieu’s monarchy will tend to exhibit a variety of moral weaknesses, and find it challenging to follow the laws of morality as

\textsuperscript{70} II, iii. 10-12. p, 565-575

\textsuperscript{71} II, iii. 11. p, 571
they direct her to be faithful to her marriage, and embrace her role in reproduction and motherhood, the condition and character of this woman are superior to those of her counterparts in despotism and republic. The woman of monarchy has far more freedom, equality, and an ability to express her rational and passionate nature, and natural roles in reproduction, than the women of the other regimes possessed. Although the principle of honor will tend to create vain, self-indulgent, acquisitive women, who tend to be immodest, the principle does not require such women. There is moral space here for aristocratic women who live social and worldly, fashionable, commercially-involved lives, but who also endeavor to restrain their acquisitiveness, self-indulgence, immodesty, and emotions, so as to develop their intellectual capacities and better embrace their unique roles in the family as well as society at large.

If Montesquieu is right that the condition and character of the woman are key indicators of the degree of liberty and morality practiced in a society, then the woman of monarchy demonstrates that this regime practices the highest levels of liberty and morality of the three main government forms. Monarchy does not force women to be morally virtuous or excellent, in contrast to republic, but tolerates (even encourages) a variety of vices of character that promote class distinctions, and allows women the freedom to choose the degree of moral excellence they will pursue. At the same time, monarchy does not abuse the nature and rights of women, or require them to tolerate serious violations of natural right, as despotism does. Monarchy is the most moral of the three forms. Although it gives priority to its political need to promote honor and class distinctions, it also defends the requirements of natural laws and natural rights.
Conclusion

Montesquieu’s political science does not contradict his commitment to a natural law and natural rights moral theory. He gives priority to political science insofar as it determines the way in which a legislator may incorporate the requirements of morality into the rule of law, but does not deny the importance of moral theory for political science. Moreover, monarchy represents the government form that is most hospitable to the requirements of liberty and morality. The condition and character of the women there indicate that monarchy best abides by a natural law, natural right code of morality.

The next chapter will focus upon the civil laws of monarchy, rather than the civil laws of republic or the British constitution, to study how Montesquieu recommends legislating sexual morality. As we have just seen, it is not desirable for us to study the civil laws of republic because they cannot abide by the requirements of natural laws and rights, and it is not possible to study the civil laws of the British constitution because he does not say enough about them to draw substantial conclusions.

Does this mean that his case for legislating sexual morality in the classic monarchy is not pertinent to modern American studies? Although the differences between the classic monarchy and the United States government are not minor, if one has a firm grasp of the differences, especially the role that the principle of honor has in the crafting of civil legislation in monarchies, it is still useful and fruitful to study
the way in which his sexual morality influences the civil laws that regulate sexual behavior. For, as we will see, he provides specific examples of the way in which the civil laws can legislate the requirements of a limited, non-perfectionist, (justice-based) natural law and natural rights sexual morality in a manner that promotes political liberty. That is the central question we Americans need to address today.
CHAPTER 4

THE REGULATION OF SEXUAL MORALS
IN MONARCHY

Introduction

The previous two chapters argued that Montesquieu endorses a non-perfectionist, natural law, natural rights moral theory that aims to promote political liberty, does not contradict his political science, and which is most compatible with monarchical forms of government.¹ This chapter turns to how Montesquieu legislates sexual morality in the context of monarchy.

In the same way that there are different schools of thought as to whether Montesquieu is a moral relativist, a moral absolutist or something in tension in between, there are related schools of thought as to whether he designs the laws of monarchy to enforce morality. The majority view, which is related to the position that Montesquieu is a moral relativist, is that he does not fashion the laws of monarchy to enforce a particular conception of the good but is in strong accord with the

¹ Sometimes I will simply refer to Montesquieu’s “moral theory” to signify his natural law, natural right moral theory.
contemporary values of John Rawls. This group includes Judith Shklar and Michael Mosher.²

The minority view, which is related to the position that Montesquieu defends moral absolutes in the form of a natural law theory, argues that he envisions a limited use of the law to defend a limited conception of the good in monarchy. This group includes C. P. Courtney and David Carrithers. Although these thinkers do not address the enforcement of sexual morals in Montesquieu’s writings, this chapter will show that their view is correct as it pertains to sexual regulation.

Mosher represents the first view most forcefully and makes three supporting claims for it. First, he argues that Montesquieu’s republic and monarchy are opposed precisely because republic is a perfectionist regime and monarchy is an anti-perfectionist regime. Second, he claims that the anti-perfectionism of monarchy not only avoids inculcating virtue in the citizenry but further avoids enforcing any conception of the moral good.

If Montesquieu’s understanding of the republic was couched in terms of its overcommitment to public life, his understanding of monarchy suggests undercommitment. The monarchy was generous about the particular ‘differences’ that could be accommodated within its territory….Monarchy was characterized by social differentiation and not moral unity…it lacked a permanent substantive content as it was subject to the changing understanding of divided subcommunities within the nation.³

² Shklar argues that Montesquieu’s vision for the civil laws of the monarchy is anti-perfectionist and enforces no unified concept of the good, especially as regards private, consensual acts. She argues that Book XII of Spirit demonstrates the opposite of what I argue, that “The single most important requirement for the realization of liberty is that only a very few misdeeds should be criminalized at all….Sexual deviations are, at worst, forms of self-neglect, and as such not the business of public law.” Shklar, Montesquieu, 89-90.

Third, Mosher claims that as a result of this undercommitment, Montesquieu’s monarchy stands not only for free trade and free speech, but also and most relevant for this chapter, for free love:

Since so much of the repressive legislation of the classical republic focused on family matters and especially on women, Montesquieu’s demonstration that monarchy is more liberal than the republic begins with the demonstration that there is no political reason why one should not simply applaud the greater liberties of women under the monarchy. [T]he heroic and also libidinous woman choosing a society of lovers over familial association had been his preferred figure of the politically free society. Enlightenment, moreover, requires the free activities made possible from participation in a society beyond the borders of family and tribe. Montesquieu thinks only of the benefits of being rid of mores that are too pure. The method carries men and women beyond the exchange of goods (free trade), even beyond the exchange of partners (free love) to an exchange and debate about norms (free speech). The latter implicates the very idea of the good, which has now become negotiable and seemingly uncontrollable by any gatekeeper other than the autonomous good sense of the communicating participants.  

The previous chapter made the case that Montesquieu did not believe the woman of monarchy is as pure as the woman of republic, but that nevertheless, she is morally superior to the woman of the despotism and lives a life more in accordance with her nature than the woman of republic. We also saw that the woman of monarchy does have tendencies to be immodest and unfaithful to her marriage and domestic roles but we have not yet addressed whether Montesquieu prefers that monarchy be rid of “mores that are too pure” and its women embrace free love, as Mosher claims. 

The second group defends the view that Montesquieu envisions a limited use of the law to defend a limited conception of the good in his monarchy. As Carrithers puts it, Montesquieu:

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4 Mosher, p. 18
draws no bright line between acts involving morality and public acts that involve one’s actions as a citizen. Acts of private immorality may indeed be regulated by criminal sanctions on the assumption that such conduct may have implications for public order, or even for the stability of government….  

These scholars, however, do not provide a more complete picture of the way in which the laws of the monarchy might enforce sexual morality.  

The main goal of this chapter is to provide that more complete picture by bringing together the evidence from *Spirit* that shows how the civil laws of monarchy do, in contemporary language, promote a conception of the moral good, or in Montesquieu’s language, enforce his understanding of natural laws and natural rights as regard marriage, procreation, divorce, adultery, homosexuality, polygamy and sexual modesty. I will show that interpretations like Mosher’s are incorrect.

In the process, this chapter also will note the moments where Montesquieu is not consistent with his natural law and natural rights theory and highlight where the principle of honor influences the way legislators of monarchies ought to craft laws. Sometimes, aspects of his civil laws are not fully consistent with his natural law, natural right moral judgments, and those moments undermine the value of his work for my project to see whether his moral theory can help legislators understand how the laws might legislate sexual morality. At other times, the principle of honor has a

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6 C.P. Courtney argues that what distinguishes Montesquieu from Grotius and Pufendorf is that while there was still a disconnection between the natural law and the positive laws of these former thinkers, Montesquieu’s achievement was to develop a coherent system of positive laws (both political and civil) that was in harmony with his natural law principles. However Courtney does not argue further, as I do, that the four categories of criminal law are the primary means by which Montesquieu’s natural law theory is enforced by the civil laws. C.P. Courtney, "Montesquieu and Natural Law," in *Montesquieu's Science of Politics: Essays on the Spirit of the Laws*, ed. David Carrithers, Michael A. Mosher, and Paul A. Rahe (Lanham: Rowman & Littlefield, 2001), 59.
role in the way Montesquieu legislates sexual morality for monarchy in ways that are not fully pertinent to a government like ours, which also undermines the value of his recommendations for my project. By highlighting these moments, my aim is to help us keep in mind what aspects of his laws are worth our consideration and what aspects are not, so that we may either reject those recommendations or suggest a civil law that would be more consistent with his natural law and natural right theory and pertinent to a society like ours.

Marriage and Procreation Laws

Montesquieu argues that it is in the state’s interest that people engage in sexual activity within marriage, that many people marry, and that many marriages have children. His marriage laws reflect these views.

Montesquieu notes that he is unsatisfied with the measures that the French legislators of his day were employing to encourage healthy marriages and strong reproduction rates. Louis XIV’s Edict of 1666 granted pensions to families that had more than ten children, but he quips that “…it [is] not a question of rewarding prodigies. In order to give a certain general spirit that would lead to the propagation of the species, general rewards or general penalties had to be established as among the Romans.”

Montesquieu selects Rome as a model for the French monarchy for two reasons. First, due to its military activities, Rome lost substantial citizens and had significant depopulation problems but was able to craft legislation that effectively

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7 *Spirit*, XXIII.27, 453.
responded to this. Montesquieu believes Europe also had serious depopulation problems during his time. Second, the mores of the post-republican Roman Empire were comparable to the mores of the French monarchy. Although Montesquieu does not indicate that French mores were as corrupt as post-republican Rome, he sees that both regimes had a monarchical form, which fostered disparities of wealth and a culture of luxury, which decreased the citizens’ interest in marriage and procreation and increased promiscuity levels. Therefore, in order to “give a certain general spirit” that favors marriage and reproduction he argues that the laws must take these economic and social circumstances into account as Rome did.

During the early Roman republic, the laws required every citizen to marry and to raise his children, but by the time Augustus came to power, the general citizenry had a “distaste for marriage” and childrearing. Therefore, Augustus crafted legislation to encourage marriage and reproduction. Called the *Lex Papia et Julia*, these laws endeavored to 1) regulate what sorts of marriages could be made, 2) reward the couples with many children, and 3) penalize those who were not married

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8 The Romans, by destroying all peoples, destroyed themselves….I shall say what they did to replace not the loss of citizens, but that of men…as they were the people in the world who best knew how to fit their laws to their projects....” *Spirit*, XXIII.20, 440.

9 See *Spirit*, XXIII.10-15, 433-36. As in previous places, Montesquieu speaks primarily of the aristocratic classes of the monarchy. Since the poorest classes of monarchical society depend upon the wealthiest to survive (so that they will be employed to provide the comforts of luxury, VII.4, 99), it is possible that these classes do not experience the same deterrence from reproduction, though Montesquieu does not clarify.


11 *Spirit*, XXIII.21, 441-42.
or who had no children. Montesquieu calls these measures “the finest part of the Roman civil laws.”

As regards what sort of marriages could be made, the laws placed limitations on the length of time a couple could be engaged (no more than two years), and upon the age of the partners. The age of the spouses had to be within reason and favor fertility and reproduction. Men had to marry women who were nubile and fertile (not younger than twelve, no older than fifty), because the state did not want “useless” marriages or the citizens to “enjoy uselessly.” Men of rank could not marry below their rank and women who had led a “dissolute life” or who had appeared in the theatre could not marry freemen. These last two provisions were in accordance with the spirit of the monarchy and the principle of honor.

Those who married and had children were rewarded in practically every aspect of life.

These privileges were very extensive, the married people who had the greatest number of children were always preferred, both in the pursuit of honors and in the exercise of those same honors. The consul who had the most children took the fasces first; he had the choice of provinces; the senator who had the most children was the first inscribed in the catalog of senators; he gave his opinion first in the senate. One could attain magistracies before the required age because each child counted for one additional year. If one had three children in Rome, one was exempt from all personal charges. Free women who had three children and freed women who had four came out of that perpetual wardship in which the old Roman laws kept them.

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12 Spirit, XXIII.21, 443.

13 Spirit, XXIII. 21, 445.

14 Spirit, XXIII.21, 444.
In addition to such rewards, Augustus reestablished the Lupercalian festival, so as to purify the people’s sexual mores, their marriages, and encourage their fertility through holiday rather than law.15

On the other hand, the penalties for those who did not marry, or who did not have children, targeted what the unmarried citizens valued, namely their luxury. For example, one could not be an heir if one did not marry and have children.16 And women under forty-five who were unmarried and without children were forbidden to wear precious stones or use litters, which Montesquieu praises as “an excellent method of attacking celibacy through vanity.”17 These measures were appropriate for the nature of a monarchy and the principle of honor there, which create vain and acquisitive women and citizens.

The diversity of ways in which the laws of Augustus regulated, rewarded, and encouraged marriages, as well as the striking ways in which he penalized those who

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15 The Lupercalian festival, held in honor of Lupercus, the god of fertility, took place on February 15 each year, and was the precursor to the modern St. Valentine’s day. This public feast included the sacrifice of two male goats and a dog, animals known for their potent sexual instincts. Two young noblemen were anointed with the blood of these animals; a meal followed, a lot of wine, and the partial dressing of the young men in the animals’ skins. Then the young men were given bands of the skins to hold as they ran playfully through the streets of the city, whipping anyone who drew near, most especially the women, so as to purify and promote their fertility. Plutarch recorded that: “at this time many of the magistrates and many young men of noble families run through the city naked, and, in their jesting and merrymaking, strike those whom they meet with shaggy things. And many women of high rank purposely stand in their way and hold out their hands to be struck, like children at school. They believe that the effect will be to give an easy delivery to those who are pregnant, and to help the barren to become pregnant.” However Montesquieu notes Augustus’s version of the festival was reformed to promote modesty, for when “Augustus …reestablished the Lupercalian festival, he did not want the young people to run around naked” (nor did he want the youth to participate in nightly activities without a chaperone). Spirit, XXIV.15, 470. By the re-establishment of the Lupercalian festival, Augustus aimed to promote his goal of increasing public interest in marriage and procreation through holiday and play. Leonhard Schmitz, “"Lupercalia,"” in A Dictionary of Greek and Roman Antiquities, ed. William Smith (London: John Murray, 1875), 718. Plutarch, Fall of the Roman Republic: Marius, Sulla, Crassus, Pompey, Caesar, Cicero: Six Lives, ed. Robin Seager (Harmondsworth, London: Penguin, 1972), ch.61.

16 Spirit, XXIII.21, 444-45.

17 Spirit, XXIII.21, 442.
did not marry, might lead modern readers to question whether Montesquieu truly meant for legislators of monarchies of his time to think of imitating such a comprehensive involvement of the law in the regulation of marriage. Montesquieu indicates that the answer is yes.

Indeed, with no other institution does Montesquieu concern the legislator or the civil laws so emphatically and comprehensively as he does with marriage. He distinguishes between the role that religion may have in regulating marriages and the role the laws should have. He first acknowledges that the religions of “all countries and all times” have regulated marriage, but he argues that the state has a special interest in regulating marriages, for “as of all human acts marriage is of most interest to society, it has certainly had to be ruled by civil laws.” He then distinguishes which matters are pertinent to religion and which are pertinent to the state:

All that regards the character of marriage, its form, the way it is contracted, its fruitfulness, and all that has made every people understand that marriage is the object of a particular benediction which, as it was not always attached to it, depended on certain higher favors; all the above belongs to the spring of religion.

The consequences of this union relative to goods, to reciprocal advantages, to all that is relative to the new family, the one from which it has come, and the one that will be born, all this concerns the civil laws.18

Whereas religion has valid reasons to regulate the way in which marriages are officiated and contracted, their “fruitfulness” or fertility, and under what terms god blesses a marriage, the civil laws have valid reasons to regulate matters of private property, the rights and privileges each member of the family owes and enjoys, and “all” that is relative to the new family, the former family, and the future family. This

18 *Spirit*, XXVI.13, 505 (my emphasis).
is tantamount to saying that the civil laws may regulate anything and everything that is not exclusively religious as regards marriage.

Although he does not dictate, in a dogmatic fashion, that the laws of the French (or any) monarchy should copy the laws of the Romans, he selects Augustus’s measures as models for monarchical legislators to study closely and follow according to their own spirit and historical needs. For Augustus understood the effects of luxury, vanity, acquisitiveness and class distinctions upon the citizens, but he also understood the natural obligations of the human race in regard to marriage and reproduction, and the political and civil need to encourage marriages and reproduction.19 They enforce Montesquieu’s natural law, natural right understanding of the obligations of marriage.

The marriage laws of the Romans have a monarchical quality insofar as they penalize unmarried or unfruitful citizens with punishments that take away luxuries or property rights, penalties that citizens of monarchies find especially difficult to bear. The Roman laws are also unique insofar as they respond aggressively to the urgent historical need to increase the size of the population, a need that Montesquieu believed Europe also had.20 Therefore, on these two points his marriage laws may not be pertinent to societies like ours, which are not monarchical or necessarily suffering from such serious depopulation problems.21

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19 See especially Augustus’s speech, which Montesquieu reproduces at XXIII.21, 442, with which Augustus chastises those of his Roman knights who had refused to marry while living sexual liberality outside of marriage. He charges them to live according to the laws of modesty, take a wife, and nourish their children.

20 Spirit, XXIII.26, 453

21 Though our modern U.S. does have a commercially advanced and in some respects a culture of luxury, and some public leaders have showed concern that U.S. citizens are not reproducing at the
Montesquieu concludes his study of the *Lex Papia et Julia* by laying down a principle that the strength of marriages depends upon high rates of married citizens, and conversely, that the fewer marriages there are, the weaker existing marriages will be.

It is a rule drawn from nature that the more one decreases the number of marriages that can be made, the more one corrupts those that are made; the fewer married people there are, the less fidelity there is in marriages, just as when there are more robbers, there are more robberies.\(^\text{22}\)

From now on, I will refer to this as the “strength of marriage” principle.

**Divorce Laws**

Divorce, Montesquieu argues, is a practice that can protect the health of marriages when properly regulated. He defends the option for divorce in all regimes, including the monarchy, and criticizes those who argue that societies should not permit divorce, on the grounds that prohibitions on divorce are drawn from ideas of Christian perfection, and are out of place in this-worldly societies, which do not seek perfection but a political and civil utility that advances the general moral good, rather than particular individuals’ virtue or personal sanctity.\(^\text{23}\)

\(^{22}\) *Spirit*, XXIII.21, 450.

\(^{23}\) “The laws of perfection, drawn from religion, have for their object the goodness of the man who observes them, more than that of the society in which they are observed; civil laws, on the other hand, have for their purpose the moral goodness of men in general, more than that of individuals” (XXVI.9, 502). To make his point, Montesquieu takes the example of marriage and divorce as viewed from the civil versus religious perspectives. Montesquieu explains that under the Roman monarchy, Constantine made a law that regulated divorces initiated by wives whose husbands had gone to war. “When a woman whose husband was at war no longer received word of him, she could, in earlier times, easily remarry, because the power to divorce was in her hands. The law of Constantine wanted her to wait four years, after which she could send the document for the divorce to the commander; and,
The political utility of divorce is that it favors reproduction, the creation of the next generation of citizens to preserve the political community. A married couple that is estranged while living under the same roof is a sterile couple that will not create more children for the political community.\textsuperscript{24} The civil utility of divorce is that it provides a way out for couples in conflict. By alleviating strife in conflicted homes, divorce promotes civil peace.\textsuperscript{25} Montesquieu concedes that divorce is not a perfect solution to marital strife. “Ordinarily divorce has great political utility, and as for its civil utility, it is established for the husband and the wife and is not always favorable to the children.”\textsuperscript{26} Children may suffer the separation of their parents in a significant way, yet he does not see this as a reason to prohibit divorce altogether. This may be

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\item Therefore, if her husband came back [from war], he could not accuse her of adultery.” Montesquieu praises this law as promoting the public good, which did not desire there to be unmarried women, and as promoting the particular interests of the women, who did not desire to be exposed to dangers without their husbands. By contrast, Montesquieu compares this law to the Catholic, religious perspective, which sees marriage as an indissoluble union of husband and wife. Under this perspective, so long as the husband is alive on the battlefield, the wife cannot marry another. When Justinian, a Christian, came to power, Montesquieu reports that he changed the law to better conform to the Christian spirit. “Justinian established that, however long it had been since the husband’s departure, she could not remarry unless she proved the death of her husband by the deposition and oath of his commander. Justinian had in view the dissolubility of marriage, but one could say that he had it too much in view. He asked for a positive proof, when a negative proof sufficed; he required a very difficult thing, an account of the fate of a man far away, and exposed to many accidents; he assumed a crime, that is, the desertion of the husband, when it was very natural to assume his death. His law ran counter to public good by leaving a woman unmarried; it ran counter to particular interests by exposing her to a thousand dangers.” To Montesquieu, divorce is not in violation of the order of natural right, nor in violation of the order of civil right, so that those who argue that divorce should not be legal are confusing the order of religion, of perfection, with the order of civil right, of the general good of preservation.

One might add that religion views marriage as a covenant between God, and the couple. Since religions understand god to be perfect, and one who cannot change, his approval of a valid marriage covenant is likewise permanent. The state, by contract, views marriage as a civil contract between man and woman. Since men and women are imperfect and changeable, the terms of the contract can change and the reasons for the contract can end.

\item Montesquieu, \textit{Persian Letters}, Letter 116-17. See also, Rosso, \textit{Montesquieu Et La Feminite} 494-95.


\item \textit{Spirit}, XVI.15, 275.
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because, as we will see, he supports a divorce policy that requires parents to mutually consent to the divorce, which increases the likelihood that the needs of the children will be taken into account and offsets this disadvantage. First, however, let us look at his understanding of divorce and its acceptable grounds.

Montesquieu defines divorce as the dissolution of a marriage based upon mutual consent and mutual incompatibility, and he distinguishes it from repudiation, when a marriage is dissolved by the act of only one of the two spouses:

A difference between divorce and repudiation is that divorce occurs by mutual consent on the occasion of mutual incompatibility, whereas repudiation is done by the will and for the advantage of one of the two parties, independently of the will and the advantage of the other.27

This definition also reveals his proper grounds for divorce. First, consent must be given by both spouses and second, it should be grounded upon a shared opinion that they, the spouses, are incompatible.28 These grounds, or conditions, for divorce are more restrictive than contemporary United States policies, which permit divorces in cases where only one party dissolves the marriage, even against the will of the other party (so-called “no-fault” or unilateral divorce). Montesquieu understands this to be repudiation and not divorce.

He suggests that the divorce policy he endorses can be an aid to protect marriages because it will not permit marriages to dissolve easily and will encourage spouses to talk through their differences and only turn to divorce as a last resort, when their conflicts cannot be resolved otherwise. “Repudiation seems rather to stem from

27 *Spirit*, XVI.15, 274

a quickness of spirit and some passion of the soul; divorce seems to be a matter of counsel.”

In addition to the requirements that the decision be mutual and based upon mutual incompatibility, he argues that both parties must try to remarry after the divorce and that neither party may enter the religious life after the separation. The last two conditions follow from the “fundamental principle of divorce” which “suffers the

29 *Spirit*, XVI.15, 275. Now, a passage towards the end of *Spirit* seems to contradict this interpretation, for Montesquieu appears to concede at one point that unilateral separation can also constitute proper divorce. In Book XXVI, he states that: “If divorce is in conformity with nature, it is so only when consent is given by the two parties, *or at least one of them*; and when neither the one nor the other consents to it, divorce is a monster. Finally, the faculty of divorce can be given only to those who bear the discomforts of the marriage and who sense the moment when it is in their interests to make them cease.” *Spirit*, XXVI.3, 496-97 (my emphasis). In this passage, Montesquieu seems to concede that divorce may take place even if only one party consents to it, against the will of the other, thereby seeming to contradict his original definition of divorce as distinct from repudiation. However, this contradiction can be resolved if one notices that Montesquieu is speaking from the natural point of view in this second passage (“if divorce is in conformity with nature”), rather than the legal point of view, the view he takes in the original passage (where he studies the different divorce laws around the world).

As a legal matter, i.e., within civil society, marriage is a legal contract. As with other contracts that cannot be dissolved by the say-so, or change of heart, of one party alone, Montesquieu takes the position that certain grounds must be met to show that either the contract was breached and therefore dissolved, *or* both parties to the contract agreed to dissolve the contract.

By contrast, in the state of nature, Montesquieu suggests that the contractual character and obligations of marriage are less clear. The laws of nature propel the two sexes to come together and reproduce, and by natural right, there is an obligation to unite to one’s sexual partner for the sake of the woman and the children, who need protection and care.29 But by nature, it is not clear whether it is unjust if only the husband or the wife agree to the dissolution of the marriage. For instance, one can imagine a family in the state of nature in which the children have been raised to maturity, and are in a position to take care of their mother, such that the father determines he is no longer necessary to protect and care for them, and he decides to leave his wife and marry another. In this case, this man has met his natural obligations to support his wife and children until they no longer rely upon him for that support.

Montesquieu’s hesitation reveals the view that the contractual nature of marriage is less clear in nature than it is within civil society. His choice of words, moreover, reveal that hesitation because he speaks in the hypothetical: “If divorce is in conformity with nature, it is so only when consent is given by the two parties, *or at least one of them*; and when neither the one nor the other consents to it, divorce is a monster.”

The two passages show, then, that Montesquieu explores divorce from two different perspectives, the civil and the pre-political. Since this chapter is concerned primarily with Montesquieu’s civil law pronouncements, it is the original passage that carries the most weight here, and which in any case is not in contradiction with the second.
dissolution of one marriage only in the expectation of another.” He considers remarriage (or at least the attempt to remarry) to be a fundamental requirement for two reasons. First, the political justification for divorce is the reproductive one, so if divorced persons do not remarry, the situation is no better than it was when the couples were in conflict and unlikely to have more children. Second, it is unwise to have large numbers of unmarried persons in society, as this will weaken the institution of marriage in accordance with his strength of marriage principle. His divorce policy is crafted to encourage marriages to prevail, allow the unsuitable ones to dissolve, and encourage (if not obligate) the divorced to form new and more suitable marriages as soon as possible. The laws and policies explained earlier, which would encourage marriage and procreation, also would encourage those divorced to remarry and have children.

For the most part, his divorce policy is in accord with his natural law, natural rights views of marriage. The legal requirement that both spouses consent to the divorce helps to ensure that wives do not flee from their marital responsibilities for light reasons or that husbands do not fail to support their wives and children as the family grows. These requirements do not perfectly guarantee that spouses will fulfill their natural marital and family obligations, because one can envision a situation of such conflict that the spouses mutually agree that it is more important to seek peace (the first natural law and order of rights) than it is for them to remain together (the third natural law and order of rights). However, these requirements are not

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30 *Spirit*, XXVI.9, 504.

31 This is also why Montesquieu dislikes celibacy in all its forms, including religious celibacy.
inconsistent with, or outside of the bounds of, his broader natural law, natural right theory.

However, his tacit consent to condone divorce even when it is “unfavorable” to the children is not consistent with his natural law, natural right theory. Recall that he argues that marriage is an obligation of natural right on the grounds that the male in particular becomes morally obligated to unite faithfully to the woman (i.e., to marry her) in order to support her and any children that result from their sexual union. Children are especially dependent upon both of their parents for their survival and proper education. Therefore, it is inconsistent for Montesquieu to forego the needs of the children when the spouses seek to dissolve their marriage—even assuming they both freely agree to do so. As he demonstrates in his writings on prejudice in *Persian Letters*, self-interest often clouds the ability of persons to see what justice requires towards others.\(^{32}\) It is not reasonable to expect married couples in conflict to clearly see that they may owe it to their children to stay together. Therefore, it would have been more consistent for Montesquieu to add another condition for divorce: that the children of the marriage be raised to a certain age of independence, as Locke recommends.\(^{33}\)

With this caveat, Montesquieu’s three grounds for divorce, namely, that it be based upon mutual consent, result from mutual incompatibility, and be accompanied by a willingness to try to remarry, are generally consistent with his natural law, natural right theory, which understands reproduction to be vital for the preservation of


the species, but dependent upon the society of the family to be accomplished properly, in a manner that ensures support of the mother and child.\textsuperscript{34} In contemporary language, his divorce laws enforce a particular conception of the moral good as regards sexual unions and their dissolution.

It is also worth noting that Montesquieu does not say how the principle of honor would influence the way legislators should craft divorce laws in the monarchy.\textsuperscript{35} His divorce laws do not have a uniquely monarchical character that would prevent us from thinking about whether they would work in modern American circumstances.

\textbf{Adultery Laws}

As with his study of marriage laws, Montesquieu turns to the example of the Romans to think about how a monarchy might handle the crime of adultery. He notes that the early Roman republic considered female adultery to be such an extreme corruption of mores that it did not suffice to deal with it behind closed doors in the context of the domestic tribunal. Female adulterers were accused in public and the usual punishment was repudiation: a husband would reject his wife, and she would lose the privileges of her married state, as well as her reputation.\textsuperscript{36} Montesquieu

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\textsuperscript{34} Here I differ slightly from Schaub, who identifies two conditions for divorce, mutual consent and incompatibility, rather than three. \textit{Schaub}, Erotic Liberalism, p. 65
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\textsuperscript{35} Judging from his writings in Part 6 on the importance of land distributions for monarchical government, I imagine that legislators would have to carefully regulate the property rights of spouses when these seek a divorce, so that the division of goods does not weaken the power of the nobility. But he does not speak about such things when speaking about divorce.
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\textsuperscript{36} “The domestic tribunal was concerned with the general conduct of women. But there was one crime which, besides being reproved by this tribunal, was also submitted to public accusation: this crime was adultery, either because such a serious violation of mores in a republic is of interest to the
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draws attention to the fact, however, that only the wife’s adultery was punished with repudiation: “Romulus allowed the husband to repudiate his wife if she had committed adultery, prepared poison, or tampered with the keys. He did not give wives the right to repudiate their husbands. Plutarch calls this a very harsh law.”

The early Romans had a double standard, which Montesquieu does not refute.

By the time of the Roman monarchy, the policies on adultery had changed somewhat, but not significantly. Although the mores of the women did not have to be as pure as they had to be in republics, the Roman Empire still considered adultery to be a serious violation of mores. Montesquieu notes that an injured husband was permitted to appeal to the civil laws to accuse and punish his wife—but that the ancient texts are not clear about what sort of punishment she received. The traditional teaching during Montesquieu’s time held that a man could kill his wife if he caught her in an act of adultery, but he cannot confirm this in the texts. The law against female adultery was in the Digest, but the penalty was not included. He speculates that it was “exile by relegation, since that for incest was only exile by deportation” and adds that this penalty was “light.” Exile by relegation {relegatio} meant that a person was expelled from the political community for a temporary time or for life, but without the loss of civil rights. By contrast, exile by deportation {deportatio} meant that a person was expelled with the loss of civil rights and property, and usually under

government, or because the profligacy of the wife might imply that of the husband, or finally, because one feared that even honest people might prefer hiding the crime to punishing it, might prefer ignorance to vengeance” Spirit, VII.10, 106. See also V.7, 50.

37 Spirit, XVI.16, 275.

38 Spirit, VII.13, 108.
military observation. He also notes that the Roman emperors also judged the penalty of exile by relegation to be light, because they “wanted the penalty they had put into the law to be increased in the judgments” by the judge on a case-by-case basis. This detail is significant because Montesquieu offers a different teaching from what tradition had taught the Roman punishment for adultery had been (death).

The reason Montesquieu thinks that the penalty under the Roman Empire was light is because in comparison to the laws which penalized female adultery during the Ancièn Regime, exile was a light punishment. The entry on “Adultery” in *l’Encyclopédie* (1751) notes that in France female adultery had been punished with the deprivation of the marriage and its privileges (including the loss of her dowry), and also with a public whipping and her subsequent enclosure in a monastery. As a

39 “Exile,” in *Encyclopedia Britannica* (1911).

40 *Spirit*, VII.13, 108. Here Montesquieu differs from the traditional teaching, which held that Roman right permitted husbands to kill their wives surprised in the act of adultery, or alternatively appeal to the Roman courts to punish an adulterous wife with the death penalty. The article on “Adultery” in *l’Encyclopédie* notes, in contrast to Montesquieu’s report, that: “The ancient Romans [under the republic] had no formal law against adultery; the accusation and the penalty were arbitrary. The Emperor Augustus was the first who made one, and had the unhappiness of seeing it executed on the person of his own child: this was the *Julia* law, which carried the death penalty against the guilty: although by virtue of this law, the accusation of the crime of adultery was public and open to everyone, nevertheless it is certain that adultery has always been considered more a domestic and private crime than a public crime; such that it is rarely permitted for outsiders to pursue vengeance, particularly if the marriage was peaceful, and the husband did not complain himself… This is why the law in certain cases has established the husband as judge and executioner of his own case; and he is permitted to seek vengeance himself for the injury that was done, in surprising in the act the two guilty parties who have ravished his honor. It is true that whether the husband makes a public business of the debauchery of his wife, or witnesses her disorder and hides it, he suffers from it; thus adultery becomes a public crime; and the *Julia* law pronounced penalties against the husband as well as against the wife.” Therefore Montesquieu’s historical research offers a different conclusion: not that the Romans punished female adultery with death but that they permitted husbands to chastise their wives as they saw fit, as a matter of domestic (private) right, or alternatively, to have recourse to the civil law, which would allow the husband “only” to repudiate his wife, i.e., dissolve the marriage and punish her with the loss of the rights and privileges assigned to the married state, and not with death. The evidence Montesquieu provides is compelling. See VII.7, fn. 31-33. Jean Le Rond d’Alembert, Denis Diderot, Montesquieu, Voltaire, *Adultery*, trans. Collaborative Translation Project, The Encyclopedia of Diderot & D’Alembert (Ann Arbor: Scholarly Publishing Office of the University of Michigan, [1750] 2003).

41 The author of the article on “Adultery” explains: “We judge, with reason, and in agreement with the feelings of all peoples, that adultery is, after homicide, the most punishable of all crimes,
judge of the Parlement of Bordeaux who had served in the criminal section of that court, Montesquieu would have been familiar with this policy, and so the Roman punishment of exile without the loss of civil rights, and which did not include a corporal punishment or her physical enclosure, would have seemed light by comparison.

His own position on the punishment of female adultery is a combination of the policies of the Roman republic and the Roman monarchy. He offers a range of penalties that draws from these two sources: “Deprivation of the advantages that society has attached to the purity of mores, fines, shame, the constraint to hide oneself, public infamy, and expulsion from the town and from society.”42 The Roman republic punished female adultery with the loss of a woman’s reputation, and Montesquieu agrees with this social punishment of “public infamy.” The (post-republican) Roman Empire expelled a woman from the town without the loss of civil rights. Montesquieu also thinks expulsion is acceptable, though he does not clarify whether the one expelled would keep or lose her civil rights. This also means that Montesquieu found the punishment of exile to a monastery (the French method of exile) too light, and does not agree with the French policy that a woman be whipped because it is the most cruel of all thefts, and an outrage capable of inciting murders and the most deplorable excesses….The laws concerning adultery are at present much mitigated. The only punishment that is inflicted on the woman convicted of adultery is to deprive her of her dowry and of all her matrimonial rights, and to relegate her to a monastery. She is no longer whipped in fear that if the husband found himself disposed to take her back, this public affront would deter him.” Ibid.

42 *Spirit*, XII.4,190.
publicly or that she should lose her marriage (the latter also a punishment of the Roman republic).  

It is surprising to read that Montesquieu, who gained such renown for seeking to establish just proportion between punishments and crimes, would recommend such a harsh range of penalties for adultery. Perhaps he had in mind the tendency of aristocratic women to be immodest and unfaithful in their marriages, and wished to correct the effects of the political laws and principle of honor upon their moral character. In this light, his civil laws against female adultery are not surprising, and are compatible with his general efforts to legally protect and enforce the natural obligations of marriage.

However, the particular range of punishments for female adultery still seem out of character for him because they do seem harsh and unfair towards women. So, let us examine whether (1) his specific endorsement of such harsh punishments for adultery are proportionate to the nature of the crime, in accordance with his moral principles of justice and equity and (2) whether the double standard he condones, punishing female adultery but not male adultery, is justifiable in light of those same principles and his natural law theory.  

43 He also consents to the French practice of stigmatizing children born to adulterous parents as “illegitimate,” a practice that would fall into the category of punishing adultery by “public infamy.” “…one finds scarcely any bastards in the countries where polygamy is permitted; these are found in those where the law establishes a single wife. Concubinage has had to be stigmatized in these countries; therefore the children born of it have also had to be stigmatized.” Spirit, XXIII.6, 430-31.

44 The article on “Adultery” in l’Encyclopédie (1750) also shows that Montesquieu was supporting the norm of the time. The laws against adultery during Montesquieu’s time only permitted French husbands to accuse their wives of adultery, and not the other way around. “Currently, in the majority of European countries, adultery is not considered a public crime; only the husband can accuse his wife; the prosecution itself cannot do so, unless there has been a huge scandal. Furthermore, although the husband who violates conjugal trust is guilty as well as the woman, it is not permitted for her to accuse him, nor to pursue him because of this crime…” (Ibid.) Rosso also cites the French jurist Muyart de Voug|lans (1780) who reports that the punishment of male adultery was entrusted to the decision of the
The first main question is whether Montesquieu’s range of punishments is proportionate. That adultery is a crime against the natural obligations of marriage is fairly clear. In Montesquieu’s moral view, justice towards the opposite sex requires that one engage in sexual activity only within marriage, conceived monogamously. Once a person marries, justice requires that one engage in sexual activity only with that person, who likewise surrenders the ability to marry anyone else (or have a sexual relationship with anyone else). Therefore, adultery is a moral crime, but it is also a civil crime because adultery is an act of injustice and a breach of contract with another citizen. It is a political crime because it endangers the propagation of the species (future citizens) insofar as it fails to respect the proper conditions for raising a child. Therefore, out of considerations of natural right, civil right, and political right, Montesquieu concludes that adultery ought to be penalized harshly. In light of this, one can better understand his judgment. In theory, there is a due measure or a just proportion between this (moral, civil, and political) crime and the punishments he suggests.

The difficulty with Montesquieu’s position on adultery is not due to the proportionality of the crime to the punishments but rather to a separate issue that he raises in regard to homosexuality, namely, the question of whether it is procedurally just to try a crime of this sort. As we will see below, he argues that it is difficult to prove that the crime of homosexuality has taken place because it is an act that is normally hidden, and one cannot find reliable witnesses to prove it took place, and thus, while the laws should prohibit homosexuality, it should not be prosecuted.

judge on a case-by-case basis. Muyart de Vougans, (Pierre Francois) Les loix criminelles de France dans leur ordre naturel dédiées au Roi (par M.M.d.V.) P., Merigot le Jeune, Crapart, Morin, 1780, p. 223, in Rosso, p. 504.
Adultery is of the same character, because it too is a hidden crime, yet Montesquieu argues that adultery should be prosecuted and punished. It would have been more consistent for him to argue that while adultery is a serious violation of natural right (civil right and political right) and so ought to be a civil crime, the laws should not prosecute and punish it.

The second main question is whether it is consistent for Montesquieu to endorse the double standard that female adultery be a crime, but not male adultery. He defends his position while commenting upon an early French law (a Franco-Germanic law) that gave women a right to accuse their husbands of adultery in the same way that their husbands had. Montesquieu argues that this policy was contrary to good sense:

As the husband can ask for separation because of the wife’s infidelity, the wife could formerly ask for separation because of the infidelity of the husband (Beaumanoir, Coutumes de Beauvaisis, chap 18). This usage, contrary to the provision of the Roman laws, was introduced in the courts of the church, where one only attended to the maxims of canonical right; and indeed, considering marriage only according to purely spiritual ideas and to its relation to the things of the next life, the violation is the same. But the political and civil laws of almost all peoples have, with reason, distinguished between these two things. They have required a degree of restraint and of continence from women that they do not require from men, because the violation of modesty presupposes in women a renunciation of all virtues, because a woman in violating the laws of marriage leaves her state of natural dependency, because nature has marked the infidelity of women by certain signs; besides, the bastard children of a wife belong necessarily to the husband and are the husband’s burden, whereas the bastard children of a husband neither belong to his wife nor are her burden.  

Here he makes two basic arguments. First, he notes that the equal treatment of male and female adultery was derived from Christian teachings on marriage, which aimed

\[45\] Spirit, XXVI.8, 502
at perfection, and as revealed doctrines beyond the requirements of natural reasoning.\textsuperscript{46} As evidence for this, he cites the differences between the male and female natures. Recall from chapter two that by nature (and specifically by the third law of nature) women have an instinct to be modest towards the sexual act, whereas men have an instinct to be impulsive. Therefore, the woman who is unfaithful to her marriage must first go against her natural instincts, as well as her natural obligations to be faithful to her husband. By contrast, the man who is unfaithful goes against his natural obligations to be faithful to his wife, but does not do as much violence to his nature, which is impulsive. He also points out that the woman who engages in adultery neglects to think of her dependence upon her husband for support if she becomes pregnant. She behaves as if she were independently capable of raising her child alone, and so denies her nature in this second respect as well.

However, these arguments are not consistent with some aspects of his moral theory. Even though his theory asserts that man is more sexually impulsive than woman by nature, the \textit{married} man has chosen a wife to be the official outlet (for lack of a better term) for his sexual impulses. The married man does not have nature to excuse him, as for example, a single male might. Moreover, if staying faithful to one sexual partner is more than a male can achieve by his own natural strength, then polygamy would have to be excusable by natural law, which Montesquieu denies to be the case in the vast majority of instances. Even in the rare instances where a

\textsuperscript{46} This argument is analogous to the argument he made about divorce. Montesquieu suggests that in the same way that policies against divorce are grounded in Christian perfectionism and are out of place in this worldly-societies, policies for the equal treatment of adulterous behavior of men and women are also grounded in ideas of Christian perfection.
serious demographic disproportion requires polygamy to be established for the preservation of the species, he argues that it is always against natural right because polygamy establishes “domestic slavery” for women, i.e., it treats women unequally. If the double standard is not acceptable in the case of polygamy, then he should not accept it in the case of adultery.

Montesquieu makes an additional argument for the double standard, which we will see again in the next chapter, since the contemporary liberal theorist Richard Posner raises it also. This slightly more convincing argument is about the possible consequences of an adulterous affair. Montesquieu argues that female adultery is worse than male adultery because if the adulterous female becomes pregnant, then her (cheated) husband must take responsibility for the child (perhaps unknowingly), whereas a married man who is unfaithful to his wife and has a child out of wedlock does not burden his wife with his illegitimate child. This argument is more convincing to show that female adultery is potentially more unjust to the spouse than male adultery is. (I say “potentially” because it depends upon the wife conceiving and bearing an illegitimate child.) However, if an adulterous man does not burden his wife with his illegitimate child, he burdens his lover, who must support and raise the child without the father. Therefore, male adultery that results in a child out of wedlock is also unjust, though the injustice is transferred to the lover rather than the wife. Altogether, Montesquieu does not show that, from a civil point of view, female adultery is worse than male adultery, though from the point of view of domestic right, or the obligations of the spouses to each other, female adultery is potentially worse.
All in all, Montesquieu’s policies regarding adultery show that he does aim to advance a particular conception of the good as regards human sexuality that is mostly consistent with his moral views about marriage. To be more consistent, he ought to have argued against the double standard of his time. Whereas female adultery violates the female nature, and is a grave act of injustice, he ought to have noted that male adultery is also a grave act of injustice, and not beyond the natural abilities of the male nature. As a legal matter, he ought to have recommended that both forms of adultery be a civil crime, and yet not prosecutable crimes because their prosecution would likely violate principles of procedural justice.

In light of these inconsistencies between his justice-based moral theory and his double standard on adultery, this is one instance where we would not wish to consider imitating Montesquieu’s civil laws, but think about following a more consistent application of his theory, like the one I have outlined. It is also worth noting that Montesquieu does not directly address how the principle of honor should influence the way legislators should craft adultery laws in the monarchy.

**Homosexuality Laws**

Montesquieu’s proposes two legislative responses to homosexuality, one negative and the other positive. The positive approach is to employ the laws to prevent homosexuality from becoming established in society by encouraging natural social interactions between the two sexes and by encouraging citizens to marry. Montesquieu suggests that the most important and effective role of the law on homosexuality is to prevent the practice. However, in the negative vein, he also
argues that there should be a clear prohibition against homosexual acts by law, though citizens should not be accused, prosecuted or punished for this crime.

It is worth noting that some scholars conclude that Montesquieu decriminalizes homosexuality, i.e., that he does not believe homosexuality is a crime.\textsuperscript{47} The reason there may be confusion on this point is because he discusses homosexuality as part of a group of other crimes, which includes magic and heresy, some of which he does not think should be crimes. However, Montesquieu does not argue that homosexuality should be decriminalized.

Montesquieu distinguishes four categories of crime. The specific categories of crime that are relevant at this moment are the first two categories: 1) the category of crimes against religion, and 2) the category of crimes against mores.\textsuperscript{48} Now, Montesquieu argues in the case of magic that it should not be a crime, or that it should be decriminalized. In the case of heresy, he argues that it \textit{should} remain a crime against religion but that “one must be very circumspect in punishing it,” that is, that one should be very careful when punishing this crime.\textsuperscript{49} However, in the case of homosexuality, his command to legislators is firm: “Do not clear the way for this

\textsuperscript{47} Schaub notes that in XII.6, on the crime against nature, that “…before recommending the decriminalization of homosexuality (along with witchcraft and heresy), Montesquieu pleads his innocence of any design to lessen the horror in which homosexuality is held….I believe Montesquieu’s point would be that the real crime against nature lies in repressive definitions of virtue, which as it happens, have the effect of distorting natural sexuality.” Schaub, fn.14 p. 175-76. See also Shklar’s intimation that homosexual acts are private acts and so are not within the purview of the criminal law, p. 89-90.

\textsuperscript{48} Crimes against mores are: “…the violation of public or individual continence, that is, of the police concerning how one should enjoy the pleasures associated with the use of one’s senses and with corporal union.” \textit{Spirit}, XII.4, 190.

\textsuperscript{49} \textit{Spirit}, XII.5, 193.
crime, let is be proscribed by an exact police, as are all the violations of mores....”  

From the very beginning of the discussion, he states directly, so as to leave no room for doubt, that homosexuality should remain a crime:

   Please god that I may not diminish the horror that one has for a crime that religion, morality, and policy condemn in turn. It would have to be proscribed if it did no more than give to one sex the weakness of the other and prepare for an infamous old age by a shameful youth.  

This is not an instance of satire on Montesquieu’s part. He states twice that it should be “proscribed,” i.e., remain illegal, and he echoes his stance against homosexuality in later parts of the work. Homosexuality is grouped with magic and heresy in the discussion because they are all punished improperly by burning, and Montesquieu wishes to make the case that homosexuality ought to be dealt with in a different way. However, it is not grouped with magic and heresy because it should be decriminalized (as magic ought to be).

   Montesquieu explains why homosexuality must be dealt with in a different way than it was dealt with at the time (by prosecution, conviction, and burning), namely, because it is difficult to prove in a court of law that a homosexual act has taken place. His primary concern is with procedural justice. Evidence for homosexuality is usually hidden {“il est très souvent obscur”} and without clear evidence, one cannot justly condemn a person. Montesquieu notes that Justinian had once tried to punish homosexuality by employing the witness of a child or a slave as evidence. But he protests that this led to false accusations and unjust sentences. Even though he agrees

50 Spirit, XII.6, 194

51 Spirit, XII.6, 194. See also XXIII.17, 438, where Montesquieu discusses the Greek’s population-control methods. The only one he does not endorse is the use of homosexuality: he is so “frightened” by it that he scarcely reports upon it.
that homosexual acts are violations of natural law and individual continence, and acts are of interest to the state, one cannot punish this crime except by running a great risk in procedural justice. Therefore, he suggests that the state should not prosecute or punish this crime, but that it remain a crime. The main role of the law would be a teaching one, to communicate to citizens that homosexuality is not an approved form of sexual behavior, and not a punitive one.

He believes prevention to be the more effective policy. He believes homosexuality may be prevented because as we saw in chapter two, his natural law understanding of human nature is that it is heterosexual. He believes that homosexuality is a product of repressive and unnatural social conditioning, not nature, but nurture. He concludes this after reading ancient Greek and Roman histories as well as travel literature from the Far East, which was circulating during his time. Montesquieu notes that in ancient Greece, in their gymnastic exercises male youths had regular exposure to unclothed bodies of the same sex, and little to no public contact with women. He also notes that Muslim men of the Far East did not have regular contact with women outside of their homes, but regular contact and friendships with men who scorned women. He concludes that repressive social conditions like these, which separate the sexes unnaturally or look down upon women, cultivate homosexual attractions.

Montesquieu is willing to excuse the Greeks for “alarming modesty” when they established gymnastic exercises in the nude which advanced “public usefulness”. But when the goodness of the principle of the government was corrupted, the exercises turned into “lustful wrestling arenas” which he no longer condones: “…when the Greeks were no longer virtuous, these institutions destroyed the military art itself; one no longer went down to the wrestling arena to be trained but to be corrupted” (VIII.11, 120).
Montesquieu also expresses the view that homosexuality is nurtured in societies where the institution of marriage is corrupt or weakened. Citing the speeches of the Roman censor Metellus Numidicus and of Augustus, he learns that the men of Rome turned to homosexuality as a way to have sexual activity without the responsibilities of marriage or childrearing. Since he sees marriage to be a natural response human beings have to their natural sexual attractions, citizens that show a disregard for marriage show that they have lost sight of, or lost the ability to feel, the third natural law.

Montesquieu concludes that the laws should work to prevent whatever conditions make citizens forget themselves, or drive them to be insensitive towards their nature and natural feelings, and not punish this act. He believes that if the laws encourage social interaction between the opposite sexes, they can prevent men from losing their original feelings. This legal approach, therefore, leans upon the efforts that his marriage laws take to encourage citizens to court and marry.

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53 Montesquieu cites a speech Augustus, who spoke to the Romans thus: “While diseases and wars take so many citizens from us, what will become of the town if marriages are no longer contracted? The city does not consist in houses, porticoes, public squares; it is men who make the city. You will not see men emerge from the earth to take care of your business, as in legend. If is not to live alone that you remain celibate; each one of you has companions at his table and in his bed, and you seek only peace for your profligacy….My only purpose is the perpetuation of the republic….would not these [rewards and penalties for marriage] of mine get you to promise to take a wife and nourish children? (XXIII.21, 442-43) And, less enthusiastically for marriage, but probably with a sense of humor, Montesquieu quotes Metellus Numidicus who told the Romans: “If it were possible not to have wives, we would be delivered from this evil, but as nature has established that one can scarcely live happily with them, or continue to exist without them, there must be more regard for our preservation than for fleeting satisfactions” Spirit, XXIII.21, 441.

54 In some ways, Montesquieu’s assessment of homosexuality is similar to his assessment of suicide. Spirit, XIV.12-13. With suicide, a person fails to feel or properly understand the natural law of self-preservation; with homosexuality, a person fails to feel or properly understand the natural law of reproduction. However with the case of suicide, Montesquieu hypothesizes that biology is at work in making a person kill himself for no apparent external or social reason. However, he does not consider biological forces to be at work in homosexual behavior.
Montesquieu is confident that prevention will be effective and that citizens will not turn to homosexuality if they are not prodded on by the circumstances:

I shall assert that the crime against nature will not make much progress in a society unless the people are also inclined to it by some custom….Do not clear the way for this crime, let it be proscribed by an exact police…and one will immediately see nature either defend her rights or take them back. Gentle, pleasing, charming nature has scattered pleasures with a liberal hand; and by overwhelming us with delights, she prepares us with our children through whom we are born again, as it were, for satisfactions greater even than those delights.55

In this subtly erotic passage that hails the pleasures of natural sexuality, Montesquieu emphasizes both the inherent pleasures and the subsequent pleasures of the natural union of the sexes. The charms and sensual pleasures of the interaction of the two sexes are sufficient incentives.56 Moreover, the consequences of fruitful marital union, children, bring great joy to parents who feel they are “reborn” in them. Montesquieu believes that these advantages, when properly felt, will be too strong for homosexuality to be attractive.

The point is that his homosexuality laws do advance a particular conception of the good as regards human sexuality consistent with his natural law and natural right theory. Moreover, here again there is no specifically monarchical quality to the laws. Montesquieu commands legislators to simply “proscribe” this act by “an exact police” like all violations of sexual mores, and he does not say whether distinctions of rank ought to inform the way in which those proscriptions are made. Therefore, the

55 Spirit, XII.6, 194

56 Montesquieu describes the pleasures of the opposite sex in Part 6: “Our connection with women is founded on the happiness attached to the pleasures of the senses, on the charm of loving and being loved, and also on the desire to please them because they are quite enlightened judges of a part of the things that constitute personal merit. This general desire to please produces gallantry, which is not love, but the delicate, flimsy, and perpetual illusion of love” XXVIII.22, 561.
principle of honor does not prevent us from considering these laws for a government like ours, but there are other cultural and scientific reasons, which I will address in the next chapters, for being cautious towards this policy.

Polygamy Laws

Montesquieu consents to the prohibition of polygamy in existence during his time. He makes a single reference to “the law permitting only a single wife in Europe” without any objection, and tacitly consents to the use of the law to prohibit polygamy in all of Europe.\(^{57}\) He does not, however, elaborate what penalties were used to punish polygamy.\(^{58}\) Nevertheless, his tacit consent to the legal prohibition of polygamy is in keeping with his natural right theory, and by prohibiting polygamy, he also aims to promote a particular conception of the good.\(^{59}\) As noted earlier, he objects that polygamy violates the natural equality of the sexes, and he also objects to

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\(^{57}\) Spirit, XVI.4, 266.

\(^{58}\) Nor have I found secondary sources to indicate what they were.

\(^{59}\) As explained in chapter three, Montesquieu’s moral objections to polygamy include the argument that polygamy violates both the natural law and the order of natural right. As a matter of natural right, polygamy violates the natural equality and humanity of women, who are normally abused in these sorts of marriages (XVI.2, 264-65). As a matter of natural law, Montesquieu disagrees with opinions of the time (not only from some philosophe\(\text{s}\) of the Enlightenment, but the Catholic Church as well), which argued that polygamy does not necessarily go against the natural end of reproduction. Against these views, Montesquieu argues for a much more limited reproductive utility of polygamy—as something to be excused in only very rare, extreme cases of need, for the purposes of saving a population from disappearance. As a general rule, Montesquieu argues that polygamy does not conform to the natural law because it does not provide the right conditions for raising children. The father cannot be attentive to the children of a polygamous marriage, as he can be attentive to his children in a monogamous marriage.
polygamy on the grounds that it increases the incidence of adultery and homosexuality in a society.

Although he is not clear, he seems to see a link between polygamy and adultery by the infidelity inherent in polygamy. Since it is not necessary for the male to have exclusively one wife, it is easy for him to be unfaithful to his first wife as he looks for new wives.

[T]he people to whom polygamy was permitted did not even abstain from adultery. Having multiple wives (who could guess it!) leads to the love that nature disavows; this is because one sort of dissoluteness always entails another. During the revolution in Constantinople...the accounts told that the people, pillaging the house of the kehaya [the Turkish governor] found not a single woman. They say that it has come to the point that most of the seraglios in Algiers have none.60

The link between polygamy and homosexuality is not clear either, but it is probably the inequality of the female that he sees to be inherent to polygamy.61 As Schaub explains, Montesquieu saw a close connection between the Greek’s homosexual behavior and the inequality of their women.

The prevalence of homosexuality among the Greeks, and particularly its pedophilic character, followed from the Greek understanding of freedom. It would be as disgraceful for a free man to love a woman as a slave, so long as women are little more than slaves; much better to love a boy who is destined for public affairs and is with respect to beardless beauty the equivalent of a woman. Quietly Montesquieu indicates that homosexuality is one of the “singular” institutions of the Greeks—an institution intimately connected with hostility to commerce and the inequality of women.62

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60 Spirit, XVI.6, 268 (translator’s parentheses).
61 Spirit, XII.6, 194.
62 Schaub, p. 141-42
Since Montesquieu sees the inequality of women to be inherent to polygamous marriages, he probably hypothesizes that societies that promote polygamy also promote in men a preference for relationships of love with other men. He seems to confirm this hypothesis from accounts of the revolution in Constantinople. Therefore, he believes legislators have natural law and natural right reasons to prohibit polygamy as well as reasons to prevent increases in adultery and homosexuality.

As regards the principle of honor, here again there is no indication that the principle of honor would influence the way in which prohibitions upon polygamy should be made.

**Modesty Laws**

As noted in previous chapters, Montesquieu has a sustained interest in the role that sexual modesty has in society. However, it is a separate question whether he thinks that the _laws_ should promote this value. At one point, in fact, he seems to argue that the law is the wrong instrument for the job of promoting sexual modesty. While speaking about the domestic tribunal of the early Romans, he notes:

> The penalties of this tribunal had to be arbitrary …for all that concerns mores and all that concerns the rules of modesty can scarcely be included in a code of laws. It is easy to regulate by laws what one owes others; it is difficult to include in them all that one owes oneself.\(^{63}\)

In this passage, Montesquieu seems to argue that since modesty primarily concerns what one owes to oneself, and since the primary role of the law is to ensure citizens give to each other what they owe to each other, then the law should not properly

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\(^{63}\) _Spirit_, VII.10, 106.
enforce the rules of modesty. However, Montesquieu is not here speaking about sexual modesty \textit{pudeur}, but rather the more general kind of modesty that was necessary in the early Roman republic \textit{modestie}.\footnote{“…tout ce qui regard les règles de la modestie, ne peut guère être compris sous un code de loix….” Montesquieu, \textit{Oeuvres Completes De Montesquieu}, VII.10.} This passage cannot be taken as conclusive evidence that Montesquieu does not envision the civil laws to enforce sexual modesty.

Montesquieu does believe that modesty involves what citizens owe to each other and that the laws should have a role in regulating and promoting sexual modesty \textit{pudeur}. His legal recommendations fall into two categories. First, he argues that the laws of all governments, not only monarchy but republic and to the extent possible despotism, must protect the natural and civil right of modesty of each person, most especially the most vulnerable members of society: women, children, slaves, and criminals. Second, he argues that the laws themselves, and by association, those who act in the name of the law, must observe the requirements of modesty when punishing criminals. In other words, he is a proponent of modesty laws as well as modest laws and magistrates.

The first task of the law in regard to modesty is to enforce the natural right to modesty of all persons. In the context of discussing the laws of the Roman republic, he brings up the subject of the civil rights of slaves, and in this case, the slaves made so by their financial debts. At one time, the Romans permitted creditors to hold

\footnote{Although the French still leaves room for an interpretation that includes sexual modesty, it is unlikely that Montesquieu is speaking about \textit{pudeur} in this passage. When speaking about sexual modesty, he always uses the word \textit{pudeur}. And when speaking about non-sexual forms of modesty, he employs the word \textit{modestie}, what in English we mean by: “unpretentious”, “humble”, “self-deprecating”, “moderate”, or even “selfless,” for example, at: V.8, 51 ; VII.3, 99 ; and XIX.27, 332.}
debtors in servitude in their homes, and that: “A usurer named Papirius had wanted to corrupt the modesty \( \text{ \textit{la pudicité} } \) of a young man named Publius whom he kept in irons.”\textsuperscript{65} This attempt on the young man’s modesty generated widespread anger among the population, and as a result the consuls passed a new law in the year 328 B.C. which denied creditors a right to keep debtors in their homes, and only granted to them a right to the \emph{property} of their creditors, not a right to their bodies. Montesquieu concludes that: “The crime of…Papirius gave [Rome] civil liberty.”\textsuperscript{66}

The consuls passed a law to protect the right to the liberty and integrity of one’s body, which in this case embraced in a heightened way one’s \emph{sexual} liberty and integrity. The Roman law created a civil right to modesty that was couched, as it were, within a broader civil right to bodily integrity and freedom from slavery. This civil law is in harmony with Montesquieu’s understanding of the natural right to modesty. It is also worth noting that in this case the modesty of a man was violated, which shows that Montesquieu understands this right to pertain to both men and women (though by natural law it pertains only to women).

One might object to my appeal to this example as evidence because it comes from the history of the Roman republic, and not the monarchy. One might object that the fact that Montesquieu praises the use of the law to protect a right of modesty in the strictest of all the regime forms does not prove that he would endorse the use of the law to protect a right of modesty in the more lenient monarchy. However,

\textsuperscript{65} \textit{Spirit}, XII.21, 206.

\textsuperscript{66} \textit{Spirit}, XII.21, 206.
Montesquieu specifically endorses the use of the civil law to protect the right of modesty of slaves in all regime forms.

Later in *Spirit*, when speaking about civil slavery, he explains that the laws should protect modesty everywhere, even in despotisms:

Reason wants the power of the master not to extend beyond things that are of service to him; slavery must be for utility and not for voluptuousness. The laws of modesty (*les loix de la pudicité*) are a part of natural right and should be felt by all the nations in the world. For if the law that preserves the modesty of slaves is good in these states where unlimited power mocks everything, how good will it be in monarchies, how good in republican states? 67

Montesquieu favors laws that protect the right of modesty of slaves in monarchies as well as other regime forms.

But does he say anything about a right of modesty for other members of society, aside from slaves? Montesquieu does argue that other members of society partake of this right, most especially women and the young. He expresses the view that women and the young are more vulnerable to attacks upon modesty than are grown men. When speaking about times when “false religions” established rituals that violated modesty, he praises the civil laws that protected women and children from the ceremonies:

> Respect for ancient things and simplicity or superstition have sometimes established mysteries or ceremonies that could shock modesty

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67 *Spirit*, V.12, 255. Montesquieu further endorses the legal protection of modesty in “all governments” when he approves of a Lombardian civil law, which existed for this purpose. “A provision of the law of the Lombards seems good for all governments. ‘If a master debauches the wife of his slave (*débauche la femme de son esclave*), both of them will be free’ This tempering is admirable for preventing and checking the incontinence of masters without too much severity…. I do not see that the Romans had a good police in this regard. They gave rein to the incontinence of masters; in a way they even deprived their slaves of the right of marriage (*du droit des mariages*). The slaves were the meanest part of the nation, but mean as they were, it was good for them to have mores, and further, by denying them marriages, one corrupted the marriages of the citizens.” *Spirit*, XV.12, 255.
\{qui pourvoient choquer la pudeur\}, and examples of this have not been rare in the world. Aristotle says that in this case the law permits fathers of families to go to the temple to celebrate these mysteries in the place of their wives and children. A remarkable civil law, that preserves the mores from religion!

Augustus forbade young people of both sexes to attend any nighttime ceremony unless they were accompanied by an older relative, and when he reestablished the Lupercalian festival, he did not want the young people to run about naked.  

In both the ancient Greek case and in the ancient Roman case, the legislators judged, (and in Montesquieu’s view rightly judged), that women and young people were especially vulnerable to attacks upon modesty. The reasons he argues that women and the young are more vulnerable to attacks upon modesty than grown men are found in his natural law views. Men are the more sexually impetuous members of the human race. By nature, women are physically weaker and have greater emotional sensitivity than men, so they are more vulnerable to attack and less likely to recover well from sexual assaults. By nature, children are also physically weaker than grown men and developmentally immature as well, insofar as they are still in the process of learning in what proper human conduct consists, so they are also more vulnerable to attack and less likely to recover well from sexual assaults. Moreover, as we saw in chapter two, it is a principle of natural law that fathers should maintain a modest environment in their homes.  

Therefore he places a special responsibility upon grown men, and

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68  *Spirit*, XXIV. 15. (translation mine, Masson ed.)

69  *Spirit*, XXVI.14, 507. “It has always been natural for fathers to watch over the modesty \{la pudeur\} of their children. As fathers are charged with the care of settling them in life, they have had to preserve in them both the most perfect body and the least corrupt soul \{le corps le plus parfait, et l’ame la moins corrompue\}; all that can better inspire desires and all that most properly produces tenderness.”

Montesquieu designates this natural responsibility to be a *principle* of natural law in Book XXVI.
especially upon fathers, to protect the rights of modesty of women and the young. It is
the other side of the coin to that special responsibility he places upon women to guard
and protect their own modesty.

Montesquieu recommends that the civil laws of all governments, not only the
monarchy, should protect the natural right of modesty of all, especially when social
circumstances are such that attacks are frequent. He shows that the laws must protect
in a heightened way the right of modesty of the most vulnerable: women, the young,
slaves, and, as we will see next, prisoners. That is the first way Montesquieu involves
the law in promoting modesty.

The second way in which Montesquieu involves the law in protecting modesty
is in punishing crimes. Whereas the first way employs the laws to ensure that citizens
do not violate the right of modesty of others, the second way charges the laws
themselves and those who act in the name of the law to observe the obligations of
modesty. In a chapter entitled “The violation of modesty in punishing crimes,” he
condemns legal punishments that violate modesty:

Rules of modesty {des règles de pudeur} are observed among
almost all the nations of the world; it would be absurd to violate them in
punishing crimes, when its purpose should always be the reestablishment
of order.

Did those in the East, who exposed women to elephants trained for
an abominable kind of punishment, want to make the law violate the law?

An old usage of the Romans forbade putting to death girls who
were not nubile. Tiberius hit upon the expedient of having them raped by
the executioner before sending them to their punishment; a crafty and
cruel tyrant, he destroyed mores in order to preserve customs.

When the Japanese magistracy had naked women exposed in public
squares and forced to walk like beasts, it made modesty tremble; but
when it wanted to compel a mother… when it wanted to compel a son…I
cannot go on, it made even nature tremble.\(^{70}\)

\(^{70}\) *Spirit*, XII.14, 200-02 (ellipses in the original).
He charges magistrates, legislators, and others with roles of political responsibility to ensure that the laws and those who act in the name of the law preserve the modesty of accused or convicted criminals.\(^{71}\) Even convicted criminals, who forfeit many of their civil freedoms, do not forfeit their natural right to modesty. He also declares (in accordance with his natural law views) that the punishments in the East, which exposed women to elephants in apparent acts of bestiality, and that the punishments of the Japanese, which forced mothers and sons to apparently incestuous acts, were gross violations of modesty, instances where the criminal laws violated the natural laws.

Taking both categories of recommendations together, Montesquieu endorses the view that the government, laws, and persons of the community, owe to every other person in the community a profound respect for the natural right to modesty, especially for the most vulnerable members of society. He sees a close connection between civil slavery and violations of modesty. Violations of modesty are a kind of sexual enslavement.

Finally, the principle of honor does not have a noticeable influence upon the way legislators should craft laws to protect modesty. Therefore, these legal measures are worth further consideration for modern societies like ours, which do not benefit from civil rights to modesty.

\(^{71}\) See also *Spirit*, XXVI.3, 496.
Conclusion

Montesquieu heavily involves the civil laws of monarchy in the work of promoting a conception of the moral good as it pertains to sexual behavior. He either endorses or crafts laws that enforce the moral view that sexual union should take place within marriage in an exclusive relationship of one man with one woman. His civil laws further this aim by regulating divorce, adultery, homosexuality, polygamy, and sexual modesty, and most of the time, do so in accordance with his natural law, natural right moral theory.

The marriage laws he endorses involve a comprehensive program of rewards, penalties, and enticements to encourage citizens to have a sustained interest in finding a spouse to marry and have children with. They also work to eliminate as far as possible the likelihood that citizens will engage in alternative forms of sexual behavior. These measures are in accordance with his natural law, natural right moral theory, which assigns importance to marriage for the preservation of the self and the species.

His divorce laws restrict divorce by requiring mutual consent, mutual incompatibility, and a willingness to remarry. This policy is mostly consistent with his natural law, natural right theory. It encourages spouses to talk through their problems so as to make the marriage work, in accord with his view about the importance of marriage. And the condition that the spouses mutually consent to the divorce helps to make it more likely that males will fulfill their obligations to support their family, and that wives will not flee from their marital and maternal responsibilities for light reasons. However, this policy does not do enough to ensure
that parents will fulfill their natural right obligations towards any children they have, and it would have been more consistent to add the further legal condition that any children they have be raised to a certain degree of independence before the divorce. With this caveat, his divorce laws are consistent with his natural law, natural right moral theory, which understands marriage and reproduction to be vital for the preservation of the species, but dependent upon the society of the family to be accomplished properly.

Adultery is probably the trickiest of all of the issues he handles. Montesquieu endorses adultery laws that make female adultery but not male adultery a crime, and outlines punishments for it that are harsh by modern standards, because they include fines, public shame, public infamy, and expulsion from the town or society. Although his general concern to protect marriage from the injustice of adultery is consistent with his natural law theory, and shows just how far he did *not* endorse female promiscuity or free love in monarchy, his double standard against female adultery is not consistent with his justice-based morality, and his view that adultery be prosecuted at all is inconsistent with his theory of procedural justice.

From the point of view of his moral theory, as well as his theory of procedural justice, he would have been more coherent to recommend that that *both* female and male adultery be a civil crime, but not prosecutable crimes. While this would not respond as efficiently to the unique need of the monarchy to deter its women from adultery (because without punishment, deterrence is weak), this policy would nevertheless remind women about the wrongfulness of adultery, and better protect them from the injustice of male infidelity as well as from false accusations of and
convictions for adultery. Such a policy would still promote his moral views about the obligations of marriage, but in a manner that would be more just and protective of the possible abuses against women.

On homosexuality, Montesquieu argues that the civil laws should keep it a crime, but not a prosecutable crime, and that the laws should aim to prevent homosexuality as much as possible. This is in accord with his natural law understanding of human nature as heterosexual, which sees persons to have obligations to engage in heterosexual union within marriage. He argues that the laws should teach that homosexual behavior is not permissible, and endeavor as far as possible to prevent it from taking place by encouraging the two sexes to interact in public and natural ways. When a homosexual act does take place, however, the civil laws should not try, prosecute, or punish it. This legal response is consistent both with his moral theory and theory of criminal justice.

Montesquieu endorses the legal prohibition of polygamy and does not indicate how it would be punished. The prohibition is in accordance with his natural law, natural right judgment that polygamy is always a violation of the natural equality of women. Polygamy also has the potential, in its more repressive forms, to violate the nature of the woman in other ways, for example, by turning her into an object of luxury or by denying her natural abilities to tend to the home and children, and Montesquieu argues that polygamy encourages adultery and homosexuality, so that legislators have a number of moral reasons to prohibit it.

Montesquieu defends a civil right to modesty that is closely related to the civil right to freedom from slavery. In accordance with his moral views, he argues that all
persons and laws owe to every other person in the community a profound respect for the natural right to modesty, especially as regards the most vulnerable members of society: women, children, slaves and prisoners.

Altogether, and contrary to Mosher’s claim, Montesquieu is deeply committed, not undercommitted, to the legislation of sexual morals in monarchy. He does not aim to be rid of sexual mores or to encourage aristocratic women to embrace free love, but argues that the civil laws ought to enforce the moral view that sexual union should take place within marriage in an exclusive relationship of one man with one woman.

Carrithers is right that: “Acts of private immorality may indeed be regulated by criminal sanctions on the assumption that such conduct may have implications for public order, or even for the stability of government….”72 Montesquieu argues that the requirements of his natural law, natural right sexual morality advance political and civil needs because sexual union within marriage provides the right conditions for raising children, protecting and supporting women, and taming the naturally impulsive instincts of men, all of which promote the political preservation of the community and civil peace. When the laws do not enforce natural laws and rights, the sexual conduct of some will threaten or directly attack the security and liberty of other persons.

Although the monarchy generally depends upon the effects of honor to preserve and protect its political laws, the principle of honor does not have a strong influence upon the civil laws that regulate sexual behavior. Considerations of honor arise in Montesquieu’s support for the Lex Papia et Julia, which penalize the unmarried by

72 Carrithers, p. 315
taking away their ability to own property or enjoy luxuries; and he probably has the effects of honor upon aristocratic women in mind when he endorses harsh penalties against female adultery. However, his divorce, homosexuality, polygamy and modesty laws do not have a uniquely monarchical character, and all of his civil laws bear a clear, and for the most part consistent, connection to his natural law and natural right moral theory. He does, in other words, legislate sexual morality.

Montesquieu’s civil laws are instructive and, with the exception of his adultery laws, are worth further consideration for a government like ours. I do not wish to argue in a dogmatic fashion that our laws should copy the laws he endorses, but that it is worth while for political theorists, and especially those working within the liberal tradition, to pay attention to the connection he sees between promoting political liberty and enforcing a limited (non-perfectionist) conception of the good. It would also be worthwhile for legislators and everyday citizens to consider whether our marriage laws, divorce laws, adultery laws, homosexuality laws, polygamy laws, and lack of modesty laws, adequately protect the sexual integrity and liberty of persons and the stability of the family and political community in light of Montesquieu’s arguments. That exercise goes well beyond the limits of this dissertation, which is why he is a good point of departure for us.
CHAPTER 5

THE VALUE OF MONTESQUIEU’S CONTRIBUTION
IN LIGHT OF
POSNER’S ECONOMIC THEORY OF SEXUAL REGULATION

Introduction

I closed the last chapter by noting that Montesquieu’s civil laws are worth further consideration for a government like ours, but that such an exercise would involve studies far beyond the scope of this dissertation. In this chapter I begin that exercise by comparing Montesquieu’s moral and legal recommendations to the legal recommendations of a contemporary liberal theorist, Richard Posner.¹ My aim is to see how Montesquieu’s contribution compares to his efforts to show how the laws of our society might regulate sexual behavior.

Despite strong libertarian leanings, Posner sets out to show in *Sex and Reason* (1992) how a liberal society like ours might regulate sexual behavior from a morally neutral point of view by advancing an economic theory of sexuality. Like

¹ I opened the dissertation by noting that a number of contemporary liberal theorists address whether it is legitimate to regulate sexual morals in a liberal regime and that at least two contemporary theorists, William Galston and Richard Posner, each (in their own way) defend the view that liberal regimes may and ought to regulate sexual behavior. I select Posner because his work, *Sex and Reason*, deals exclusively with the question of sexual regulation.
Montesquieu’s analysis of human sexual behavior, Posner’s theory aims to be both descriptive and normative.\textsuperscript{2}

On the descriptive side, he employs rational choice theory, which sees all human behavior, including sexual behavior, as volitional, rational, and well adapted to an individual’s ends. This is to say that each actor maximizes his/her own benefits and minimizes his/her own costs.\textsuperscript{3} Based upon this understanding of human agency, he predicts what sexual choices will be made under different circumstances. For example, prostitution is a mechanism for coping with surplus bachelors in a society where the ratio of men to available women is high.\textsuperscript{4}

In addition to rational choice theory, Posner appeals to evolutionary biology, history, anthropology, sociology and other social science disciplines to describe sexual phenomena and to support his rational choice predictions. Normally, rational choice predictions (like the one above about prostitution) are meant to serve as oversimplified hypotheses about reality that need to be confirmed or falsified with empirical data. It seems that Posner draws from a variety of empirical studies to reduce the hypothetical nature of his predictions and give them a firmer grounding in reality.

I will argue that while the descriptive side of Posner’s economic theory shows an impressive effort to summarize and synthesize the vast literature on sexology and the regulation of sexual behavior under the same roof, as it were, of rational choice

\textsuperscript{2} It is “a theory that both explains the practices of sex and also points the way toward reforms.” Richard A. Posner, \textit{Sex and Reason} (Cambridge, Massachusetts: Harvard University Press, 1992), 3.

\textsuperscript{3} As Posner notes, “rational man goes where the balance of costs and benefits inclines.” Posner, p. 88.

\textsuperscript{4} Posner, p. 131.
theory, he (1) assumes an over-simplified and problematic understanding of the human person as (a) “rational” in a unemotional and instrumental sense, i.e., as a being with no emotions who is focused exclusively upon calculating how to do certain things and not able or interested in pondering non-instrumental questions like why one should do certain things; and (b) self-interested and individualistic, as focused primarily upon one’s own adult interests and not concerned about the needs of dependents, like children, or other communities, like the family or society.

Due to this understanding of human nature, (2) Posner makes predictions of sexual behavior that are (a) not always credible or (b) inappropriate for public and legal reasoning. They are not always credible because in the area of sexual behavior, persons act out of a complex combination of causes, including emotional and rational causes (social, moral, aesthetic) that are not “rational” in the narrow sense Posner understands it. Moreover, he does not always provide supporting empirical evidence for those predictions, which adds to their incredible character. Furthermore, (b) there is some pedagogical danger involved in promoting the idea in the public and legal spheres that “rational” human beings behave in these ways, where the oversimplified, hypothetical, and descriptive nature of these predictions is not always obvious to non-academic citizens. It is one matter for Posner to argue that rational choice theory ought to be used for academic purposes, so as to generate hypotheses and test their validity. It is another to argue that rational choice theory can help citizens, political theorists, and legislators to understand sexual behavior. It can promote false understandings of human agency and encourage citizens to act in narrow, self-interested ways.
Montesquieu’s approach to the study of sexual behavior and his conclusions about human nature are more persuasive because they are more realistic and comprehensive. Recall that Montesquieu draws from all of the empirical disciplines at his disposal, biology, history, social studies (including travel literature), and his own observations and experiences about human experience and society (phenomenology). He does not try to give priority to any particular discipline over another, or force all data to fit into one particular model. Consequently, his method yields a complex synthesis of information about the causes of sexual behavior, and a more holistic understanding of the human person (as a rational, emotional, instinctual, social, animal). His conclusions are more realistic and better suited for public reasoning about what sexual behavior consists in.

On the normative side, Posner follows John Stuart Mill, and appeals to libertarian principles to arrive at policy prescriptions. The libertarian commandment is the no-harm principle: “Government interference with adult consensual activities is unjustified unless it can be shown to be necessary for the protection of the liberty, or property of other persons.” So, a given sexual act is innocent, as it were, until proven harmful to the liberty or property of the agents or to other third parties, which is to say that the burden of proof is on the opposition to show that it is harmful. However, Posner further proposes that harm must be established in a particular way: by identifying the costs and benefits associated with the choice to engage in a given act.

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5 Posner, p. 3

6 As a result of his utilitarianism, Posner argues that his theory is morally neutral, and that conclusions are “founded on practical, concrete, non-moralistic concerns with the external effects of sex and with the use of force or fraud to gratify sexual desires.” Posner, p. 201. He is emphatic that his normative approach is prescriptive without being moral: “Functional, secular, instrumental, utilitarian,
If the consequences of the behavior are more costly than beneficial, then it flunks the cost benefit test, and the laws ought to prohibit or restrict the act.

I will argue that Posner’s libertarian-utilitarian approach to the normative assessment of sexual behavior has a number of difficulties in application: (1) it is a formidable, perhaps an impossible, task to predict and quantify the harms and benefits of any particular act; and (2) as a result of this difficulty, it becomes difficult to prove that any given act is harmful enough to be prohibited or regulated by law, which results in a highly permissive legal code. Although Posner sets out to show the grounds upon which our laws may regulate private sexual behavior, in the end, he does not show that the laws can do so.

Aside from these difficulties, Posner does not always apply his own libertarian-utilitarian method faithfully when judging sexual behavior, but appeals to other methods or beliefs to make normative conclusions. This lends an air of arbitrariness and insincerity to his study, and further weakens the case for the utility of his economic theory for resolving sexual policy disputes. * 

By contrast, Montesquieu demonstrates greater coherence between his justice-based, natural law, natural right method of judging sexual behavior and his final policy recommendations. Although, as we saw in the last chapter, there are some moments when he is not fully consistent with his moral theory, overall there is a clear

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* I use “Posner’s economic theory” as shorthand for both the descriptive and normative sides of his theory, which employ rational choice methods, empirical studies, economic tools of analysis, and libertarian and utilitarian principles to arrive at policy recommendations.
connection between his moral theory and his political and legal recommendations. Moreover, his moral theory offers a more straightforward and practical way to judge sexual behaviors. It is not as difficult to determine whether a given act violates principles of justice, equity, or nature, as it is to determine in a utilitarian manner whether a given action is more costly than beneficial to the agents involved. This is to say that the normative side of Montesquieu’s theory is also more realistic and practicable.

As with the last chapter, the argument will proceed by analyzing Posner’s response to a selection of policy issues: marriage, divorce, adultery, polygamy, homosexuality, (and since he does not deal with modesty) incest and bestiality.

**Marriage**

Posner’s descriptive analysis of marriage includes 1) biological reflections, 2) historical reflections and, 3) rational choice reflections about the causes of marriage.

Starting with his biological reflections, Posner appeals to evolutionary biology to explain why reproduction is *sexual* rather than asexual, and why there are males and females rather than hermaphrodites. One reason for sexual differentiation is that it allows for the specialization of essential human tasks, such as defense and

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8 Posner explains that from an evolutionary biology point of view, sexual reproduction increases genetic diversity by combining and reshuffling the genes of different individuals during each generation, so as to better perpetuate the species. Moreover, genetic diversity “speeds up evolution” by giving natural selection a wider field of choices upon which to operate. Thus, sexual reproduction is superior to asexual reproduction from an evolutionary standpoint. Similarly, evolutionary biology explains why the human species has males and females rather than hermaphrodites. Humans would be even more vulnerable during the gestational and infancy period of their lives if they each had to develop both sex organs. It would increase the risk of complications, deformities, or death during gestation and infancy, which would not serve survival well. Posner, p. 89.
reproduction, which serves survival well.\textsuperscript{9} Therefore, from a biological point of view, male and female need each other to survive, which provides a biological basis for marriage. This conclusion is in accord with Montesquieu’s understanding of the biological and natural law basis for marriage.

Posner also explains the different sexual strategies of males and females, and combines biological analysis with rational choice theory.\textsuperscript{10} He argues that since the reproductive capacity of the female is limited by the number of eggs she has and by the time she must spend in each pregnancy (20 pregnancies in a lifetime being a realistic maximum), the woman who wishes to maximize her reproductive potential must guard her sexual activity more than a man. She will try to “make every pregnancy count” and be selective about whom she has intercourse with. She will ask herself whether the man will be able and willing to stay and protect her and her children.\textsuperscript{11} Promiscuity will not be an optimal sexual strategy for women, as restraint will be. Posner also appeals to empirical studies which show the female sex drive is

\textsuperscript{9} “Just by virtue of not having female sex organs, a man does not have to worry about being incapacitated by pregnancy. He can specialize full time in physically demanding activities, such as hunting and defense, that were essential to survival in the era in which human beings reached their present state of evolution, and that pregnancy interferes with….By contrast a woman, by virtue of not having male sex organs with their incredible fecundity, and not having to devote herself to hunting or defense because the community contains specialists in those activities—men—has both incentive and opportunity to specialize in reproduction, an activity to which the male, in the male-female division of labor that I am sketching, devotes less time. Pregnancy and lactation, time-consuming activities essential to reproduction that are performed by women and not by men, illustrate the female specialization in reproduction.” Posner, p. 90.

\textsuperscript{10} Not necessarily conscious strategizing, but as most fitting from the evolutionary standpoint. Posner, p. 90.

\textsuperscript{11} Posner, p. 91.
weaker than the male sex drive, which supports his hypothesis that women evolved to fit this rational choice strategy of sexual behavior.\textsuperscript{12}

Posner next studies the most rational sexual strategy of the male. Biologically, the male has a greater reproductive capacity than the woman. He does not deplete his sperm by each insemination and his role in reproduction can be as minimal as that of a few minutes, which allows him to father a great number of offspring. Rational agents will wish to maximize their full reproductive potential, so males must inseminate as many women as possible and have a “taste” for a variety of sexual partners. He points to empirical research that shows men do have a stronger sex drive and tend to be more promiscuous than women.

Posner further argues that due to the physical weaknesses of women and infants, evolution would also favor the males who had qualities that made them protective of their women and progeny.

The protracted vulnerability of the human infant compared with other infants, and of the pregnant woman and nursing mother compared to other pregnant and nursing animals, makes it vital to have mechanisms for inducing men to stick around after insemination and after—even long after—birth, in order to protect the female, fetus, infant, and child; mechanisms, in other words, to limit promiscuity.\textsuperscript{13}

Altogether, Posner concludes that the optimal male sexual strategy would be a balance (or tension) between promiscuity and loyalty, which would be resolved in the practice of polygamy, or a combination of polygamy with promiscuity.

\textsuperscript{12} It is worth noting that Posner identifies the natural causes for female modesty that Montesquieu identifies, though he does not call it such, and his analysis is more complex because it explains the natural instincts of women in more sophisticated, evolutionary and rational choice, terms. However the conclusions are in accordance with Montesquieu’s views.

\textsuperscript{13} Posner, p. 98.
Posner is in agreement with Montesquieu that by nature the male is more impetuous towards the sexual act than is the female. However, he makes stronger claims that males are single-mindedly focused upon maximizing their sexual encounters and willing to try any number of sexual partners to further this end. This is a questionable conclusion because it is premised upon an oversimplified and truncated understanding of the male as a being who thinks only of “how can I get more sex,” and does not consider competing reasons or emotions that lead him to alternative forms of behavior. Moreover, he does not support this description of the male nature with empirical evidence because it is based upon aspects of evolutionary theory that have not yet been verified.

Montesquieu makes the more realistic proposal that by nature, males are not only interested in maximizing their sexual encounters. They have biological, emotional, and rational reasons to be more discriminating in their selection of a mate. The third law of nature shows that men desire a female who “charms” them, a word which does not limit the phenomenon to a rational choice, but includes an emotional element, as well as aesthetic and social considerations (which are not “rational” in Posner’s understanding of the word).\(^\text{14}\) Furthermore, Montesquieu does not conclude that males will necessarily prefer polygamy and promiscuity by nature, but allows for the possibility that males will seek exclusive and monogamous sexual union. He leaves it an open question. Posner’s oversimplified concept of the male nature is not a

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\(^{14}\) Montesquieu, *Spirit*, I.2, 6-7. As opposed to Posner, Montesquieu gives greater priority to feelings than to reason in the third law of nature, by emphasizing the pleasure that the two sexes feel towards each other. He also includes reason, however, because humans gain knowledge, and “thus they have a second bond.”

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persuasive depiction, which makes his conclusions about the most rational sexual strategy of the male likewise unpersuasive.

Leaving biology behind, Posner also offers historical reflections of the causes of marriage. These are more comprehensive than any Montesquieu offers, but they also indicate that Montesquieu shows a coherent commitment to marriage.

Posner argues that there have been three stages in the evolution of sexual morals. Although he does not give names for these stages, one might call them the pre-Christian, Christian, and post-Christian stages of sexual morality. Moreover, to properly understand the three stages, we must first understand the distinction between companionate and non-companionate marriage:

In noncompanionate marriage, husband and wife are virtual strangers from an emotional standpoint, and the sexual relationship between them is no more rewarding than that between strangers. For the husband, therefore, prostitutes, concubines, casual mistresses, and even...adolescent boys may offer good substitutes for marital sex, as lovers may for the wife...

In companionate marriage, marital sex is invested with affective elements, thereby creating ‘socioemotional closeness and exchange’ rather than just ‘psychophysiological pleasure and relief’. These elements have the effect on many men of making extramarital sex either an inferior substitute for marital sex (or at least no longer a superior one) or a more costly one, because the wife in a companionate marriage is more likely to be jealous.…

He explains that the model of non-companionate marriage was the standard in pre-Christian times. In ancient Greece, friendships were not found in marriages and

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15 Posner, p. 112-13. Another illuminating definition “…companionate marriage….signifies marriage between at least approximate equals, based on mutual respect and affection, and involving close and continuous association in child rearing, household management, and other activities, rather than merely the occasional copulation that was the principal contact between spouses in the typical Greek marriage….” Posner, p. 45.

social mores were generally permissive. Only upper class women had to live by restrictive sexual mores. The rest of Greek society could engage in sexual activity outside of marriage. For example, married upper class men could have male or female lovers so long as they fulfilled their basic marital duties, and homosexuality and prostitution were widespread. Additionally, most marriages were arranged, and since the prevalence of infanticide supplied a shortage of women, girls married young and their husbands were often much older. These factors did not contributed towards non-companionate marriages. Posner also notes that ancient Rome was highly tolerant of deviant and extramarital sexual practices, especially of homosexuality and adultery.

This all changed with the emergence of Christianity. “The Roman Catholic Church had, from the beginning, a substantive conception of the marital relationship—that of companionate marriage—which it bequeathed to modern people in the West regardless of their religious beliefs.” This is because the Church interpreted the story of Adam and Eve in a way that exemplified companionate marriage, unlike the Jewish tradition (Biblical Judaism permitting polygamy).

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17 Posner, p. 38-41, 146-47. “Spouses were not good friends, united by bonds of love and trust and by shared interests, values and experiences. They did not socialize together, did not even take meals together. And there was no expectation that the husband would be faithful to his wife—just that he would not bring his concubines into the marital home.”

18 Here Posner disagrees with the historian Edward Gibbon (and Montesquieu) that the Roman empire was sexually licensious as compared to the Roman Republic. “Gibbon’s idea that sexual puritanism in the Roman Republic gave way to sexual license in the empire appears to be the reverse of the truth.” Posner, p. 45 as well as Posner argues Roman literature had begun to value companionate marriage, but that in practice non-companionate was still the norm. He cites Xenophon’s Oeconomicus, p. 45. This makes one wonder, however, whether the ideal of companionate marriage was not also present in early Greek writings. Consider Odysseus and Penelope.

19 Posner, p. 244. See also p. 44-45.
As a result, the Church placed new conditions on those who presented themselves for marriage. First, couples had to be approximately the same age and second, they had to consent freely to the marriage. The age requirement did considerable work to move society towards the model of companionate marriage because a common characteristic of non-companionate marriage was the significant age difference between husband and wife. The requirement of free consent undid the custom of arranged marriages, which were also tended to create non-companionate marriages. Therefore, the Church promoted conditions that increased the likelihood that marriages would be companionate.

With the rise of companionate marriage, Christian societies became intolerant of sexual practices that undermined companionate marriage, such as adultery, prostitution, homosexuality, masturbation, and other deviant forms of sexual behavior. “…[T]he effect of a social commitment to companionate marriage is not to condemn outright but to problematize what in a society of noncompanionate marriage would be an unproblematic institution.” Posner further argues that this trend made sense because “conventional sexual morality is a function of companionate

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21 “[P]eople who are far apart in years tend to have different tastes and interests, and…because the older a spouse is at marriage, the sooner the marriage can be expected to be cut short by death.” Posner, p. 245.

22 The Church effectively shifted the focus on the couple’s free decision. The effect of this change was not as strong as the effect of changing the age requirements, but Posner explains that this condition still had a moderating effect on marriage customs, for the couple had the power to decline a marriage that their families had arranged. Thus “companionate marriage [was] made possible even though the marriage [was] in a sense arranged.” Posner, p. 245.

23 Posner, p. 158.
marriage;” and “forces that weaken the marital bond or reduce the (companionate) marriage rate will foster departures from the conventional morality.”

Posner’s historical reflections on the causes of marriage are more comprehensive than any Montesquieu offers. But this does not necessarily devalue the merits of Montesquieu’s work, which did not benefit from the quantity of academic studies available to Posner. On the contrary, Posner’s analysis shows that Montesquieu aims to promote companionate marriage. Montesquieu is aware of the natural need of males and females to find emotional and intellectual bonding in marriage. His decision to defend marriage between one man and one woman and to condemn alternative forms of sexual behavior is a clear manifestation of this aim, and a coherent position to take by Posner’s standards. Montesquieu’s “strength of marriage” principle asserts that strong marriages require a strong marriage culture, i.e., traditional sexual morals. Montesquieu sees in Greece and Rome cultures that embraced sexual permissiveness, which weakened significantly the quality and quantity of marriages that were made.

Aside from biological and historical reflections, Posner offers rational choice reflections about the causes of marriage, and re-examines the historical stages through the rational choice lens. For this analysis he needs to select a particular rational agent to study and he chooses the woman. Like Montesquieu, Posner argues that the changing role of the woman in society has been, and continues to be, central to the transformation of the sexual and marital culture.25

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24 Posner, p. 178.

25 I should note that I will not provide a comprehensive summary of Posner’s descriptive theory, and will not touch upon additional influences upon sexual activity that Posner mentions, such
In stage 1, women are focused upon securing protection for themselves and their children, their primary role is the reproductive one, they do not educate their children, and non-companionate marriage is the norm. Men enjoy “almost complete sexual license” while being married to women.\textsuperscript{26}

In stage 2, the woman’s role expands. Although she still primarily desires protection for herself and her children from her husband, she becomes her husband’s companion and the qualified caretaker of her children as well. Society promotes companionate marriage and discourages alternative forms of sexual behavior. Posner believes Western culture has persisted in the second stage for the most time, “from the era of Catholic hegemony…until about the middle of the twentieth century.”\textsuperscript{27}

In stage 3, women find greater employment opportunities outside of the home and the start to leave it, partly because modern labor saving devices (dishwashers, washers, driers) lower the costs of leaving, and partly because they find more lucrative opportunities elsewhere. As women become self-employed, they become less dependent on men. Moreover, improvements in science and medicine such as better maternal and infant care, which lower rates of infant and female mortality in childbirth, contraceptive technology, and the development of formula and bottle-feeding allow women to focus less intensely upon reproduction and better manage it

\textsuperscript{26} Posner, p. 174.

\textsuperscript{27} Posner, p. 174.
when they do.\textsuperscript{28} Altogether, these developments contribute towards a change in the most rational sexual strategy for the woman in stage 3.

Since women no longer need to depend upon men for their protection or that of their children, they no longer need to offer premarital virginity, marital fidelity, or reproductive services in exchange for male protection and they are less interested in marriage. As reproductive technology reduces the costs of extramarital sex, its frequency increases, and other forms of sexual liaison flourish and serve as substitutes for marriage. Posner predicts that there will be fewer marriages in stage 3, although he claims that the marriages there \textit{are} will be companionate, since society will value the equality of women.

Posner concludes that stage 3 offers the greatest variety of sexual choices for men and women: companionate marriage, cohabitation, premarital sex, homosexual sex, remaining single, children, no children, etc. And although he acknowledges that conventional morality does not survive, and deviant forms of sexual behavior find their social niches, he claims that companionate marriage \textit{will} survive in this stage, although he concedes that it will not be the dominant form of sexual behavior. There would be a “positive correlation of companionate marriage with sexual liberality.”\textsuperscript{29} However, this latter claim is very difficult to accept in light of his prior claim that there is a strong correlation between companionate marriages and traditional sexual morals. Judging from his description of stage 3, there seem to be no strong economic

\textsuperscript{28} Posner, p. 175.

\textsuperscript{29} Posner, p. 174.
incentives or social causes to encourage couples to marry or be exclusively committed to each other.

Aside from this difficulty, which points to an internal inconsistency, the analysis assumes an oversimplified concept of human nature. Posner portrays women to be rational when they are single-mindedly focused upon securing protection for themselves and their children from men through the first two stages of sexual morality. He does not consider, as Montesquieu does, that women have emotional, instinctual, non-instrumental (non-economic) reasons to marry and have children. In stage 3, moreover, Posner portrays women as rational when they maximize their economic independence, minimize their dependence upon men, and free themselves from having to take care of their children. These assertions ignore important aspects of the female nature. Montesquieu understands woman to have natural inclinations and desires to seek companionate marriage and to care for her children. As we saw in chapter three, these inclinations are natural because they are rooted in her biological makeup. Moreover, they exist independent of economic considerations or self-interested strategies for survival. Montesquieu would say that no matter how much science and commerce advance, or women become financially independent, they will always have these natural inclinations and desires for marital companionship and attachment to their children. In this light, the predictions of stage 3 are unconvincing.

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30 Posner, p. 168. For another example, Posner reduces the phenomenon of Catholic priesthood to sexual marketability: “[T]he selection of persons for the priesthood in general and monastery life in particular would tend...to favor men who had relatively poor marital prospects; and homosexuals—real homosexuals—would be overrepresented among such men.” p. 153. The analysis is not equipped to identify possible motivations for entering the religious life that go beyond sexual marketability, or financial considerations.
because they are premised upon an unconvincing, oversimplified, unemotional, understanding of the woman.

Nor is it an entirely desirable prediction. This is some danger involved in promoting the idea in the public sphere that “rational” women behave in these ways. Women can be falsely led to believe that it is irrational to act in emotional, instinctive, or other rational ways that do not further their economic independence or reduce their dependence upon men. Montesquieu’s more holistic understanding of the female nature is more accurate and desirable for public reasoning.

These are the main outlines of Posner’s descriptive theory on marriage, his biological, historical, and rational choice reflections about the causes of marriage, its two main forms, and the evolution of the marriage form and sexual morality in the three stages. His biological reflections are mostly in accord with Montesquieu’s biological conclusions, though his assumption that the male is exclusively focused upon maximizing his sexual potential is exaggerated and oversimplified, and the conclusions that follow (that his most rational sexual strategy is to seek polygamy and promiscuity) are likewise questionable.

His historical reflections, including the distinction between companionate and non-companionate marriage and the different historical phases of sexual morality, are informative and helpful for thinking about how social mores have changed over time. They confirm that Montesquieu’s position is a coherent position, and that his “strength of marriage” principle was compatible with the spirit of his (stage 2) times. However Posner’s rational choice reflections, and the three stages of sexual morality (as cast in rational choice terms) present a more problematic understanding about the
female nature and what rational behavior consists in for her. He also makes the questionable (if not inconsistent) claim that stage 3 would still be able to support companionate marriages despite its endorsement of unconventional sexual morals.

Leaving his descriptive thoughts on marriage behind, the question is what is his normative position on marriage? Posner does not answer this question directly, nor does he guide the reader through a cost-and benefit analysis of companionate marriage versus other forms of sexual companionship, so as to arrive at policy recommendations, as he suggests he will use in the “Introduction” to his work.\(^{31}\) Instead, he turns to social commentary and introduces the example of Sweden as the society that has progressed the most along the three stages of sexual evolution. Although Posner never explicitly endorses Sweden as his normative ideal, the reader is left to conclude that the Swedish model comes the closest.

Swedish women are the most liberated. Perhaps more than any other country in the world, educational and occupational opportunities for women are on par there with those of men.\(^ {32}\) Moreover, the sexual freedom of Scandinavian women is striking. As Posner explains, there is not even the semblance of a cult of virginity there and sexual mores are not only highly permissive but highly contraceptive as well.\(^ {33}\) As regards reproduction and child-rearing, Swedish women often deliberately

\(^{31}\) Posner, p. 2-3

\(^{32}\) Posner, p. 161.

\(^{33}\) “...in Sweden, no stigma is attached to premarital sexual intercourse, even when engaged in by teenagers. For reasons that are thoroughly practical, the Swedes do not want unmarried teenage girls to have babies, but this is effectively discouraged by intensive sex education inside and outside of the home, and by widespread dissemination of female as well as male contraceptives to teenagers....and the result is that although the average age of first sexual intercourse for girls is a year younger in Sweden than in the United States, the rate of teenage pregnancy is a little more than a third as high as in this country.” Posner, p.166.
choose to have children out of wedlock because there are few benefits associated with marriage:

The extensive system of social welfare (including publicly financed day care, long and well-paid maternity leaves, and much else besides), which does not distinguish between married and unmarried mothers, emancipates women from dependence on men. The taxpayer has in effect assumed the protective role formerly played by the husband.  

All in all, Sweden manifests a highly secular, practical, utilitarian, and “morally indifferent” approach to sex, which does not suppress anything unless there are manifestly practical, social reasons to do so. Posner admires Sweden for demonstrating his morally neutral, economic style, approach to sexuality. Although the socialist components of Sweden’s government do not sit well with his libertarian values, he argues that ironically, as compared to the United States, in matters related to sex Sweden “more nearly approximates a free-market society than the United States does.” Posner has strong leanings towards the Swedish stage 3 model, and seems to suggest that if its sexual freedoms and the liberation of women and children from the family could somehow be achieved without a socialist government and laws, and without undermining the possibility of some citizens opting for traditional marriages and families, this would be his favored normative arrangement.

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34 Posner, p. 166.

35 Posner, p. 162, 177.


37 Posner, p. 85. Posner argues that the morally indifferent approach to sex must be differentiated from a libertine approach. “Suppose we were as a matter-of-fact about sex as we are about eating or driving,” he asks, “Sex would nevertheless be an issue of public concern. Few people in modern Western society consider eating (as long as it is not cannibalistic) an activity charged with moral significance, but everyone recognizes that it is an activity to be conducted with due regard for considerations of health, expense, time, and seemliness. Food disorders, such as bulimia and anorexia, are recognized; people are criticized for being too gluttonous or too fastidious; the gourmet is distinguished from the gourmand, cuisine from sustenance, healthy diets from unhealthy ones; there is
Adultery

Posner explains that adultery is among the most challenging policy issues for libertarianism to confront because it involves adult, consensual, private and informed conduct.\(^{38}\) When an act takes place between consenting adults, as with adultery, then the method presumes the act to be innocent until proven harmful, or at least more harmful than beneficial to the actors. Therefore, he studies the costs of adultery to the husband and wife in stages 1 and 2 to determine if there is significant harm done.\(^{39}\) Because these two analyses are very similar, I only summarize the cost-benefit analysis of the harms of adultery under stage 2 conditions.

First he studies the costs to a woman of her husband’s adultery under stage 2 conditions. The wife is dependent upon her husband for financial support for herself and her children as well as for emotional affection in stage 2. So, he argues that the main costs to a wife of her husband’s adultery would be fewer resources available to her and her children, “merely some diminution” in resources, as well as the emotional a concept of good table manners. So while eating is not a moral subject except to vegetarians and to persons who adhere to religious dietary restrictions, neither is it a free-for-all; it is guided by aesthetic and prudential considerations. So would sex be in a society in which it was morally indifferent subject. An intelligent person understands that one is dealing with a strong desire that must be kept in place, not allowed to dominate or endanger one’s life….. Not everyone is intelligent or self-controlled, however, and when a person engages in sexual acts that harm other persons without their explicit or implicit consent, there is a case for social intervention. It is that case that I want to explore.” p. 182

\(^{38}\) When consent between adults is absent, as with rape, then there is a direct violation of liberty rights, and the act is automatically reprehensible.

\(^{39}\) It is also worth noticing that Posner does not calculate the possible costs of adultery to children or society, or the benefits of adultery to the spouse who is unfaithful or to the lover. A more rigorous application of his method would have to include such calculations, but it would also show the difficulties of trying to faithfully calculate actual costs (after the benefits are included) of adultery. Since I will argue that even Posner’s limited analysis of utilitarianism fails to be normatively persuasive, it is not necessary to belabor additional matters.
costs of feeling unloved in her marriage when she expected there to be love.\textsuperscript{40} In other words, she would suffer minor financial costs and significant emotional costs.

Posner argues that the costs to a man of his wife’s adultery will be greater. Female adultery is financially, emotionally, and genetically costly for a husband. Financially, if the wife’s adultery results in a pregnancy, then the husband will be forced to support a child that is not his own. Emotionally, if he happens to discover his wife’s adultery, he will be deeply jealous.\textsuperscript{41} (This jealousy is partly the result of the affection he has for his wife in companionate marriage, but also has primitive biological roots that exists even during stage one.\textsuperscript{42}) Genetically, he will have lost an opportunity to father a child and maximize his reproductive potential.

Posner argues that the emotional costs incurred by both sides would cancel each other out, so that the main costs would be genetic and financial on the male side and financial on the female side. Posner concludes that female adultery is more costly to the injured husband than male adultery is to an injured wife, and that the historical legal double standard against adultery is therefore reasonable. Posner believes that adultery laws previously rightly reflected the “asymmetry” in costs between the husband’s and wife’s adultery, though Posner states that it no longer makes sense to ignore male adultery as no offense at all, as was done in early law.\textsuperscript{43} From this,

\textsuperscript{40} Posner, p. 184.
\textsuperscript{41} Posner, p. 184
\textsuperscript{42} “Human emotions are adapted to the conditions that prevailed during the evolutionary period of human prehistory, long before contraceptives and paternity tests. In that period, indignation at the fact of adultery was what was vital to a man’s inclusive fitness, and it continues to be the usual male response to a wife’s adultery.” Posner, p. 185
\textsuperscript{43} Posner, p. 184-85, 251-251. Posner also argues that the double standard of the laws makes sense in light of biology: Biologically, “...a husband’s adulteries are more likely than a wife’s to be casual. Evolutionary biology implies that a married man may be attracted to a woman precisely
Posner concludes that his normative economic analysis of sex would recommend laws against adultery.\textsuperscript{44} “Without going any further,” he concludes, “we can see that adopting the model of morally indifferent sex would not necessarily confine public regulation to coercive sexual acts such as rape and the sexual abuse of children. Libertarian and libertine are not synonyms after all.”\textsuperscript{45}

However, one wishes that Posner had gone further in the analysis. First he does not study the possible costs of adultery to other third parties, such as the children of an adulterous parent or society at large. No doubt, the costs of adultery to these parties would make the calculations of utility more difficult to execute, but it would be more realistic to include these harms. Second, he does not study the costs of adultery in stage 3, the stage that best represents his model of morally indifferent sex. If we think about the possible costs of adultery under stage 3 conditions, it is much more difficult to argue that adultery is costly and can be prohibited.

Posner argues that technology, science, and the market alter the sexual strategies of men and women in stage 3. If a married man commits adultery, then his wife will suffer emotional costs like before. However, it is not clear if she would suffer significant financial costs. Recall that Posner argues that stage 3 women maximize their economic independence and minimize their dependence upon men. They have more earning power and opportunities for employment outside of the

\textsuperscript{44} Posner, p. 186.

\textsuperscript{45} Posner, p. 187.
home. Therefore, they will suffer even fewer financial costs in stage 3 than they did under stage 2 conditions, which according to Posner were minimal already.

If a married woman commits adultery in stage 3, her husband will suffer emotional costs like before. However, it is not clear whether he will suffer significant financial or genetic costs. Since paternity tests and contraception are available in stage 3, and since women are financially more independent from their husbands, it is (first of all) less likely that a child will result from an adulterous union, and (second of all) if a child does result, a husband who feels cheated may appeal to paternity tests to verify whether he is co-responsible for the child. Mothers who do not have their husband’s financial support can use their own resources to support the child, (or perhaps even use legal means to acquire the co-assistance of the lover.) Moreover, it is no longer persuasive to say that there are genetic costs to a husband of his wife’s adultery in stage 3. Since contraception is a regular part of sexual intercourse in this stage, couples cannot be so concerned about losing opportunities to further their genes.

My point is not that there are no financial costs of adultery under stage 3 conditions, but that it is much more difficult to predict, quantify and prove that there are significant harms of adultery in this stage. Posner’s libertarian principle places the burden of proof upon those who wish to prohibit acts, so the costs of adultery must be significant and clear enough to leave no room for doubt. (And we have not even considered the net benefits of adultery to the lovers, which would make it even more difficult to demonstrate that adultery is more costly than beneficial.) Once we try to study the costs of adultery under stage 3, it is not clear that Posner’s method would in
fact recommend laws against adultery. His silence about adultery under stage 3 conditions may indicate that he is aware of this difficulty of predicting and quantifying the costs, one of the main problems with the utilitarian approach.

**Divorce**

Posner reviews four different legal policies on divorce and studies whether each promotes or undermines companionate marriage. In the end, he does not endorse the divorce policy that best promotes companionate marriage, but abstains from the normative question. So his analysis of divorce does not further his claim that an economic theory is a useful method for resolving public policy questions. However Posner’s descriptive analysis indicates that Montesquieu’s divorce policies are among the best there are to promote a companionate marriage culture.46

The four social policies on divorce which Posner reviews include: (1) regimes that do not permit divorce (regimes of no-divorce), (2) regimes that permit divorce at will (regimes of no-fault divorce) (3) those that allow consensual divorce and (4) those that permit divorce upon proof of grounds.

As regards the first, states that ban divorce usually do so with the intention of strengthening companionate marriages. However, Posner argues that bans on divorce increase the costs of marriage, which increases the age when couples marry, which increases the incidence of extra-marital sex, which undermines the conditions for a

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46 It is misleading for Posner to suggest that he will address the normative question on divorce, for he places the discussion in Part 3, chapter 9, on: “The Regulation of Sexuality” where he aims to examine “a number of the practical applications of his economic theory”. Introduction, p. 8.
companionate marriage culture. Although Posner is careful not to endorse any policy, he is in agreement with Montesquieu that the state that wishes to foster a companionate marriage culture must permit the dissolution of some marriages, those in serious conflict.

As regards the second policy, no-fault divorce allows a marriage to be dissolved without proof of grounds or consent from one spouse. Posner explains that in these regimes, couples have fewer incentives to take the marriage vow seriously. The costs of entering into a bad marriage are lower, the risks lower, and so spouses will spend less time searching for the right mate, which in turn will decrease the chances of making a good match, and will increase the likelihood of non-companionate marriages that end in divorce. He concludes that a policy of no-fault divorce will undermine companionate marriage as much as, if not more than, a policy of banning divorce altogether. Despite the strong tendency of no-fault divorce to weaken marriages, Posner does not denounce it.

The third divorce policy involves consensual divorce, and the fourth is a policy of divorce upon proof of grounds. Recall that Montesquieu’s divorce policy was a combination of these two: consensual divorce based upon (proof of) mutual incompatibility. Regarding the third policy, Posner explains that consensual divorce treats the marriage like a business partnership: “just as a partnership can be dissolved by agreement of the partners, so might a marriage be dissolvable by agreement of the

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47 Posner, p. 246.
49 “The tendency in a regime of divorce at will is, therefore, to substitute for a single, durable companionate marriage a succession of shorter and perhaps no more companionate marriages.” Posner, p. 248.
However, he notes that there are two problems encountered in application: first, a spouse will probably be able to coerce or “badger” the other spouse into giving his or her consent if the other is unwilling at first, making it not truly consensual, and failing this, the first spouse could offer to buy the other’s consent. While Posner argues that the purchase of consent would make it technically consensual, this sort of divorce policy still would undermine companionate marriage by reducing the costs of separation. However, as compared to the first two divorce policies, this one is less destructive of a companionate marriage culture.

The fourth policy, divorce upon proof of grounds, requires that the spouses show that the marriage has failed, i.e., that it never did, or no longer can, or will be able, to meet the goals of marriage. The goals of non-companionate marriages are few (reproduction and raising the children) so the circumstances that can thwart the goals are also few (sterility and female adultery). In companionate marriage, however, the goals of marriage also include companionability. So Posner lists additional conditions that could inhibit a marriage from being companionate, such as, the insanity or lengthy imprisonment of a spouse, or the physical or mental cruelty of one spouse towards another.

In theory, this fourth divorce policy is the most respectful of companionate marriage, because it avoids many of the disadvantages of the other policies.53


51 And it would do so in a more degrading way, by permitting the marital relationship to be cheapened through sale.

52 Posner, p. 249.

53 He notes that by allowing divorce upon proof of adultery, the laws raise the costs of non-marital sex. Therefore, it has the advantages of 1) allowing unworkable marriages to dissolve and
However, Posner notes that it has disadvantages in litigious governments like ours, where lawyers do most of the investigating and proving, rather than in inquisitorial systems of justice, where the judge is responsible for uncovering the facts. “[S]pouses who desire to divorce can do so by manufacturing evidence of the existence of one of the grounds for divorce”.\(^{54}\) Collusive litigation like this can give way to a \textit{de facto} no-fault divorce policy. So, he is skeptical that this fourth divorce policy can be maintained in modern American and other non-inquisitorial systems of justice.

He concludes that all four divorce policies have disadvantages for a marriage culture but that no-fault divorce regimes do the most harm to companionate marriages; in second place, regimes that ban divorce; in third place, regimes that permit divorce with mutual consent; and in fourth place, divorce upon proof of grounds (in regimes which employ inquisitorial systems of justice).

Although France did not employ the inquisitorial system of justice during Montesquieu’s time, it was his preferred method of trial.\(^{55}\) In light of this, his support for a divorce policy that combines proof of grounds with the requirement of mutual consent has the advantage of preventing divorce upon proof of grounds from becoming a \textit{de facto} no-fault divorce policy. This is because a spouse must prove that the conditions for companionate marriage never did, or no longer exist, and \textit{both} spouses must expressly agree to this conclusion in court. Therefore, in light of

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reform, 2) not permitting the easy dissolution of marriages, so that couples are encouraged to try to search for the right mate and, once married, encouraging couples to try work through problems to make the marriage work and 3) raising the costs of failing to fulfill marital duties.

\(^{54}\) Posner, p. 249.

Posner’s analysis, Montesquieu’s restrictive divorce policy is a compelling way to ensure that divorce does the least harm, and most good, for companionate marriage.

On the larger question of which theory has more value for understanding and normatively judging divorce, Posner’s descriptive analysis is more comprehensive than Montesquieu’s analysis, but Montesquieu makes normative, legal recommendations for divorce, whereas Posner does not, and the recommendation Montesquieu makes shows sophistication in the light of Posner’s descriptive account.

Posner may be abstaining from answering the normative question because he is caught trying to defend two incompatible positions, a pro-companionate marriage policy with a commitment to the toleration of sexual deviance, and the issue of divorce touches a nerve, as it were, in that effort. Posner acknowledges that lenient (no-fault) divorce policies undermine companionate marriage in a significant way, but he previously showed a commitment to the toleration of sexual deviance, of which lenient divorce policies are an important part, since these optimize the sexual choices available to people. If Posner took a normative position in favor of no-fault divorce, then he would be showing his under-commitment to companionate marriage; if he took a normative position in favor of strict grounds for divorce, he would be showing his under-commitment to toleration of sexual deviance. In this light, it makes sense for Posner to abstain from answering the normative question.

Therefore, rather than state openly that he does not unreservedly favor a companionate marriage culture, he gives the appearance of favoring it by engaging in a descriptive mode of analysis that uncovers the divorce policies that do it least harm—without endorsing them specifically. This may indicate that Posner is aware
he has conflicting principles, but does not know how to reconcile them. Whatever his reasons may be, Montesquieu’s candor in favor of marriage is more satisfactory and his normative conclusions are more persuasive.

**Homosexuality**

With homosexuality, Posner leaves the realm of “normal” sexual behavior enters the realm of “deviant” sexual behavior. He explains that deviant sexual behavior involves forms of sexual expression that are not related to procreation even indirectly, such as homosexuality, masturbation, voyeurism, exhibitionism, fetishism, and the seduction of young children.\(^{56}\) While Posner does not want to call these “unnatural” as Montesquieu would, he does call them “peripheral” to reproduction from a biological perspective.

Posner’s main task is to explain the rationality of homosexuality, much in the same way he explained the evolutionary and rational choice mechanisms behind normal sexual behavior. However, like the other deviant sexual phenomena, homosexuality is more difficult to account for from the perspective of evolutionary theory, so he turns to rational choice theory first.

Posner argues that because of the potent male sex drive, and the tendency of females to ration sexual access, there would have been great competition among men for women in the evolutionary era, which would have resulted in the domination of the few stronger, more sexually attractive, males over those who for some reason or another were less sexually adequate. The few superior men would have had access to

\(^{56}\) Posner, p. 98.
most of the available women, which would have resulted in a surplus of males to compete for the few women left. Therefore, these men would have needed “safety valves,” alternative sexual practices that would have allowed them to meet sexual needs when there were insufficient available women.\textsuperscript{57} Thus he argues that there is “naturalness” to deviant sexual practices like homosexuality.

This explanation, however, only accounts for what Posner describes as “opportunistic” homosexuality, and not for “real” homosexuality, i.e., genetically-based homosexuality. The opportunistic homosexual is the person who has a heterosexual \textit{preference} but for some reason related to his or her circumstances is convinced to substitute a member of the same sex for sexual gratification.\textsuperscript{58} So Posner tries to account for a genetic base for homosexuality by appealing to evolutionary theory.

According to that theory, homosexuals may have propagated their own genes indirectly by dedicating their time to helping to protect the children of their close relatives. Although Posner does not explain his account clearly, the suggestion seems to be that some of the close relatives of the homosexual might have had recessive homosexual genes that they could have passed along heterosexually. And so, for instance, the homosexual uncle who took care of his sister’s children could have been

\textsuperscript{57} Posner readily notes that this line of reasoning does not explain lesbianism, because if women were to have shunned men, the birth rate would have been reduced directly, and so lesbianism would have been selected out. Since in the scenario Posner laid out all available women were accounted for, and presumably reproducing, the fact that some virile men were left without women would not have depleted the birth rate, and so their deviant sexual practices would not have been selected out. He also explains exhibitionism, pedophilia, and rape in terms of this substitutional theory. Posner, p. 99, and 106-07.

\textsuperscript{58} And Posner grounds this distinction in terms of the Kinsey scale. p. 105.
maximizing the chances of his own homosexual genes surviving through his heterosexual nephews or nieces.\textsuperscript{59}

Posner also reviews other non-genetic explanations for homosexual behavior, primarily psychological studies, which have found that a common narrative in the early childhood experiences of many homosexuals consists in a distant father, combined with an affectionate mother, and “sissified” child. These boys are born with less markedly male personality traits, are shunned by or are at odds with their fathers, rejected by their male peers, and as a consequence, cause the boy to see his affectionate and often overly-protective mother as the ally and role model. He thinks of himself in increasingly feminine terms and eventually finds men, who have been the less familiar and mysterious opposites in his life, to be what attract him sexually. For Posner, however, these psychological and social explanations for homosexuality can only be secondary to the genetic explanation, which he proposes as foundational to the homosexual phenomenon.\textsuperscript{60}

As for the merits of Posner’s theory for describing the phenomenon of homosexuality, as Posner acknowledges, rational choice and cost-benefit models only account for opportunistic homosexuality. Posner is caught in the dilemma that he personally wants to account for genetically based homosexuality, so he goes to great lengths to find an evolutionary account for homosexuality that is compatible with his rational choice lens. That genetic hypothesis, however, seems farfetched. On that view, a homosexual uncle who helps to advance the chances of survival of his

\textsuperscript{59} Posner p. 101-102.

\textsuperscript{60} Posner, p. 103. Posner also appeals to studies of homosexual twins who have been reared apart from each other as evidence. However, below I will contest the reliability of this appeal. p. 102, fn. 40.
younger relatives by offering his additional protection for them indirectly has the
opportunity to advance his genes through the genes of his relatives (who *may* have a
recessive homosexual gene). However, this is a highly inefficient, at best a very
complicated, way to advance one’s genes in a game that favors the fittest for survival.
Even on this account, it seems more likely that evolution would have selected any
possible homosexual genes out for not serving survival well. (A more likely
evolutionary explanation is that homosexuals would have engaged in opportunistic
*heterosexuality*, so as to reproduce by natural means.)

What one is left with is the impression that Posner goes to great lengths to find
data that fits his preconceived notions about homosexuality, rather than go to great
lengths to make sure that his theory fit the most compelling data available. However,
one cannot fault Posner too strongly for trying to find some scientific backing to the
claim that there is genetically based homosexuality. For during the time of
preparation and publication of *Sex and Reason*, Posner was not alone in hoping, with
some of the most prominent psychiatric guilds of America, of discovering clinical
evidence for an exclusively genetic basis for homosexuality. Today, it is more widely
accepted that twin studies show that there is no exclusively genetic basis for it, and
that this orientation must be the result of a more complex combination of causes
which include not only biological ones (of which genes are probably only a minor and
hypothetical part, since to date no gay genes have been discovered) but also
environmental causes.
For instance, the American Psychological Association (APA) has backed away from earlier claims that homosexuality had a genetic basis. And Dr. Julie Harren, President of the National Association for Research and Therapy of Homosexuality, explains that the current consensus about the causes behind homosexual orientation can be most simply explained in terms of an equation:

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\text{Genes + Brain Wiring + Prenatal Hormonal Environment} = \text{Temperament}
\]
\[
\text{Parents + Peers + Experiences} = \text{Environment}
\]
\[
\text{Temperament + Environment} = \text{Homosexual Orientation}
\]

In light of these newer understandings, Posner’s evolutionary account for genetically based homosexuality is dated and unpersuasive for that reason. What remains is his supply-demand account for opportunistic homosexuality, the theory that a limited supply of women would have caused competition among the most sexually fit men, and encouraged the weaker men to turn to homosexual activity.

Curiously, this explanation does about as well as Montesquieu’s explanation to account for the causes of homosexuality. Recall that Montesquieu denies that there is such a thing as natural, or biological homosexuality and only aims to explain the causes for opportunistic homosexuality. Montesquieu’s account drew from reports of ancient Greece and the Far East, which described societies that segregated women.

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61 In 1998, the APA stated that: “There is considerable recent evidence to suggest that biology, including genetic or inborn hormonal factors, play a significant role in a person’s sexuality”. Ten years later, in its revised pamphlet on homosexuality, the APA stated instead that: “Although much research has examined the possible genetic, hormonal, developmental, social, and cultural influences on sexual orientation, no findings have emerged that permit scientists to conclude that sexual orientation is determined by any particular factor or factors. Many think that nature and nurture both play complex roles...” “APA's New Pamphlet on Homosexuality De-emphasizes the Biological Argument, Supports a Client's Right to Self-Determination” by A. Dean Byrd, Ph.D., MBA, MPH, which can be found at: [http://www.narth.com/docs/deemphasizes.html](http://www.narth.com/docs/deemphasizes.html) (Accessed Nov 2009)

62 “Homosexuality 101: What Every Therapist, Parent, And Homosexual Should Know”

from the men or looked down upon women as sexually inadequate (different forms of creating female scarcity), which led men to turn to each other for sexual gratification.

In the end, therefore, both Posner and Montesquieu offer similar accounts of the causes behind opportunistic homosexuality, and scientifically dated views about the naturalness of homosexuality, though they take opposite positions about whether it is natural or not. So one might say that on the question of describing the homosexual phenomenon these theorists end in a tie.

**Sodomy Laws**

Leaving description behind, Posner’s normative reflections on homosexuality address three main issues: whether sodomy laws should be repealed; whether homosexual marriage should be permitted; and whether homosexuals should be allowed to serve in the military. In the interests of space and relevance to Montesquieu, I confine the inquiry to the first two issues, sodomy laws and homosexual marriage.

Posner does not employ his utilitarian-libertarian method to make normative recommendations about sodomy. That method would have involved: (1) noting that the kind of homosexual behavior involved is private, adult, consensual behavior, and that as such, must be proven to be harmful before the laws can prohibit it, (2) presenting a cost-benefit analysis of the act to establish whether it is significantly harmful or not. Instead, Posner approaches the matter with a new approach. He proposes that if the following conditions are met, then it is very difficult to justify laws that prohibit and punish homosexual acts between consenting adults.
[1] Suppose at one extreme that there is a huge number of “real” homosexuals in the sense used throughout this book of persons who have a strong and basically lifelong preference for sexual relations with persons of their own sex, [2] that this preference is entirely the result of biological endowment, and that [3] were it not for legal oppression, the behavior of homosexuals other than in matters of sex in the narrowest sense (the gender of the sex partners and the difference in sexual practices necessitated by the partner’s being of the same gender) would be indistinguishable from that of heterosexuals. Then it would be very difficult to justify laws that make a “statement” of opposition to homosexuality, which is the main contemporary significance of the laws against homosexual sodomy and is justifiable if at all only if young people choose rather than are destined to become homosexuals.63

“We must try to estimate,” he further explains, “on the basis of admittedly inadequate knowledge, how closely those assumptions approximate the truth.”64

Setting aside for the moment the problem that this normative approach leaves aside his utilitarian method of resolving questions and seems to be an arbitrary way to settle this matter, let us follow him through the reflection.

Regarding the first assumption, he notes that the homosexual rights movement usually claims that 10% of the population is gay. However, this figure is drawn from Kinsey’s original studies on sexual behavior, which since their publication have been proven to be unreliable in their sampling methods. Therefore, appealing to more reliable estimates, Posner concludes that most likely “the number of male homosexuals are in fact between 2 and 5 percent.”65 This is not a large number of homosexuals. So the first assumption is false.

63 Posner, p. 293
64 Posner, p. 293
65 Posner, p. 295
Regarding the second assumption about the causes of homosexuality, he argues that the evidence points more strongly towards a determined rather than chosen theory of homosexual preference, especially for male homosexuality. Citing studies of societies that repress or tolerate homosexuality, and alluding to brain and twin studies of homosexuality, he concludes that: “homosexual preference is stubbornly resistant to social influence.”\(^{66}\) By contrast, he argues that studies of female homosexuality better demonstrate that lesbianism is more often a chosen than a determined phenomenon. But Posner discounts lesbianism because it involves opportunistic homosexuality, and he wishes to see if real homosexuality, a deeply homosexual *preference*, can be chosen or influenced socially. He concludes that the second assumption is probably true: homosexuality is caused by biological factors.\(^{67}\)

Here Posner’s reasoning seems fallacious, because his aim is to discover whether there is any truth to the assumption that homosexuality is biologically caused. When he finds studies that show lesbianism is more of a chosen phenomenon,

\(^{66}\) Posner, p. 296. Posner does not actually cite brain or twin studies but claims that “studies of identical twins and of the recent brain studies” show that homosexuality is probably innate. However, since 1991, five twin studies have been conducted to test whether same sex attraction (SSA) might be genetic. Posner probably had in mind the first and only twin study to have been executed before 1992, namely, a 1991 study by Buhrich, Bailey & Martin. (Twins have been the focus of research because, if SSA is genetically caused, then one can expect that if one twin has SSA, then the identical twin also would exhibit SSA.) However, as Dr. N.E. Whitehead has argued, all five twin studies to date have shown the same conclusion: “That is, if one identical twin--male or female--has SSA, the chances are only about 10% that the co-twin also has it. In other words, identical twins usually differ for SSA.” N.E. Whitehead, "Latest Twin Study Confirms Genetic Contribution to Ssa Is Minor," (2008), http://www.narth.com/docs/isminor.html. (Accessed Nov. 2009) Therefore, twin studies do not support the case Posner is trying to make. As for brain studies, Simon LeVay, the leading researcher of the so-called gay brain, explains in his book, *Queer Science* (1996) that, "At this point, the most widely held opinion [on the causation of homosexuality] is that multiple factors play a role."(7) Argued in: NARTH, "Is There A "Gay Gene"," (2008), http://www.narth.com/docs/istheregene.html. (Accessed Nov. 2009)/ Simon LeVay, *Queer Science: The Use and Abuse of Research into Homosexuality* (Boston: MIT Press, 1996). All in all, neither twin studies nor brain studies have shown that homosexuality is a genetically determined phenomenon.

\(^{67}\) The nature of this argument is questionable, for Posner inquires whether homosexuality has biological roots, or whether “this preference is entirely the result of biological endowment”, but then discounts any causes that are not genetically or biologically rooted.
he discounts those as irrelevant to the inquiry, rather than as evidence that the assumption is false. Furthermore, the twin studies he alludes to do not support his claim that male homosexuality is a biologically caused phenomenon.\textsuperscript{68} He either misunderstands or inaccurately portrays the scientific data. So while he concludes that the second assumption is “probably true,” it is not a persuasive conclusion.

Regarding the third assumption about whether homosexual behavior (apart from its sexual components) is any different from heterosexual behavior, Posner mentions the views of some radical critics who find the portrait of the typical homosexual to be “disgusting.”

The objection is to the entire homosexual lifestyle….believed to be pervaded with effeminacy, including physical weakness and cowardice; with promiscuity and intrigue, prominently including seduction of the young; with concentration in a handful of unmanly occupations centered on fashion, entertainment, decoration, and culture—such occupations as the theatre (above all the ballet) and the arts, hairdressing, interior decoration, women’s fashions, ladies’ shops, library work; with furtiveness and concealment, with a bitchy, gossipy, histrionic, finicky, even hysterical manner; with a concern with externals (physical appearance, youth, dress); with bad health, physical and mental, including suicide and alcoholism, with a wretched old age; with a general immorality and unreliability; with an above-average IQ, education, and income…and of course, with narcissism.\textsuperscript{69}

Posner tries to sort out the characteristics of this view that are farfetched from those that have some grounding in scholarly evidence. He cites studies that show homosexuals have a tendency towards promiscuity and effeminacy, an interest in the

\textsuperscript{68} See footnote 65 above.

Regarding lesbianism, he states that: “…women who dislike men—perhaps because they were sexually abused as children or subjected to sexual harassment as college students or as workers, or because they work in an occupation such as prostitution which shows men at their worst, or because they have signed on (perhaps for some of these same reasons) to the radical feminist critique of heterosexuality—may turn away from sex with men and become practicing lesbians.” Posner, p. 299.

\textsuperscript{69} Posner, p. 301.
arts, and in the creative world of fashion. Posner also argues that the stereotypical neuroticism and narcissism is confirmed by some studies, which show that these are character traits found in a number of artists, whatever their sexual orientation. He concludes that the homosexual lifestyle is, on the whole, an unhappy one and that it is unlikely that removing legal disabilities or intolerance will change this. The societies that are “light years” ahead of the United States in terms of homosexual tolerance, such as Sweden and the Philippines, witness a similar array of homosexual tendencies and occupational patterns.

I conclude that even in a tolerant society the life prospects of a homosexual—not in every case of course, but on average—are, especially for the male homosexual, grimmer than those of an otherwise identical heterosexual, a conclusion that lends an ironic touch to the appropriation of the word gay to mean “homosexual”—usually male homosexual.

This is to say that the third assumption is also false. Although not as disgusting as its entrenched critics claim, Posner agrees that the non-sexual aspects of the homosexual way of life are decisively different from the average heterosexual lifestyle and that it offers a lower quality of life than the average heterosexual life offers. Altogether, his first and third assumptions are false and the second assumption is “probably” true (though unpersuasively so).

Recall that Posner argues that if all three conditions are true, then it is very difficult to justify sodomy laws. Since at least two out of the three assumptions are false, then the reader would expect Posner to conclude that sodomy laws are not difficult to justify. However, he comes to the surprising conclusion that: “The
analysis in the preceding section seems to me decisive in favor of repealing laws
punishing homosexual acts between consenting adults.”\textsuperscript{73} Posner’s arguments do not
follow. Moreover, they are not related to his utilitarian method of resolving public
policy issues. He does not faithfully apply his methods, nor does he show logical
coherence in the methods he does apply. By comparison, Montesquieu’s method and
his faithfulness to his method are more persuasive. He finds homosexuality to be a
violation of natural law and natural rights, and recommends legal proscriptions of this
act. However, without contradicting the conclusions of his natural law, natural rights
morality, he moderates the way in which the laws are to legislate homosexuality by
recommending that it not be prosecuted, for reasons of procedural justice. Altogether
Posner does not provide reasons to believe that his normative analysis of sodomy
laws is sound.

\textbf{Same Sex Marriage}

Posner does offer a utilitarian, cost-benefit analysis to study the normative
question of whether the laws should permit same sex marriage.

On the benefits side of the equation, he argues that the legalization of same sex
marriage would have three benefits. First, it would raise homosexuals’ self-esteem.
Second and third, it would marginally advance the stability of homosexual
relationships, which would make homosexuals slightly happier and reduce spread of
infectious diseases, especially of AIDS. Posner argues that legalization of marriage
would only marginally increase the stability of homosexual relationships because

\textsuperscript{73} Posner, p. 309.
studies have found that it is the presence of a female in a marriage, and in second place, the presence of children, which contribute towards marital stability. Homosexual unions would not become significantly more stable by the simple fact of making them legal marriages. Thus the second and third benefits to legalization are “marginal.”

On the costs side, the government would give its political approval to a lifestyle that was not as happy as the heterosexual lifestyle. That is, the laws would lead citizens to falsely believe that homosexual marriage was as equally stable or rewarding as heterosexual marriage.

To permit persons of the same sex to marry is to declare, or more precisely to be understood by many people to be declaring, that homosexual marriage is a desirable, even a noble, condition in which to live…[but] for reasons stated earlier it would be misleading to suggest that homosexual marriages are likely to be as stable or rewarding as heterosexual marriages….It…would place government in the dishonest position of propagating a false picture of the reality of homosexual’s lives.

Given that Posner had earlier concluded the homosexual lifestyle was, on the whole, an unhappier life than the average heterosexual life, same sex marriage would promote unhappiness.

74 “A pair of men is inherently less likely to form a companionate marriage-type relationship than a man and a woman. This is not a proposition about male psychology or about the supposedly narcissistic character of homosexuality. It is a proposition about the biology of sex and reproduction. A male couple could, if the law permitted, …adopt children. But the children would not be the couple’s biological children; they might be the biological children of one of the men, but it will be a while before technology enables a child to be produced from the genes of two men. Since the demand for one’s own children exceeds that for adopted children, the average homosexual marriage would have fewer children than the average heterosexual marriage. Children are the strongest cement of marriage and the emotional, if no longer the financial, support of old age. But there is more. The male taste for variety in sexual partners makes the prospects for sexual fidelity worse in homosexual than in a heterosexual marriage. “It is not heterosexuality that contributes stability [to a marriage], but the presence of a female.” ” Posner, p 305-06, citing Donald Webster Cory, The Homosexual in America: A Subjective Approach (Greengerg, 1951), 88.

75 Posner, p. 312.
In addition, he makes the trivial point that there would be “information costs” to extending marriage to homosexuals. Currently, when someone speaks about “marriage” it is understood to regard a union of husband and wife. Extending marriage to homosexuals would overturn linguistic customs and force people to explain in more detail what they mean by marriage.\textsuperscript{76}

More significantly, he argues that legal marriage and its incidents, its entitlements, and benefits, were designed with heterosexual marriage in mind, and specifically, to “heterosexual marriages resulting in children.”\textsuperscript{77} To extend this legal category to a homosexual couple would generate a number of legal costs. There would, at the very least, be a great many “collateral effects” involved in adjusting to the new reality.\textsuperscript{78}

Taking his reflections together, the three net benefits of legalizing same sex marriage would be: a rise in the self-esteem of gays and marginal improvements in: the stability of gay unions, their happiness levels, and the spread of venereal diseases. The three net costs would be: the promotion of an unhappy lifestyle, and the linguistic and legal costs of switching to a different understanding of marriage.

It is very difficult, if not impossible, to \textit{quantify} whether these projected benefits are greater or less than the projected harms. If we speak strictly in terms of

\textsuperscript{76} “If our son or daughter tells us that he or she is getting married,” Posner explains, “we know the sex of the prospective spouse. All of these understandings would be upset by permitting homosexual marriage….” Posner, p. 312

\textsuperscript{77} Posner, p. 313.

\textsuperscript{78} “Do we want homosexual couples to have the same rights of adoption and custody as heterosexual couples? Should we worry that a homosexual might marry a succession of dying AIDS patients in order to entitle them to spouse’s medical benefits? These questions ought to be faced one by one rather than elided by conferring all the rights of marriage in a lump on homosexuals willing to undergo a wedding ceremony.” Posner, p. 313.
dollar amounts, however, the net costs of changing all of our marriage laws to address homosexual’s circumstances and needs (including tax laws, adoption laws, property laws, inheritance laws, etc., etc.) would seem to be the greatest cost, especially in comparison to the “marginal” improvements in the spread of venereal diseases (the only benefit that may have a quantifiable dollar amount). However, it is impossible to put into dollar amounts the degree that marriage would raise gay’s self-esteem or happiness levels. This shows how difficult it is to properly quantify and compare incommensurable things like self-esteem to legal costs.

Posner acknowledges that his utilitarianism does not yield a clear answer, but concludes (the opposite of what I have just concluded) that the benefits of legalizing gay marriage may be greater than the costs, which may show just how difficult it is to come to an agreement on how the degree of costs or benefits involved in such measures.

None of these points is decisive against permitting homosexual marriage. All together may not be. The benefits of such marriage may outweigh the costs. Nonetheless, since the public hostility to homosexuals in this country is too widespread to make homosexual marriage a feasible proposal even if it is on balance cost-justified, maybe the focus should be shifted to an intermediate solution that would give homosexuals most of what they want but at the same time meet the three objections [the three costs] I have advanced.  

His calculations are inconclusive, but since the no-harm principle places the burden of proof upon the opposition, Posner gives the benefit of the argument to those who favor gay marriage. The temporary solution he proposes is the registered partnership of Denmark, and the homosexual cohabitation permitted by Sweden, both of which

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70 Posner, p. 313.
would allow homosexuals to form something like a civil union until public opinion about homosexual marriage changes.\textsuperscript{80}

Although his cost-benefit calculations are faithful to his utilitarian methodology, and his conclusion is faithful to his libertarian principle, the analysis reveals the futility of making utilitarian calculations when non-quantifiable or incommensurable activities (such as raising happiness levels) are involved. Furthermore, the combination of libertarianism with utilitarianism creates a theory that places the burden of proof so high upon those who oppose any particular behavior that it seems very difficult, if not impossible, to demonstrate in utilitarian terms that anything is costly enough for it to be outlawed or regulated. So far, no sexual behavior (except adultery in stage 1 or 2 conditions) is harmful enough that it can be prohibited or regulated.

**Polygamy**

Posner’s normative analysis of polygamy takes a different form than his previous analyses. Rather than a cost-benefit study of polygamy, he writes more loosely about the pros and cons of the practice, citing a number of sources. He appeals to the opinions of philosophers, social historians, anthropologists, sociologists, and even novelists to summarize what the benefits and costs of

\textsuperscript{80} “The Swedish approach assumes, realistically I think, that a homosexual relationship, even when meant to last, is more like heterosexual cohabitation than like heterosexual marriage, so the forms that the Swedes have worked out to regularize what is after all an extremely common relationship in their country provide the appropriate model for homosexuals who want to live together in ours. It may indeed offer an increasingly attractive model for heterosexuals as well.” Posner, p. 314.
polygamy may or may not be.\(^{81}\) (He does not cite sources for each individual argument so it is not possible to know for certain which arguments are grounded in empirical evidence and which are not.) From the start, then, his analysis of polygamy does not follow his promised methodology.

On the pros side, legalization of polygamy would have three main advantages. First, it would make women more marketable because it would increase the demand for women, lower their average age of marriage, and increase the percentage of women who marry.\(^{82}\) This increased demand would raise the price each woman could demand in exchange for marriage, and give them more leverage in courtship.\(^{83}\) Second, polygamy would provide another life choice for women, not only to remain single, or to marry monogamously, but to marry into a polygamous marriage as well.\(^{84}\) On these two grounds Posner concludes that polygamy would be “unequivocally advantageous” for women, in stark contrast to Montesquieu. Third, Posner argues that polygamy would have social benefits because it would reduce the incidence of adultery, fornication, and prostitution, because it would allow men to take on more wives and find greater sexual outlets within marriage.

On the cons side, there are two main disadvantages of polygamy. First, it does not satisfy women emotionally in marriage. Polygamy weakens the bond of affection

\(^{81}\) Posner, p. 255, fn 33

\(^{82}\) Posner, p. 255, 253.

\(^{83}\) I disagree with this prediction. Polygamy lowers the stakes for men for finding the right woman. The man has multiple opportunities to get it right, so he can lower his standards and love a woman less when he proposes to marry her than he would otherwise love a woman when he only had one opportunity. As such, this woman would not have greater leverage in courtship but less than a woman who sought monogamous marriage, and likewise would not be able to demand as much in courtship as the woman who sought monogamous marriage.

\(^{84}\) Posner, p. 253.
between husband and wife/ves because there is no exclusive love from the husband:

“The polygamist’s wife is one of several, sometimes many, women among whom her husband must divide his time. She is sexually deprived, lonely, jealous, given to intrigue, and (particularly if she is his first wife) degraded.”\(^{85}\) Furthermore, the male affection a wife receives is often inappropriate for her age or maturity. Older men are more likely to have the resources to support many wives and children, so there tends to be a significant age difference between husband and wives.

In addition, he notes that it is difficult for husbands to manage the family in an egalitarian way when there are so many wives, so the women are frequently subject to hierarchical rule:

The more wives a man has, the likelier he is to manage his household (or households) on a hierarchical rather than on an egalitarian basis…. The costs of coordination through negotiation are higher the greater the number of activities that have to be coordinated….The higher the costs of transacting, the likelier is a substitution of hierarchical for transactional coordination and direction.\(^{86}\)

Posner concedes that polygamy “bears a family resemblance to a master-servant relationship,” in agreement with Montesquieu’s claims.\(^{87}\)

Moreover, Posner predicts that polygamous arrangements give wives stronger incentives to be unfaithful. The husband is not around a large part of the time because he must split his family time between wives. The women will tend to be emotionally and sexually frustrated, and so will be drawn to the satisfactions that an extramarital

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\(^{85}\) Posner, p. 255. Posner notes that one reason why the Mormon church permits polygamy is because it can free the husband to devote greater time and emotional energy to the Church rather than to his family.

\(^{86}\) Posner, p. 256.

\(^{87}\) Posner, p. 256.
affair may offer.\textsuperscript{88} Therefore, the polygamist has incentives to increase surveillance over his wives or even seclude them to make sure they are not unfaithful. All of these factors serve to diminish the emotional satisfaction of women and increase the probability that these marriages will be abusive towards them.\textsuperscript{89}

Second, he argues that polygamy has social disadvantages, a claim for which he does cite sources. Citing evolutionary and social studies, Posner reports that polygamy reduces the diversity of the gene pool; increases the likelihood of incest; aggravates financial disparities and power among men (since the poorer men are less qualified to enter into polygamous marriage), which increases the incidence of opportunistic homosexuality;\textsuperscript{90} and reduces the time and emotional energy polygamists can give their children, which has its own negative effects upon children and society.\textsuperscript{91}

Although it is difficult to compare and contrast the advantages and the disadvantages when it is unclear which are grounded in empirical data and which are not, overall the negative side of the analysis reveals such a grim picture of polygamy that it renders the positive side unconvincing. The first alleged advantage of polygamy, that it would increase the marketability of women and their leverage in courtship, seems a very small benefit once the costs of entering into an emotionally unsatisfying and possibly abusive marriage are better known.

\textsuperscript{88} “[T]he benefits of extramarital sex are greater for the polygamist’s wife and the costs lower.” Posner, p. 256.

\textsuperscript{89} Posner, p. 256.

\textsuperscript{90} Here Posner cites evidence for Montesquieu’s suggestion that there is a connection between polygamy and homosexuality in societies. Posner, p. 258, fn 37-38

\textsuperscript{91} Posner, p. 258.
The second alleged advantage, that it would provide another life choice for women, is also of questionable value once the nature of that choice is better known. What rational female actor aware of the disadvantages polygamy would freely choose to enter into a possible relationship of servitude in marriage? Although Posner’s libertarianism impels him to state that, “rarely is a person made better off by having an option removed,” his own analysis suggests that this is probably one of those instances where women are better off by not having this choice made available to them.92

The third alleged advantage is the reduction in the incidence of male adultery, fornication, and prostitution. However, Posner argues that women are more likely to commit adultery when they are a part of a polygamous marriage. And he cites evidence that polygamy increases the likelihood of incest and causes disparities of power and wealth among the men in the society, which contributes to increases in opportunistic homosexuality. In light of these costs, i.e. increases in female adultery, incest, and homosexuality, the third alleged advantages are not compelling.

Remarkably, notwithstanding the grim correlations between polygamy, the inequality of women, and the adverse social effects he identifies, Posner does not recommend regulation against polygamy. In the end, he sides in favor of legalization. If the free consent of all the wives can be secured, then polygamy would be the “unambiguously best regime” because it would add an additional life choice for

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92 Posner. 253.
women. However, *if* the legal system were incapable of securing the free consent of all the wives, then he says that it “might” be better to prohibit polygamy.93

This conclusion does not follow from his (loose) pros and cons analysis, because the disadvantages of polygamy seem great enough that they would permit a prohibition of polygamy so as to protect women. It is unclear why Posner concludes that polygamy should be legalized. Perhaps he is not convinced that there is enough evidence that it is costly enough to merit legal prohibition, because as noted earlier, in order to validate legal prohibitions of any given act, the costs must be shown in utilitarian terms to be significant enough that they overshadow any net benefits to the act. However, Posner may be faulted for failing to present a utilitarian cost-benefit analysis that would better show whether there are more costs than benefits to permitting polygamy. Not only is he unfaithful to his method, but he is also not transparent about what method(s) he uses to arrive at normative conclusions. The case of polygamy does not provide us good reasons to endorse his economic theory either, and increases the relative value of Montesquieu’s contribution.

**Incest and Bestiality**

With incest, Posner excludes cases where a family member rapes or seduces a child, because such crimes are coercive and violate the no-harm principle on those grounds. He focuses upon cases where incest is performed between consenting adults

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93 “In principle, polygamy with the consent of all of the husband’s wives would be the unambiguously best regime for women because it would expand their choice set. But a premodern legal system might be incapable of determining whether consent had been freely given…. In these circumstances, the second best choice from the woman’s perspective might be no polygamy.” Posner, p. 257.
(siblings, first cousins, or fathers with adult daughters) and studies what the costs and benefits of legalization of incest would be.

There is only one benefit of legalizing incestuous relationships: it would grant another sexual choice to citizens. On the cost side, one possible cost would be to increase the number of children with genetic defects, which would be costly to society at large. However, this cost could be significantly prevented by effective contraception, and failing that, prenatal analysis and abortion techniques, which could identify and destroy the defective fetuses. Moreover, Posner cites findings that demonstrate that children are “imprinted” with a natural revulsion towards sex with close family members when they are raised together.\(^94\) This natural revulsion would further diminish the probable costs incurred by the legalization of incest, so liberalization would probably not cause much more incest anyway. Furthermore, he notes that currently, the laws do not prohibit marriages between people who carry dangerous recessive genes.\(^95\) It would be inconsistent for the laws to prohibit siblings to marry each other on genetic grounds.

Altogether, once he admits only legitimate costs into the calculation and adjusts for those that cannot be reasonably expected (natural revulsion reducing the likelihood of real incest to rise drastically), it turns out that the expected aggregate


\(^95\) Posner, p. 200. Although he later argues that: “there is nothing arbitrary about picking out a class of sexual unions that, if fertile, are likely to produce damaged offspring and prohibiting them….The effect of the prohibition is to redirect [in this case] cousins’ procreative activity into channels in which they are much less likely to produce damaged offspring.” Posner, p. 201. But one could counter that it would be discriminatory on the basis of genetic fitness, which is a larger problem. Montesquieu’s rationalist, natural law, natural right approach to solving this dilemma is more satisfactory, in that he argues that incest is a violation of modesty. Posner has to argue on the basis of utility, which in this case would be discriminatory against those who are less genetically fit.
costs to the population of incest would be quite minimal. However, he seems hesitant to conclude that his theory would favor the legalization of incest, so he asks whether the cost of social disgust might warrant prohibitions on incest.

Left out of account...is what may be the biggest externality: the revulsion that so many people in our society feel at the very idea of promiscuity and of sexual deviance. Revulsion seems to be a better explanation for why incest has been criminalized than concern with genetic fitness or even the coercion of minors by persons standing in a fiduciary relationship to them.96

Given what appears to be a deeply natural revulsion toward incest within the human species (“the core of the incest taboo” Posner reminds us, “appears to be common to all human societies, past and present”97), the legalization of incestuous sex would likely be followed by increased feelings of repugnance at its incidence. This could well qualify as a significant external cost of legalization, perhaps enough to surpass the burden of proof required by the libertarian challenge.

However, Posner rightly questions whether it would be licit to include such a cost in a libertarian analysis. Citing Mill, he explains that one of the main concerns of libertarianism is with the tyrannical tendencies of the moral majority. Citizens should not be allowed to decree that “no person shall enjoy any pleasure which they think wrong” even though the enjoyment is harmless in itself aside from the disgust it brings about.98 Permitting moral revulsion to enter into the calculation could open the door to the persecution of other acts that were otherwise harmless, though deeply

96 Posner, p. 201.


disgusting to people.\textsuperscript{99} Therefore, this cost is not valid and there appear to be no strong reasons to prohibit incest. Posner does not seem comfortable making this conclusion clear, however, because in the end, he argues unconvincingly that the analysis is too complicated to draw a conclusion.

If we ignore moral revulsion, and all population effects, as justification for regulating sexual behavior, we are still left with complicated factual questions of the sort raised….Even when simplified as much as I am attempting to do, normative economic analysis of sexual regulation remains a formidable task.\textsuperscript{100}

Aside from the momentous concession that his economic theory offers a very difficult method for judging sexual regulation, on the question of incest, Posner’s analysis is the most straightforward submitted so far. There is only one benefit to permitting the practice, and there are no clear costs. The conclusion seems clear: incest should be allowed.

Bestiality, though deeply offensive to society as well, is even more difficult to denounce with his method. In this case, the act takes place between an adult and a non-human animal, which does not constitute (from the perspective of Posner’s libertarian viewpoint) an act between two persons. So while there may be health costs incurred by the person who engages in sex with an animal of another species, it is such a private act that he does not admit there are tangible costs to anyone else. In a sense, bestiality is a non-starter. One cannot even begin the normative analysis with the method he provides.

\textsuperscript{99} Posner would probably say that previously in his argument, natural revulsion was acceptable because it arose from the actors themselves and not from other third parties.

\textsuperscript{100} Posner, p. 204.
He concedes that the implications of his normative theory are radically at odds with the morality of the West and to which most Americans still cling.

The fact that the prohibition against human intercourse with animals cannot be derived from the model of morally indifferent sex just shows that that model, attractive as it is to John Stuart Mill’s modern followers (among whom I count myself), is at odds with contemporary Western morality—and not merely with the periphery of that morality, but, at least in the case of “bestiality”, with its core.\textsuperscript{101}

However, the outcome of his normative analysis of bestiality is so contrary to American mores that one must question whether the faithful application of this method would be of service to public debates, or only exacerbate them. Moreover, the study of incest and bestiality shows just how difficult it is prove that any given act is harmful enough for it to be prohibited or regulated by law, so that Posner’s theory yields a highly permissive legal code.

**Conclusion**

Montesquieu’s moral and legal recommendations for the regulation of sexual behavior are internally more coherent than Posner’s economic theory of sexuality and his legal recommendations. And Montesquieu’s descriptive theory of sexual behavior is more convincing and desirable as a theory of public reasoning than Posner’s descriptive rational choice theory of sexual behavior.

On the question of marriage, Posner offered biological, historical, and rational choice theory reflections about its causes. The historical reflections were the most meritorious, especially the distinction between companionate and non-companionate

\textsuperscript{101} Posner, p. 231.
marriage, the exposition of the three stages of sexual morality, and the conclusion that there was a strong correlation between a companionate marriage culture and traditional sexual mores.

However, his biological and rational choice reflections assumed and portrayed a truncated understanding of the human person that was not persuasive. For instance, he understood males to be single-mindedly focused upon maximizing their sexual encounters in all three stages, and stage 3 females as single-mindedly focused upon maximizing their independence from men and children. Males and females do not have emotional or non-instrumental reasons for choosing marriage or any other sort of sexual behavior, and he does not present empirical evidence to support this hypothesis. By contrast, Montesquieu presented a more holistic and convincing concept of the male and female natures as motivated by a variety of causes (biological, social, aesthetic, moral, emotional, political, etc.) and an understanding of human agency that did not seek personal gain or survival alone but could and ought to have other motives (such as social, aesthetic, moral, emotional motives) for behaving and choosing certain sexual behaviors over others.

Furthermore, Posner did not take a normative position on marriage. Although he claimed that his theory would point the way towards reforms, and he seemed to have admiration for companionate marriage, he did not indicate that the laws should endorse and promote companionate marriage. It seemed that Posner was not willing to endorse companionate marriage because he was committed to a culture of sexual liberality and he did not know how to reconcile these positions. By contrast, Montesquieu was candidly and coherently in favor of companionate marriage and
showed his legal commitment to it by discouraging alternative forms of sexual behavior. This was more consistent and persuasive.

On the question of divorce, Posner presented a more comprehensive study of divorce policies than did Montesquieu. However, Posner did not take a normative position here either, whereas Montesquieu proposed a restrictive divorce policy that did the least harm to marriage by both his own and Posner’s standards. Although, as shown in the last chapter, his divorce policy was not fully consistent with his natural law and natural right theory as regarded the needs of the children, his general concern to promote marriage by permitting a restrictive divorce policy was consistent with his moral views.

On adultery, Posner claimed that his economic theory would recommend laws against adultery, but the analysis fell short of calculating the costs of adultery under stage 3 conditions, which would have better portrayed what his morally neutral model would say about adultery. Under those conditions, the costs of adultery were far less clear and the grounds for prohibition much weaker. By contrast, Montesquieu argued for the harsh prosecution of female adultery. Although his concern to protect marriage from adultery was understandable and consistent with his moral theory, his policy involved an inexcusable double standard against women that was inconsistent with his principles of justice, and a proposal that adultery be prosecuted that was inconsistent with his principles of procedural justice. On the question of adultery, therefore, neither theorist provided a satisfactory answer that was consistent with his normative theory.
On homosexuality, Posner and Montesquieu did about as well to describe the phenomenon of opportunistic homosexuality, and about as poorly to describe any other (biological or genetic) causes for homosexuality, which was to be expected in light of the clinical studies available to them, but perhaps more excusable in Montesquieu’s case.

On the normative question of sodomy laws, Posner abandoned his utilitarian method and adopted an unrelated approach, arguing that it would be difficult to justify sodomy laws if three conditions were met. When two out of the three conditions were not met, he did not follow through to conclude that sodomy laws were not difficult to justify. Instead he claimed that his analysis decisively favored the repeal of sodomy laws. The analysis was unfaithful to his method, and unfaithful to the approach he chose. Montesquieu by contrast, argued that sodomy should remain a crime but that it should not be a prosecutable crime. This was consistent with his normative (natural law, natural right) method and with his principles of procedural justice.

On the normative question of homosexual marriage, Posner was faithful to his utilitarian method, and offered a cost benefit analysis of gay marriage. However, the analysis revealed how difficult it is to quantify costs and benefits, especially intangible costs and benefits like unhappiness or self-esteem. The analysis did not strengthen his case for utilitarianism because his cost-benefit analysis was inconclusive. Nevertheless, he sided in favor of gay marriage in accordance with his libertarian principle. In light of the significant costs of legalizing same sex marriage, and the unquantifiable benefits he identified, this conclusion gave the impression that
his method offers a biased method of conflict resolution because it is very difficult to prove in utilitarian terms that any given act is costly enough that it can be regulated or proscribed by law.

Regarding polygamy, Posner again abandoned his utilitarian cost-benefit method and presented a new approach, an informal discussion about its possible advantages and disadvantages. Overall, the disadvantages of polygamy seemed significantly greater than any benefits to women or society, but Posner concluded that polygamy ought to be legalized anyway if the free consent of all the women could be secured. Like his normative analysis of sodomy laws, he was unfaithful to his method and unfaithful to the approach he chose. By contrast, Montesquieu’s legal recommendation on polygamy were consistent with his natural law, natural rights theory. He found that polygamy always violated the equality of women, and so was to be proscribed by the laws.

With incest and bestiality, Posner did apply his utilitarian-libertarian method consistently, but his very consistency weakened his case. He showed just how difficult it is to argue in utilitarian terms that acts as shocking as incest or bestiality can be proscribed. Again, it contributes towards the impression that his method is biased towards sexual permissiveness. Moreover, in the case of incest and bestiality his normative theory would only exacerbate public debates and not help to resolve them. By contrast, Montesquieu argues that incest and bestiality violate the natural law and right of modesty because these acts fail to observe the restraint all persons should demonstrate towards sexual behavior, either towards family members or towards animals of other species. Bestiality is an especially grave violation of the
third law of nature, which orders the human species to interact sexually with animals of their own kind. Therefore, Montesquieu legally recommends that these acts be crimes, in accordance with his moral conclusions. He normative conclusions about incest and bestiality are (in Posner’s terms) in accord with “the core” of Western morality and American views about these acts. As this is a theory more Americans could relate to and understand.

All in all, Montesquieu’s normative method for judging sexual behavior (his natural law, natural rights moral theory) and his subsequent legal recommendations are more viable than Posner’s normative (utilitarian-libertarian) method and subsequent legal recommendations for the reason that Montesquieu shows greater internal coherence. Regardless of the side one takes on any given issue, all sides should agree that normative claims should follow from principles of reasoning that are rational, clear, coherent, and accessible to anyone with an average education and good disposition to understand. If modern academic scholarship is to assist in the matter of helping to bring resolution to matters of such heated public debate, then academics must be the first to demonstrate this kind of methodological clarity, consistency, and restraint.

Posner does not show these qualities a number of times. He goes beyond the boundaries of his methodology to settle the normative questions of sodomy laws and polygamy, and he simply does not apply his utilitarian-economic method to resolve policy questions like marriage, divorce, and adultery under modern (stage 3) conditions. Although Montesquieu was inconsistent in the case of adultery, and slightly inconsistent in the case of divorce, in all other respects he was consistent and
followed principles of reasoning that were reasonable and clear. For this reason he
offers a more persuasive moral and legal theory of sexual behavior.

Montesquieu’s normative method for judging sexual behavior is also more
viable than Posner’s normative method for the reason that utilitarianism is very
difficult to apply. As we saw with a number of cases, it is difficult to predict and
quantify the costs and benefits of any given act, and subsequently to decide which are
greater in magnitude. Posner admits that normative economic analysis is a
“formidable task.” By contrast, Montesquieu’s proposal that we embrace principles of
justice and equity and a universal concept of human nature is a more workable and
straightforward way to arrive at normative conclusions.

The descriptive side of Montesquieu’s theory is also more persuasive than
Posner’s because it is more comprehensive, realistic, and therefore desirable for
public purposes. Rational choice theory offers oversimplified understandings of
human agency, as self-interested and rational in a very narrow sense. While these
understandings may be useful for generating hypotheses and conducting empirical
tests, they are untruthful and undesirable for public pedagogical purposes. There is
danger involved in promoting these understandings in the public square because they
can mislead and encourage citizens to behave in self-interested and narrow ways that
ignore important aspects and needs of the human person and society. Montesquieu’s
more holistic and comprehensive depictions of sexual behavior better captures the
reality we experience, and takes into account the complex needs of the person and
society.
In light of the greater merits of Montesquieu’s contribution, it is worth considering further his descriptive and prescriptive theory of sexual behavior. His non-perfectionist, natural law, natural rights moral theory is an attractive theory for public moral reasoning. It is also worth considering further and more seriously his conclusion that a serious commitment to marriage, understood as companionate marriage between one man and one woman, requires an equally serious commitment to discourage alternative forms of sexual behavior. It is a sobering conclusion, because it forces us to think more carefully about what is at stake in our public debates about marriage and other forms of sexual behavior.
CHAPTER 6

CONCLUSION

Montesquieu makes the case that governments committed to political liberty ought to regulate morals because political liberty consists in the security of each person. This involves a wide-ranging endeavor to secure and protect the full humanity of each person, according to the richness of the male and female natures and the variety of natural laws and rights that define what human beings are and how they are to behave so that they do not harm themselves or others and fulfill their obligations in a manner that is just. The enforcement of natural laws and rights is an essential part of Montesquieu’s project to promote political liberty.

Sexual behavior, like other forms of human behavior, must conform to the requirements of natural laws and rights if it is to preserve liberty. Montesquieu believes that some governments, like monarchies (and unlike despotisms or republics), are politically able to conform to the requirements of natural law and natural rights and have further obligations to enforce those requirements as the condition for liberty.

This enforcement can be achieved in negative and positive ways. Negatively, the criminal laws prohibit (and in some instances penalize) persons from abusing the sexual integrity of others or failing to observe the sexual obligations of natural right.
Such abuses include adultery, homosexuality, polygamy, incest, bestiality, and violations of sexual modesty. Positively, marriage laws strongly encourage and reward citizens for choosing to marry and have children, and divorce laws help to ensure that marriages are not dissolved for light reasons, but that divorce assist citizens to form new and better marriages.

If the laws do not enforce sexual morals, then Montesquieu believes that the security of persons will be attacked or lost, especially the security of the weakest and most vulnerable members of society. For instance, if the laws allow polygamy, then women will be subject to inequality and abuse within marriages. If the laws do not protect the right to modesty, then women, children, prisoners, and slaves will be subject to attacks upon their sexual integrity or development. If the laws do not prohibit repudiation, or place restrictive conditions upon divorce, then unhappy spouses will have an unfair advantage over spouses willing to stay married while seeking a divorce, and will subject their spouses to attacks upon their security in marriage.

At the same time, the laws are not to promote virtue or perfection, but protect persona and the community from harm. For example, Montesquieu does not argue that marriage laws should promote an idea of marriage as an indissoluble union between husband and wife, but a justice-based understanding of the martial commitment as a contract that obligates spouses to support and take care of each other and any children they have but which can be dissolved under certain conditions. Divorce should not be banned, but permitted so long as the laws do not give to one spouse an unfair or unwarranted advantage in ending the marital union. Modesty laws
should not require that women be separated from men or that women be models of purity, but that abuses of sexual integrity and security should not take place.

Altogether, his vision is for the laws to enforce the basic requirements of justice and not the higher conditions for virtue. The laws enforce a non-perfectionist, limited, conception of the good as described by his natural law and natural rights theory.

At the end of chapters one and four, I argued that Montesquieu’s contribution is a point of departure and not the final destination, that it is worth studying further the practicability and merits of his civil laws, but premature to conclude that they ought to be implemented in a government like ours. There are two main reasons for this caution.

The first is due to the scientific information available to Montesquieu about the causes of homosexuality. Montesquieu’s conclusions about opportunistic homosexuality are persuasive. The historical link he identifies between male opportunistic homosexuality and the inequality of women should not be ignored, and the historical link between cultures that foster conditions that undermine companionate marriage and reproduction and promote opportunistic homosexuality should not be ignored either. However, modern scientific studies about homosexuality (cited in chapter 5) suggest that Montesquieu did not have the full picture of the causes of homosexuality, and his legal response was premised upon that narrow understanding of its causes.

Today, we still do not know a lot about the causes of homosexuality. We do know enough to conclude that criminalizing it is not the correct legal response, but we do not know enough to conclude that our civil laws ought to promote the
homosexual lifestyle unreservedly, as gay marriage would do, nor is there sufficient
evidence that gay marriage would secure the needs of communities and individuals
(including children) as well as companionate marriages do. Further scientific
research, reflection, and patience are needed to better understand homosexuality and
formulate the proper legal response.

The second and more general reason for caution is due to the difference
between political theory and practice, and Montesquieu’s teachings about the
relationship between laws, mores and manners.

In theory, Montesquieu’s case for the regulation of sexual morals by law is
persuasive. In theory, governments that promote political liberty ought to regulate
sexual morals and have civil laws like these. However, he also teaches that in
practice, legislators must be attentive to the social, political, intellectual and cultural
development of their own society, i.e., its particular place in history. As explained in
chapter three, legislators must be philosophers and moralists, but they must also
understand what their society is capable of bearing and work from their society’s
particular place in history in a manner that respects the general spirit (mores,
manners, religion, climate) and does not try to change society before it is ready.

What this means is that legislators must make sure that they pass laws that
accord with the cultural environment. If a legislator sees that there ought to be
different civil laws, laws that better protect natural laws and rights, he must wait for
the mores and manners of the society to change before passing those new laws. He
also argues that the proper way to change mores and manners is by other mores and
manners (not by laws), and that the most effective way to change mores and manners
is by engaging women to change their mores and manners. Women influence their social environment far more effectively than men.\textsuperscript{1} If women can change their ideas and patterns of sexual behavior to better accord with the requirements of natural laws and rights, then the culture will change and better conform to the requirements of natural laws and rights, and legislators will be able to pass laws that promote liberty.

Our current American mores and manners, that is, our collective beliefs about acceptable forms of behavior and patterns of social behavior, are pluralistic. We do not have a shared understanding of what values are universal and what behavior is acceptable. While some citizens’ morals accord with Montesquieu’s, others’ do not. Therefore, before we can seriously consider passing civil laws like the ones he recommends, our culture’s mores and manners need to become more unified and rally around a commitment to natural laws and rights.

The most effective way to achieve this is to engage American women to change their mores and manners. American women need to appreciate not only their rationality and equality with men, but also what makes them different from men. As regards their sexual aspects, women are different from men in their reproductive role, greater dependence upon men and family for support in reproduction, instinct to live sexual modesty, and greater attachment to children. Women are similar to men in having natural, bodily, emotional, rational and social causes to unite with the opposite sex, and the ability to unite on all these different levels. However, due to male and female biological differences, Montesquieu also shows that there are differences of

\textsuperscript{1} \textit{Spirit}, XIX.21-26, 321-5.
degree here. Women have stronger emotional (or passionate) impulses, and men have stronger bodily or physical impulses to unite sexually.

If American women better appreciate these natural differences and similarities, they will better know how to behave and demand that others behave towards them so that behavior patterns respect the natural similarities, differences, and obligations of justice of the sexes. In particular, women can teach society why modesty and companionate marriage should be valued.

Montesquieu argues that the social impact of modesty is the most far-reaching. Sexually modest women encourage men to tame their natural instincts to attack them sexually and to respect their natural equality and rationality. Modesty also encourages citizens to engage in sexual activity within marriage; it obligates citizens to protect children from sexual corruption, and restricts sexual activity to the human species, among other positive effects.

Modesty must return not only as a female right and value but also and very importantly as a male right and value. Montesquieu’s double standard is not acceptable. Although he is right that by nature, it is easier to appeal to females to live modestly, and that women have a greater capacity to influence society than men do, we ought to insist that males learn to live modesty and naturalize it as their own value. Such a commitment to sexual modesty would go a long way towards transforming American sexual patterns, mores, and manners, and encourage people to rally around the natural laws and rights that inform sexual behavior. Eventually, this would allow legislators to pass the necessary laws.
In the meantime, that is, while women and citizens work to change mores and manners, the theoretical, academic conversation about the role of the laws in legislating morals should continue. Montesquieu ought to be brought into dialogue with modern academic scholarship on the question of how the laws may encourage or enforce sexual morals. He offers a unique framework that combines ancient (Aristotelian) and early liberal (Hobbesean) teachings that results in a non-perfectionist, justice-based, liberty-oriented system of natural laws and rights that may be able to serve as common ground for contemporary liberal, natural law, and communitarian academics and citizens to think through this question.

If the academic conversation continues, it too can help change mores and manners by educating citizens about what values can be shared and what changes can be made to our patterns of sexual behavior so that these better promote the liberty, equality, and security of all, especially the most vulnerable members of our communities. More education and civil discussions are necessary. If our mores and manners are so pluralistic and divergent that we cannot agree upon such basic truths as what forms of sexual behavior violate the humanity and security of persons, then we must continue to seek that agreement until we find it. It is not acceptable to cease discussions or agree to disagree. Avoidance of these questions does not resolve the public dilemmas at hand or work for the cultural unity that will allow legislators to pass those civil laws that will protect liberty.

Montesquieu shows that we can start this work by appealing to each other in language that all people can understand, using a form of public reasoning that appeals
to our common humanity, a universal idea of justice, and which respects the ability of all persons to think through these problems and choose the right answers.
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