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Montesquieu and Analogical Reasoning

One of the more acute philosophical problems raised by the historian's activity is ascertaining the degree to which one can actually know anything about the past. By this, I do not mean to highlight the serious but pedestrian issues that plague professional historians (the quality and reliability of the documentary evidence, etc.), but the very difficulty of listening to and understanding the dead. There is a fundamental hermeneutic problem in the historian's task, and it is one that becomes more acute when the historian conceives of her task as one with a philosophical or political utility beyond itself. One response has been to treat the past as a distant country, to be entered into in all its alterity. This entails either a frank acknowledgment that historical writing carries the inevitable taint of the historian's subjectivity, or the radical, near-impossible self-effacement of the historian and attunement to the other. Our present becomes absent to us in this activity. Nietzsche denigrated this goal with this alteration of Christ's injunction: «let the dead bury the living»[1]; certainly we know what Nietzsche thought of those who denigrate life, however untimely they may be. Either position conceives of a radical incommensurability between the life-world of the historian and those of the figures she treats. The opposite strategy has been to posit a radical sameness – the capacity to draw universal rules from (or confirm them with) historical inquiry: «The thing that hath been, it is that which shall be; and that which is done is that which shall be done» (Ecclesiastes 1:9). Positivist historians and social scientists have tended to share this view that things are indeed subject to unchanging law. Traditional natural law theory, extra-historical in its method – is equally comfortable with this view. And even champions of enlightened progress – an idea that takes as a starting point

[1] Friedrich Nietzsche, *Untimely Meditations*, tr. Daniel Breazeale, Cambridge, Cambrdge Univ. Press, 1997, p. 72.

the fact of historical change – can feel that there is a fundamentally unchanging material that history works upon and an unchanging measure by which one can situate historical epochs hierarchically. Otherwise there would be no basis to claim that things are getting better and better. This is roughly the position of Voltaire – people have always been the same type of absurd creature, better or worse depending on their levels of civilization and learning; it is his fortune to live in a time of increasing civilization and decreasing superstition. But between the extremes of radical identity (natural law and positivism) and radical discontinuity (various forms of historicism) lies a wide field of thinking that is attuned to historical difference yet convinced of the possibilities of retrieval[2].

When we inquire into Montesquieu's position in modern historiography, we find people placing him on both sides of this divide. For some readers, Montesquieu prefigures historicism in his attention to particularity and his detailed account of the subtle interaction between mores, climate and laws. Vanessa de Senarclens affirms that for Montesquieu «l'intérêt de l'histoire réside plutôt dans la compréhension de l'altérité irréductible que constitue chaque époque et chaque culture»[3]. This is, however, difficult to reconcile with another image of Montesquieu, the founder of sociology, for whom history can be studied scientifically for eternal lessons about political society. This is the Montesquieu castigated by Herder as insufficiently particularist, holding the vast history of the world together with «drei schwache Nägel», (three weak nails)[4], the three principles of governments. The difficulty is that both readings are true; Montesquieu is both the champion of the particular, for whom each age and region has its own laws and for whom European modernity is without precedent, and he is the seeker of the universal , for whom, «history proves», «history shows». He is the teacher of lawgivers, for whom history is the great textbook: «Il faut éclairer l'histoire par les lois, et les lois par l'histoire»[5]. But how does Montesquieu manage this dance with the particular and the universal? How does he make history inform a modern Europe whose condition of wealth and power is entirely without historical precedent (*EL*, XXI, 21)? I would like to suggest that it is precisely by

[2] This tripartite schema is somewhat indebted to Paul Ricoeur's division between Same, Other, and Analogue, *The Reality of the Historical Past*, Milwaukee, Marquette University Press, 1984, p. 25 ff.

[3] Vanessa de Senarclens, *Montesquieu Historien de Rome*, Genève, Droz, 2003, p.12.

[4] Johann Gottfried von Herder, *Auch eine Philosophie der Geschichte zur Bildung der Menschheit*, Berlin, Weidemann, 1891 [1774], p. 566.

[5] *EL*, XXXI, 2; t. II, p. 358.

means of analogical reasoning that Montesquieu reconciles the particular and the universal. The comparative method that Montesquieu deployed entails a capacity to find unity in alterity.

But Montesquieu himself never fully articulated the theoretical underpinnings for this method of arguing from particular to particular, and he even retained a residual Cartesian conception of reason as extra-historical and deductive. The tension between these two aspects of Montesquieu's thought is particularly evident in his puzzling reaction to English common law. For Montesquieu, who offered an unparalleled appreciation of English institutions, evinced a surprising lack of sympathy – and even interest in – for the very institution that most embodied the type of analogical reasoning he celebrated: the common law. Montesquieu was not merely silent on the workings of English common law, but he also exhibited a strikingly rationalist conception of law and a certain hostility to the manner in which English jurists make the past speak to the present. If Montesquieu inaugurated a philosophy grounded in particularity, he retained in his legal thought a monist streak.

Historical Analogies as a Means of Reasoning

If I may indulge in a commonplace schematism which is historically problematic if heuristically useful, there is a 'Cartesian' tendency to treat history as irrational, or at least of questionable epistemological utility[6]. This is a modern manifestation of the Platonic preference for being over becoming, a standpoint that has been as difficult to escape for most of western history as it is to adopt today. Among the many paradoxes one encounters in Montesquieu, one of the most oft-noted is that between his 'Cartesian' rationalism that thinks there are universals – including moral universals – prior to their empirical manifestation («Dire qu'il n'y a rien de juste ni d'injuste que ce qu'ordonnent ou défendent les lois positives, c'est dire qu'avant

[6] The degree to which late 17th century post-Cartesian philosophers neglected history is questioned by Béatrice Guion, *Du bon usage de l'histoire: Histoire, morale et politique à l'âge classique*, Paris, Champion, 2008, p. 549 ff. But we need not question the commonplace that «Descartes expelled history from the halls of philosophy», (Ernst Breiasch *Historiography: Ancient, Medieval and Modern*, 3rd ed., Chicago, Univ. of Chicago Press, 2007, p. 192). The dismissive comments on history (and other traditional sources of knowledge) from the beginning of the *Discours de la méthode* are the standard source for this observation.

qu'on eût tracé de cercle, tous les rayons n'étaient pas égaux»[7]) and his empiricist attention to the world of becoming in which the great variety of contradictory positive laws in the history of the world can be understood to be reasonable within their respective national, climatic and cultural contexts. This latter is captured in the oft-cited passage: «Je n'écrit point pour censurer ce qui est établi en quelque pays que ce soit. Chaque nation trouvera ici les raisons de ses maximes»[8]. While this line is clearly belied by the text's strong moral voice – the voices of nature and the heart speak volubly throughout the work – it nonetheless does highlight an important element of Montesquieu's procedure.

There are two related questions that this raises about the nature of Montesquieuan rationality. First, what is the nature of this immanent rationality that Montesquieu discovered in history's apparently irrational variety of nations and conditions? Second, what is the type of rationality that allowed him to exercise moral judgment? We shall find that the answer to these two questions is ultimately the same, for Montesquieu had the fortune to live in a time that did not habitually separate fact from value. Those who wish to attribute to Montesquieu a radical relativism (an interpretation that runs from Helvétius all the way through to Jonathan Israel)[9] are clearly incorrect: despite the Baron's capacity for finding rationality in morally questionable practices, the normative power of his judgments leaps off the page. *L'Esprit des lois* is a work, he believed, «propre à former d'honnêtes gens»[10]. There is a meta-rationality that one can employ in the study of historical institutions, one that offers a standard for both comprehension and judgment – a standard whose utility somehow covers both the needs of modern explanatory science and the cause of cultivating *phronesis*.

On this tension between explanation and moral purpose we can overlay the eighteenth-century quarrel, elucidated clearly by Chantal Grell and taken up anew by de Senarclens, between the *érudit* and the *philosophe*[11]. The *érudit*, of course, accuses the *philosophe* of superficiality and bias; the *philosophe* retorts that the learned people are engaged in arid, meaningless feats of memory. Montesquieu thought that he had found a *juste milieu* between these two extremes, employing erudition

[7] *EL*, I, 1; t. I., p. 8.
[8] *EL*, «Préface»; t. I, p. 5.
[9] See Jonathan Israel, *A Revolution of the Mind*, Princeton, Princeton Univ. Press, 2010, p.185.
[10] Montesquieu, *Défense de l'Esprit des lois*, *OC*, t. 7, 2010 ; «Seconde partie», p. 86.
[11] Chantal Grell, *L'histoire entre érudition et philosophie: étude sur la connaissance historique à l'âge des Lumières*, Paris, PUF, 1993.

with philosophical purpose[12]. For we must recall that the glib denunciations of *érudits* that we find littering the pages of Enlightenment historians serve, above all, to assert the *concerned* nature of historical inquiry. *In fine*, we study the past for present purposes, be they the cultivation of virtue, the understanding of law, the destruction of infamous priest-craft, or even the teleological march of progress. Above all, all the historians of the Enlightenment would have rejected the young Quentin Skinner's historicist claim that we ought not to seek lessons from history but would «do better to learn to do our own thinking for ourselves»[13]. To seek moral instruction from history was no betrayal of *sapere aude*, even as the problem of commensurability was itself one of Enlightenment origins. Of course, Montesquieu disapproved of turning history merely into another arrow in one's rhetorical quiver, suggesting, for instance, that Voltaire had hardly advanced over Bossuet : Voltaire «est comme les moines, qui n'écrivent pas pour le sujet qu'ils traitent, mais pour la gloire de leur ordre. Voltaire écrit pour son couvent»[14]. But if history as pure polemic was sterile, so too would be history as disengaged study (the scientific history that our modern research universities so want to produce). *La nature des choses* – in its double material and moral significations – deserves to be treated with erudition and philosophy. Montesquieu proposes to give lessons to lawmakers[15]; his oeuvre is a relentless war against despotism and political immoderation.

If one wants to see in action the tension between seeking universal historical wisdom and pointing out the incommensurability of particular world views, one needs only to quote a passage from his historical Book 30: «Transporter dans des siècles reculés toutes les idées du siècle où l'on vit, c'est des sources de l'erreur celle qui est la plus féconde. A ces gens qui veulent rendre modernes tous les siècles anciens, je dirai ce que les prêtres d'Égypte dirent à Solon : "O Athéniens! vous n'êtes que des enfants"»[16]. Note the juxtaposition – in the very same sentence – of the historicist and universalist stances. The content of the sentence is overtly historicist – we cannot understand another age by our own standards – yet

[12] «Peut-être peut-on dire de la plupart des auteurs qui en on écrit [sur l'histoire], que les uns avoient trop d'érudition pour avoir assez de génie, et que les autres avoient trop de génie pour avoir assez d'érudition», (*P* 1488, p. 482).
[13] Quentin Skinner, *Visions of Politics: Regarding Method*, Cambridge, Cambridge University Press, 2002, p. 88. Skinner has subsequently modified (and partially abandoned) the stark historicism of this early stance.
[14] *P* 1446, p. 477.
[15] See *EL*, XIX.
[16] *EL*, XXX, 14; t. II, p. 318.

the authority is found in the Egyptian response to Solon, a response that is full of timeless wisdom. The Egyptians, with their age and historical sense, are more capable of judgment than those enlightened Athenians, with their extra-historical reason; Montesquieu is the Egyptian, Abbé Dubos the Athenian.

Montesquieu's appeal to history serves a number of purposes. On the one hand, it is intended as a history of the present. The concluding books on medieval French history are, in this sense, the climax of (and not, as is sometimes argued, an appendix to) the entire work. Those interested in preserving French liberty from the ever-present danger of despotism must know the spirit of their nation and the nature of their own laws. Another purpose his historical writing serves is as a basis for the sociological task of comparison between radically different conditions allowing us to form general claims about relations. But it seems to be a near Herculean effort to overcome the barrier between ourselves and the past. And, indeed, a further purpose of his historical writing is surely to insist upon alterity. Among the reasons for his historical writing was to get his countrymen to cease making nostalgic appeals to the adoption of Roman ways[17]. He wrote, in a passage that could have come off the pages of Thomas Kuhn: «...les anciens philosophes sont très inconnus, et quoiqu'ils disent les mêmes termes, ils n'ont pas les mêmes idées»[18]. We can see Montesquieu insisting on historical particularity in book XXIX, where apparently identical laws are shown to be radically different in differing socio-political contexts, and thus *are* different laws. Montesquieu sounds almost like he is talking about Wittgenstein's *Lebensformen*. Of course, Montesquieu never suggested that there existed the type of radical incommensurability between historical (or cultural, or climatic) paradigms that made all comprehension impossible. The very faculty that allows us to find the reason behind each nation's laws – and a greater basis for judging laws – suggests that there is a common denominator. A family resemblance, perhaps, born of our belonging to a great human family?

Different, but the same. Hence there is epistemological utility in drawing the most diverse analogies: ancient Egypt was the Japan of its day, because of its isolationism (*EL*, XXI, 6), Xenophon's Athens could well describe England (*EL*, XXI, 7), William Penn is a new Lycurgus (EL, IV, 6), Servius Tullius erred in the

[17] If this figures heavily in the *Considérations*' opening passage about the radical discontinuity between Roman and modern French life, or in the *Réflexions sur la monarchie universelle en Europe*, it equally informs his views about the pathologies of republicanism in *EL*, V, 2; XI, 4.

[18] *P* 291, p. 272, quoted in Senarclens, p. 135.

same way as England's Henry VII (*Romains*, I, p. 92), the Roman Empire under Caracalla had a similar constitution to the government of Algiers under the Dey (*Romains*, XVI, pp. 219-220) ... these are not just fanciful or decorative. They are the type of comparison at the heart of Montesquieu's oeuvre. In the incomparable worlds of different epochs and different countries, commonalities can be found. In making sense of radical alterity, Montesquieu reasons by analogy.

Does this constitute a method? It does and it doesn't. While analogical arguments contain distinctive characteristics, there are no existing theories establishing when a given analogy is persuasive and when not – much of the work in establishing the viability of an analogy must be done by arguing similarities and dissimilarities and the relevance thereof, and here it is difficult to pin down the principles at work behind this most 'common sense' process. Critics of analogical arguments sometimes suggest that when they are persuasive they are merely deductions in disguise (where the premises are not stated); more often than not they are simply unrigorous inductions[19]. Certainly, analogies, while clearly inductive, are not social-scientific comparisons isolating dependent and independent variables and seeking statistically significant sample sizes. Their lack of formal standing gives some observers cause for concern. Other writers who do find them persuasive sometimes speak about their method in a manner that makes them sound almost magical[20]. There is, of course, nothing novel in arguing from historical analogy. It is a timeless and even banal rhetorical practice. On any given question, one hunts for a useful historical example to buttress one's position (an opponent of the war in Iraq is charged with being Neville Chamberlain in Munich; a champion of the invasion is warned that Iraq will be another Vietnam...). Such arguments often appear tendentious, but we are equally loath to jettison them entirely. After all, to abandon the possibility of meaningful historical analogy is to abandon the possibility that history might teach us anything; surely previous decisions on war or peace are instructive in some

[19] This, Scott Brewer notes, was the view of John Stuart Mill, «Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument», *Harvard Law Review*, 109: 5 (Mar., 1996), p. 932.

[20] One champion of analogical reasoning (in the common law) writes that «analogical reasoning is an unscientific practice with imperfect results», and is nonetheless worthwhile defending (Emily Sherwin, «In Defence of Analogical Reasoning», *The University of Chicago Law Review*, 66: 4 (Autumn, 1999), p. 1179). Another champion of a more formalized analogical reasoning refers to those, like myself, who are wary of excessive formalization as «Young Turk neo-Aristotelian analogical mystics» (a group, he claims, led by Cass Sunstein), (Brewer, «Exemplary Reasoning» cit., p. 952). Cass Sunstein does, indeed, celebrate the lack of full theoretical underpinning in analytical reason-giving.

way to our contemporary deliberations... Historical analogies are a subspecies of comparison itself, which Montesquieu calls «la faculté principale de l'âme»[21]. And, indeed, to compare two things is to presuppose both difference and an underlying similarity that makes the comparison meaningful. That is, arguing a disanalogy is a similar mental process. But what does analogical reasoning entail? Why should we have recourse to analogy?

Classically there are numerous sources for thinking about analogical reasoning. One is the philosophic-theological attempt to speak about a matter – the divine – that is outside of the realm of sense experience. We thus speak in metaphorical ways about God or the Good. There is a powerful strain of this in St. Thomas, and there are aspects of it in both Platonic and Aristotelian metaphysics. We recall Plato's constant reversion to analogy – and particularly to parables and allegories – when his characters seek to describe the good[22]. And naturally, we are all familiar with the analogy of God as a creator, maker, designer – an analogy that informs the teleological argument for the existence of God[23]. Another important source is Aristotle's response to difficulties of general terms. In rejecting the Platonic argument for the unity of the form of the good, Aristotle argues that good things are good in different ways: «Are goods one, then, by being derived from one good or by all contributing to one good, or are they rather one by analogy?», (*Nicomachean Ethics*, 1096b). For Aristotle there is something empty in Plato's great abstraction 'the good'. Particular goods are good in particular ways.

[21] *Essai sur les causes qui peuvent affecter les esprits*, in *Œuvres et écrits divers* II (*OC*, t. 9, 2006), p. 249.

[22] *Republic*, transl. Allan Bloom (New York, Basic, 1991), 506d-e : « 'No, in the name of Zeus, Socrates,' said Glaucon. 'You're not going to withdraw when you are, as it were, at the end. It will satisfy us even if you go through the good just as you went through justice, moderation and the rest.' 'It will quite satisfy me too, my comrade,' I said. 'But I fear I'll not be up to it, and in my eagerness I'll cut a graceless figure and have to pay the penalty by suffering ridicule. But, you blessed men, let's leave aside for the time being what the good itself is – for it looks to me as though it's out of the range of our present thrust to attain the opinions I now hold about it. But I'm willing to tell what looks like a child of the good and most similar to it, if you please, or if not, to let it go' ».

[23] Incidentally, this is an analogy in which Montesquieu indulges, though one never knows how seriously to take his forays into theology. God is the legislator of the world; the dual nature of law (the manner in which the term covers both physical laws and legal/normative injunctions) hangs on this analogy. Montesquieu points out that human freedom – the human capacity to break moral laws – is a product of human weakness. That is, the analogy between God and Man – and between physical and moral laws – is instructive because it tells us how it is that human beings can err. If humans were gods, they would invariably follow the moral law, but the variable that makes God perfectly law-abiding is his perfect intelligence. So there is the need for *ersatz* laws, civil and political laws.

Most often the term 'analogical arguments' refers to a type of reasoning – which also has an Aristotelian pedigree – based on a structural similarity found between two sets of terms. Aristotle describes this in the *Poetics*: there is a relationship between two in the same way as this mathematical analogy (or ratio, the original meaning of the Greek *analogia*), 2:4 as 4:8. An example Aristotle gives is «Old age is to life what evening is to day», (*Poetics*, 1457b) [24]. What is being suggested here is that there is a similarity in the relationships, not in the terms themselves. Mathematical proportions are naturally exact, but it remains an open question just what type of knowledge is conferred by other analogical arguments.

In the *Rhetoric*, Aristotle speaks of two types of analogical argument, historical analogies and fables. He suggests that historical analogies are more successful «since in most respects, the future will be like what the past has been», (*Rhetoric*, 1394a). This appears to be an unpromising source for Montesquieu, given Montesquieu's deliberate argument that the future will differ from the past[25]. If Montesquieu was serious in suggesting that «Les histoires sont des faits faux composés sur les vrais ou bien à l'occasion des vrais»[26], we might perhaps think that Montesquieu's historical analogies serve the same function as Aristotle's fables. But Montesquieu's history is not fable; fable can serve one's rhetorical purposes because it can be crafted to make each term fit the intended argument. Montesquieu's purpose is not primarily to persuade but to discover – he does not write for his convent – and his profound historical sense does not undermine his fundamental assumption that there are sufficient historical continuities to make comparison possible. Employing fables or entirely fabricated analogies might serve a revelatory function if they are thought experiments or have a heuristic purpose: what is the harem of the *Persian Letters* if it is not a thoroughgoing fable serving as a mirror for French absolutist tendencies under Louis XIV? But for the most

[24] There is, here, a «resemblance between relations», to use J. S. Mill's phrase ; John Stuart Mill, *A System of Logic*, 2 vols., London, Parker, 1843, Vol. 1, 92.

[25] This is a central claim of the *Réflexions sur la monarchie universelle en Europe*, which insists that developments in technology and commerce are such as to render a Roman-style universal monarchy impossible. It is thus incorrect for Masterson to conclude that Montesquieu «does not show much sense of time bringing really new things that prevent a restoration of the old». In spite of the universality of Montesquieu's *principes*, he is particularly aware of this fact of radical historical change. See Michael P. Masterson, «Montesquieu's Grand Design: The Political Sociology of 'Esprit des Lois», *British Journal of Political Science*, 2: 3, 1972, p. 283-318.

[26] *P* 916, p. 369.

part the employment of a fabulous analogy serves a perlocutionary – and not an illocutionary – function. There are other times when Montesquieu indulged in analogy as a rhetorical strategy, choosing to accept the most doubtful evidence of travel writers in order to make a point[27]. But in general, he attempted to be as true to the historical record as possible – and his historical analogies are means of discovering truth. Indeed, while Aristotle may have been correct to point out that the utility of historical analogy depends on similarity of past and future, it is equally important to point out that to draw an analogy is to assume difference. The study of laws and constitutions must make use of analogies precisely because of the fact of difference. Only in mathematics can there be relations of complete identity. This is because mathematics is an ideal system, and can thus admit of certainty. As Montesquieu himself wrote, «Le mathématicien ne va que du vrai au vrai, du faux au vrai par les arguments *ab absurdo*. Ils ne connaissent pas ce milieu, qui est le probable, le plus ou le moins probable»[28]. Perfection is not possible where identity does not exist between the terms. To make sense of experience one is ill served if one begins by treating the world through the lens of a system, which is simply a mental creation. Hence even in the hardest of sciences, experience trumps system : «Les observations sont l'histoire de la physique, et les systems en sont la fable»[29]. He insisted: «Je dis que dans les lois il faut raisonner de la réalité à la réalité, et non pas de la réalité à la figure, ou de la figure à la réalité»[30]. In the study of human institutions, observation trumps system, and Montesquieu's historical turn thus appears to be a thorough rejection of the modern natural law tradition typified in such system-builders as Grotius, Hobbes, or Pufendorf; if history, for Montesquieu, is a «surrogate for natural law»[31] as one author claims, it is because proper jurisprudence (which has elements of science and *phronesis*) requires knowledge of particulars. One needs to cultivate the capacity to study similarities and

[27] One example is the story about the savages who cut down a tree in order to get the fruit (*EL*, V:13). Voltaire excoriated Montesquieu for this and other credulous or inventive use of sources. (He points out that it is, among other things, a Spanish proverb. See his comments on Montesquieu in Catherine Volpilhac-Auger, *Montesquieu: Mémoire de la critique* (Paris: Presses de la Sorbonne, 2003), p. 513.) But the image is a powerful one, and it serves an important rhetorical function, despite its lack of authenticity – we can nonetheless class it among the fabulous rather than veridical analogies.

[28] *P* 172, p. 224. Montesquieu appears unaware of the developments in mathematical probability.

[29] *P* 163, p. 222.

[30] *EL*, XXIX, 16; t. II, p. 294.

[31] Mark Hulliung, *Montesquieu and the Old Regime*, Berkeley, Univ. of California Press, 1976, ch. 6, p. 140 ff.

to draw analogies rather than to get overwhelmed by the apparent certainties of arguments based on identity.

I do not wish to overstate the degree to which Montesquieu was a thoroughgoing empiricist. As Mark Waddicor has noted, it is an open question whether Montesquieu's principles – the principles that hold l'*Esprit des lois* together – were discovered through the study of particulars or posited speculatively at the outset[32]. Just as natural law continues to play a role (albeit a highly muted one) in Montesquieu's thought, so too does his reasoning periodically proceed from the top-down, rather than the bottom-up method that analogical arguments entail; his reflections on climate tend to read this way, as if every fact justifies his primary claim and every exception simply proves the rule. But in the main, his arguments are from particular to particular – and the rationality of customs is to be discovered through these comparisons.

Let us recall the core argument of l'*Esprit des lois*, that for all their diversity of their laws and actions, the nations of the world «n'étoient pas uniquements conduits par leurs fantaisies»[33]. There is an underlying, immanent rationality that orders and explains the world's dazzling diversity – a rationality that finds its most general expression in the principles of government that Montesquieu counted as his great discovery. Montesquieu thought reason could perform this task of finding unity in particularity, not, as Hegel would want to do, by inscribing apparent irrationality within a greater, teleological historical narrative[34]. Reason is not mysteriously exercising its cunning behind individuals' backs, but simply being exercised by people within the context of their historical and cultural condition. Unintended consequences abound, but practices are reinforced by their functionality and regularized as a means of preserving societies within their 'esprit general'. Things in themselves irrational – such as trial by combat – have an essential functionality, and hence

[32] Mark Waddicor, *Montesquieu and the Philosophy of Natural Law*, The Hague, Martinus Nijhoff, 1970, p. 23 ff. Durkheim made the same point about Montesquieu mixing inductive and deductive arguments, Robert Alan Jones, «Ambivalent Cartesians: Durkheim, Montesquieu, and Method», *The American Journal of Sociology*, 100: 1, 1994, p. 29-30.

[33] *EL*, «Préface»; t. I, p. 5.

[34] Montesquieu was extremely insightful in pointing out the entirely unprecedented nature of the modern, commercially linked world. But it is, I think, incorrect to ascribe to him a teleological account of modernity, though some American scholars have been intent on supplying this defect in their hero. Montesquieu's entire tenor of mind was unsympathetic to universal history, and he never offered anything resembling a historical teleology.

'rationality', and history is a long pattern of intelligent people regularizing practices and prejudices (which themselves have their reasons). Rationality – that which gives even *unreason* reasons – is everywhere at base the same not merely because circles are circles before they are drawn, but because there is a fundamental similarity between human passions and basic human needs. Even if Italians are hot-blooded and Muscovites insensible there are different varieties of the same creature: «les hommes ont eu dans tous les temps les mêmes passions, les occasions qui produisent les grands changements sont différentes, mais les causes sont toujours les mêmes»[35]. History is not a 'surrogate' for natural law, but a completion of it; natural law is not jettisoned, but is merely of insufficient detail for the complexity of human life. It is a background on which the rational foreground of positive law is painted. And discovering the fundamental rationality behind practices is the work's main task. «La loi, en général, est la raison humaine, en tant qu'elle gouverne tous les peuples de la terre; et les lois politiques et civiles de chaque nation ne doivent être que les cas particuliers où s'applique cette raison humaine»[36].

Historical analogies – and comparisons more generally – are possible because of this underlying unity, the underlying rationality of human institutions. Analogies are useful because they help us to see greater purposes at stake in a given law. Consider an analogy drawn in XXVI, 25. Montesquieu compares the seventeenth-century French law that invalidates all contracts made between sailors on a trip with an ancient Rhodian law that gave ship and cargo to the brave people who, during a storm, do not abandon it seeking shelter on land; he points out that the Rhodians sailed close to the shore, so abandoning the ship was apparently an option. These laws, he tells us, were written in the same spirit. What is the common element? In both cases, the laws superseded the ordinary course of civil law – where property rights and contracts must be respected – in a case in which such rules no longer had civil utility. On both the French ships and the Rhodian ones, it was necessary to keep other concerns from interfering with the sailor's fundamental duties towards their ship. The moral he wishes to draw is the title of the chapter: «Il ne faut pas suivre les dispositions générales du droit civil lorsqu'il s'agit de choses qui doivent être soumises à des règles particulières tirées de leur propre nature»[37].

[35] *Romains* , ch. I, p. 91.
[36] *EL*, I, 3; t. I, p. 12.
[37] *EL*, XXVI, 25; t. II, p. 193.

Now, this naturally raises an important juridical question. When ought property laws to be suspended? Montesquieu does give his reader a detailed account of when such suspensions would be just – that would be the method of the natural law theorists from Grotius through Locke. The analogy between the Rhodian and French laws tells us something about a general principle; that principle is sufficiently broad to encompass divergent laws in divergent situations. This is consistent with Montesquieu's insistence on the importance of evaluating a law based on its wider context and function. That is, the analogy does not provide anything in the way of a fully articulated theory, but it tends, rather, to give us a window onto relationships leaving open to legislators the future task of making the general rule fit the realities of their context.

Another example is the strange claim that «A Lacédémone, il étoit permis de voler; à la Chine, il est permis de tromper»[38]. The propensity of Chinese people to cheat each other (a claim based on a traveller's report that Montesquieu accepted at face value) is the same as the Spartan rule that encouraged guile for the purpose of training for war. There is a functional rationality that is shared by these two, historically and culturally disparate cases of licit vice: they both serve a function of training people in something necessary for the existence of the state. Once again, such a comparison does not give us a precise rule about what social conditions might justify which moral abrogations. But the argument is intended to have normative – and not merely explanatory – force. That is, Montesquieu explains the functional logic of myriad diverse laws, but (to repeat what I have already said) he certainly does not justify all laws: he argues strongly for the utility and the disutility of various laws in various contexts. When and how a given legislator might apply the learning drawn from these analogies is left open; it would be for a future legislator himself to determine whether there is an analogous situation that would justify appeal to this principle. Montesquieu does not give any rules about how one might determine the extent to which an analogy is correct and fruitful; rather, reading l'*Esprit des lois* is itself a training in analogical reasoning. Legislators must understand complex relationships and be able to compare the detailed cases : «Il n'appartien de proposer des changements qu'a ceux qui sont assez heureusement nés pour pénétrer d'un coup toute la constitution d'un État»[39]. They must be able, in the myriad of diverse facts, to see the underlying similarities in relationships. If

[38] *EL*, XIX, 20; t. I, p. 342.
[39] *EL*, «Préface»; t. I, p. 5-6.

l'*Esprit des lois* seeks to cultivate the judgment of legislators, this is the nature of such judgment: reading this text is a training in finding underlying relations in the vast forest of particulars.

Analogical Reasoning in the Common Law: Montesquieu's Strange Silence

When considering the manner in which Montesquieu reasoned from particular to particular, one finds oneself puzzling about his lack of attention to the central role that analogy and reasoning from particulars plays in common law jurisprudence. This is doubly striking given Montesquieu's infatuation with the English constitution. Now, Montesquieu thought that the English common law was basically apiece with the 'Gothic' mixture of medieval Germanic laws that informed his own history of French law[40], but he never entered into a serious study of the manner in which tradition was interpreted in English jurisprudence. One author has affirmed, «Montesquieu did not understand the nature of the common law»[41]. Paul Carrese suggests that this ignorance is feigned and that Montesquieu's silence on the English common law was deliberate, but the evidence he gives for this claim is somewhat conjectural[42]. I will suggest, on the contrary, that Montesquieu retained, in spite of himself, a centralizing, deductive tendency in tension with the particularism that informed his partiality for the *thèse nobiliaire*.

Now, both civil law traditions and common law traditions require analogical reasoning. In the case of civil law, this is because no rule can encompass the complexity of real experience (it is the same in Canon law, and casuistry is a necessary mechanism); in the case of common law it is because the very fabric

[40] Paul Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism*, Chicago, University of Chicago Press, 2003, p. 27.

[41] Laurence Claus, «Montesquieu's Mistakes and the True Meaning of Separation», *Oxford Journal of Legal Studies*, 25:3, 2005, p. 431.

[42] That Montesquieu placed great importance in the independence of the judiciary is clearly correct, and Carrese gives a very interesting argument about the role of this view in subsequent common law thought. The argument that Montesquieu was deliberately silent on the common law is, however, unsustained. Carrese writes: «His [Montesquieu's] failure to associate himself explicitly with either the Fronde or Coke...seems deliberate», (p. 30). I would reply that his failure to associate himself with the Fronde probably was deliberate, but there is no basis for thinking that he was being circumspect about praising Coke; nor, indeed, ought we to counfound the views of the Frondeurs and the Common Lawyers. For a more detailed account of Montesquieu's somewhat ambivalent attitude to the Fronde, see Jean Ehrard, «La Fronde», in *L'esprit des mots: Montesquieu en lui-même et parmi les siens*, Genève, Droz, 1998, p. 95-107.

of law depends upon maintaining the coherent voice of the historical court and treating previous findings as normative. But while there is, in practice, constant recourse to analogical arguments in civil law proceedings, reasoning by analogy is particularly foundational in the common law[43]. Gerald J. Postema calls analogical thinking «the distinctive technique of the common law discipline»[44]. Indeed, the common law tradition – and the interpretation of it that was emerging in late seventeenth-century English jurisprudence – contained many of the characteristics that we commonly think of as the original contributions of Montesquieu to social science. The common law was a web of ancient practices rendered rational through the constant experience of practical reasoning. Consider, for instance, Coke's view of the rationality of the laws: «Reason is the life of the law, nay, the common law itselfe is nothing else but reason: which is to be understood of an artificial perfection of reason, gotten by long study, observation, and of experience[.]»[45]. Coke also thought that English liberties had been founded in the woods, in ancient, pre-Roman and pre-Norman history[46]. Matthew Hale, in opposing Hobbes' rationalist legal positivism, repeated this position, making the case for long experience over abstract system, empiricism over rationalism, and detailed knowledge of history as the rule for lawgiving. John G.A. Pocock summarizes Hale's view of law thus: «law [is] the fruit of a great social process whereby society adapts itself to the consecutive emergencies brought to it by its experience in history»[47].

[43] I could mention another legal framework in which analogical reasoning is foundational: the Islamic Sharia. While the revelations of the prophet have a rationalist frame to them, and analogy is required for Islamic casuistry (ie. 'the prohibition on wine is actually a prohibition on marijuana, since they both have intoxicating effects'), the application of the Sunnah – the tradition of the prophet – has a thoroughly analogical character, since one must apply the actions of a seventh-century prophet to one's own life. I will be noting in the text the surprising neglect that Montesquieu showed for the common law tradition's central mode of reasoning. We might note here that he was even more uninterested in the details of Islamic jurisprudence, the consideration of which would have undermined his central narrative about the despotic nature of 'oriental' rule. That said, Montesquieu was well aware of the degree to which being tied to a textual religious tradition could act as a break on the caprice of a despot; see *EL*, XXV, 8.

[44] Gerald J. Postema, «Philosophy of the Common Law», *The Oxford Handbook of Jurisprudence and Philosophy of Law*, eds. Iules Coleman & Scott J. Shapiro, Oxford, Oxford University Press, 2002, p. 603.

[45] David E.C. Yale, «Hobbes and Hale on Law, Legislation and the Sovereign», *The Cambridge Law Journal*, 31:1, April 1972, p. 124-5. See John G.A. Pocock, *The Ancient Constitution and the Feudal Law*, New York, Norton, 1967, p. 35.

[46] Yale, «Hobbes and Hale on Law» cit., p.127.

[47] Pocock, *The Ancient Constitution* cit., p. 173. Yale follows Pocock in calling Hale a proto Burkean; others have naturally attributed Burke's conservative insights to the influence of Montesquieu.

It is a product of «myriad minds who, not knowing the importance of what they do, have, each by responding to the circumstances in which he finds himself, contributed to build up a law which is the sum total of society's response to the vicissitudes of its history[.]»[48]. What is this but the great immanent reason described by Montesquieu? Certainly, Montesquieu's treatment of the feudal law appears to share much of Coke and Hale's view of rationality being perfected in history. Considering the order given to the most apparently irrational historical custom (trial by combat), Montesquieu notes, «Les hommes, dans le fond raisonnables, mettent sous des règles leurs préjugés mêmes»[49].

There are, of course, important differences between analogical reasoning in common law and Montesquieu's use of such reasoning in his social science. For one thing, their purposes are somewhat different (courts seeking immediate practical judgments, Montesquieu seeking wide-ranging understanding), but this ought not to be overstated. Montesquieu conceived of his work as a work on jurisprudence and he wanted it to influence lawgivers. The most important difference is that in a common law framework, the authoritative analogies that one can draw are limited to the cases and reasons employed by the historic court. The common law's goal is to deliver consistency with past reasoners, not necessarily a philosophical ambition[50]. But if Montesquieu's moral reasoning is more open-ended, he nonetheless insists that a given law must be considered within the entire context of a nation's history, climate and *esprit général*. This insistence does somewhat constrain the legislator, preventing the wild flights of innovation that inspire more geometrical spirits. A related difference is, of course, that the common law mind takes tradition as in some sense an *authoritative* guide for current action; the Montesquieuan student of history seeks to understand, not to find any false justification in the past. He is a philosopher, a word that is rarely a synonym for 'conservative'. This is true but not to be overstated. In the three books on the origins of French law, Montesquieu's purpose, no less than Dubos' or Boulainvilliers', is to justify historically an ideal of the French constitution: «His concern is to show that historically the spirit of the French state was the spirit of political liberty – not

[48] *Ibid*, p.173.

[49] *EL*, XXVIII, 23; t. II, p. 240.

[50] Consider Cass Sunstein's separation of legal analogical reasoning from Rawlsean 'reflective equilibrium,' («On Analogical Reasoning», *Harvard Law Review*, 106:3, 1993, p. 782 ff.). Sunstein points to the advantages this gives to legal reasoning.

despotism but power sharing»[51]. But he does not do so with a simplistic appeal to an original condition at the time of the Franks' conquest. Rather, he accounts for the complexity of France's constitutional developments, employing this itself as a concrete demonstration of how apparently irrational institutions could have rationality behind them. The historical books at the end of l'*Esprit des lois* are means of illustrating his principles in action. Iris Cox is certainly correct to argue against reducing these books to the status of an appendix: they are a direct engagement in French constitutional debate, and they are at once an attempt to test his principles in a detailed historical account[52], and to find a historical precedent justifying his reading of the French constitution as one containing intermediary powers[53].

The historical nature of common law, and its dependence upon analogical reasoning have always made it look suspect in the eyes of more continental, rationalist authors. Weber thought English law a strange, irrational hold-out in the modern world. «Formal judgments – Weber argues – are rendered, though not by subsumption under rational concepts, but by drawing on 'analogies' and by depending upon and interpreting concrete 'precedents.' This is 'empirical justice'»[54]. Weber suggests, not implausibly, that this is akin to Islamic jurisprudence, terming it (derisively) 'Kadi justice': «Kadi-justice knows no reasoned judgment whatever»[55]. Naturally, this analogy of Ottomans and Englishmen would have caused Montesquieu to raise his eyebrows, and in general, given what we have seen about Montesquieu's empirical method, we would expect him to have a thoroughly un-Weberian assessment of 'empirical' justice. But I would like to suggest that there is something highly rationalistic about Montesquieu's conception of law that is in the spirit of Weber's dismissive remarks.

Montesquieu writes of laws that they ought to be brief and easily understandable – the twelve tables are far superior to the Byzantine complexity of Justinian's *Novelles* (*EL*, XXIX, 16). While no one likes obscurity, this call for simplicity and

[51] Iris Cox, *Montesquieu and the History of French Laws*, *SVEC* 218, p. 31. This runs counter to Mark Hulliung's claim (*Montesquieu and the Old Regime* cit., p. 62) that Montesquieu was uninterested in entering the debate on the same level as other jurists.

[52] Cox also writes that they are written «in the style of a scientist demonstrating a theory». *Ibid.*, p. 171.

[53] Céline Spector equally notes this justificatory purpose, *Montesquieu: Liberté, droit et histoire* (Paris: Michalon, 2010), p. 263-270.

[54] Max Weber, *Wirtschaft und Gesellschaft*, translated and exerpted in Hans Heinrich Gerth & Charles Wright Mills, eds., *From Max Weber*, Oxford, Oxford University Press, 1946, p. 216.

[55] *Ibid.*

clarity is not the dominant spirit of a common lawyer (it might have come from the pages of Hobbes!). In a similar spirit is his admonishment to lawgivers: «Les formalités de la justice sont nécessaires à la liberté. Mais le nombre en pourrait être si grand qu'il choqueroit le but des lois mêmes qui les auraient établies : les affaires n'auraient point de fin»[56]. Liberty, he writes, itself depends on preserving this simplicity. Of course, he was equally wary of excessive simplicity (a sure sign of despotism; see *EL*, VI, 1), but, as we shall see, both his historical narrative and his reforming instincts saw reforms from above as worthwhile.

Rebecca Kingston has pointed out the tension between Montesquieu's legal pluralism and his centralizing conception of reform, stressing, indeed, the centralizing tendencies of his thought: «the irony of the work...is the means through which the language defending regional particularities is appropriated for the defence of relatively uniform and centralized systems of control and regulation»[57]. While Montesquieu famously praised the Chinese (and the ancient Franks, in an implied historical analogy) for allowing different groups of people to be governed by different laws (*EL*, XXIX, 18), and while he suggested that a monarchical government such as that of France was able to deal with such differences (*EL*, VI, 1), the tenor of his writing on the *esprit général* of France generally tends towards a centralized reform. One of the more strikingly 'top-down' elements of his legal thought is his suggestion that judges ought to be – and, in England, *are* – invisible (*EL*, XI, 6). The justification for this is that it is important for people to fear the institution and not the magistrate himself. This is not because Montesquieu is trying to 'cloak the power' of individual judges (*pace* Carrese); on the contrary, he meant what he said when he wrote that «si les tribunaux ne doivent pas être fixes, les jugements doivent l'être à un tel point, qu'ils ne soient jamais qu'un texte précis de la loi. S'ils étoient une opinion particulière du juge, on vivroit dans la société, sans savoir précisément les engagements que l'on contracte»[58]. Montesquieu clearly thought that the English had avoided Kadi justice by having judges who were «que la bouche qui pronounce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigeur»[59]. A greater misrepresentation of common law is difficult to imagine. It is not by avoiding judicial interpretation

[56] *EL*, XXIX, 1; t. II, p. 281.
[57] Rebecca Kingston, *Montesquieu and the Parlement of Bordeaux* (Geneva: Droz, 1996), p. 273.
[58] *EL*, XI, 6; t. I, p. 171.
[59] *Ibid.*, p. 176.

that English law avoided arbitrariness, but rather by maintaining a continuous reference to past judicial reasoning, and comparing modern cases analogically with those of the past[60].

Now, Montesquieu was not entirely unsympathetic to this. He wrote that monarchical jurisprudence was complex. Indeed, his passage on French judges sounds almost as if it is describing England: «Il y faut des tribunaux. Ces tribunaux donnent des décisions; elles doivent être conservées; elles doivent être apprises, pour que l'on y juge aujourd'hui comme l'on y jugea hier [...] Il ne faut donc pas être étonné de trouver dans les lois de ces États tant de règles, de restrictions, d'extensions, qui multiplient les cas particuliers, et semblent faire un art de la raison même»[61]. The complexity here that Montesquieu is defending, however, is not due to the empirical nature of law, but to the complexity of the various ranks in a monarchy. The fact that the law becomes encumbered with complicated and sometimes contradictory decisions of the various tribunals is «un mal nécessaire» that is to be overcome by direct intervention of «le législateur»[62]. In this passage, the conservative attachment to ancient customs remains, but it is attenuated radically with this call for centralized reform[63]. In pointing to this, I am not entirely disagreeing with Carrese's analysis

[60] Hale, for instance wrote that a Judge «should keep his Reason as Neare as may be within the Cancelli of the Reason of the law», by which he meant previous judgments. Quoted in Michael Lobban, «Custom, Nature, and Authority: the Roots of English Positivism», in David Lemmings, *The British and their Laws in the Eighteenth Century*, Woodbridge, Boydell, 2005, p. 45. Lobban points out that Hale combined a commitment to legal positivism with an equally strong commitment to precedent. For our purposes, however, it is merely important to note the latter.
[61] *EL*, VI, 1; t. I, p. 80-81. Note, however, that he does not say that these judgments constitute lawmaking.
[62] In discussing other passages in which Montesquieu urges legislators to reform penal codes, Carrese tells us that we are to understand him to mean judges (*The Cloaking of Power* cit., p. 42); hence judge-made law. This is an example of stretching the evidence to meet the thesis. Carrese continues to treat what Montesquieu says about legislators as if it is said about judges. A typical example from Carrese's exposition is the following: «If he wrote this work 'only to prove' that 'the spirit of moderation should be that of the legislator,' then wise legislators should increase the prominence of judging in politics (29.1)», (*ibid.*, p. 43). *EL*, XXIX, 1 merely argues that there ought to be neither too many nor too few judicial formalities (and the real danger emphasized is that of excessive legal formalities). Neither it nor the other evidence he cites in these pages say anything about «encourag[ing] judges to imperceptibly reform the administration of justice», (*ibid.*, 43).
[63] David Carrithers points to these passages on the complexity of Monarchical jurisprudence, and its reliance on precedent, suggesting that it is «akin to the common-law method of judging», («Jurisprudence», in *Montesquieu's Science of Politics*, eds. David W. Carrithers, Michael A. Mosher & Paul A. Rahe, Lanham, Rownal & Littlefield, 2001, p. 296), but he does not really discuss the extent of this similarity,

(which wishes to paint Montesquieu as quietly sympathetic to English common law) – *The Cloaking of Power* notes that Montesquieu «departs from the classic common law because of his moderately liberal notions of nature and human nature, which in turn inform his distinctive jurisprudence and constitutionalism»[64]. That is to say, Montesquieu was a reformer, and thought that knowledge of nature (rather than mere adherence to tradition) should guide legislation[65].

We see Montesquieu further his opposition to judicial lawmaking – and implicitly to *stare decisis* – in his attack on 'rescrits' [66]. These were not edicts or decrees, but particular responses to queries by judges attempting to determine the nature of law. «On sent que c'est une mauvaise sorte de legislation [...] Macrin avoit résolu d'abolir tous ces rescrits; il ne pouvoit souffrir qu'on regardât comme les lois les réponses de Commode, de Caracalla, et de tous ces autres princes plains d'impéritie»[67]. The examples of these despotic princes are meant to indicate the dangers of will overstepping law. But a significant weakness of this 'method of legislating', according to Montesquieu, is that it accords universal significance to a particular instance: «Trajan [...] refusa souvent de donner de ces sortes de rescrits, afin qu'on n'étendît pas à tous les cas une décision, et souvent une faveur particulière»[68]. The larger problem identified here, of course, is punting the judicial power to the arbitrary decision of the monarch, but the accompanying problem is the way in which this imperial casuistry undermines rational law: particulars should not become rules[69].

We have seen that law, in general, is human reason, and particular nations' laws are but particular applications of it (*EL*, I, 3). So too did Montesquieu envision law on a national scale as top-down. Consider his treatment of the feudal origins

and he goes directly – without skipping a beat – from Montesquieu's argument against despotic simplicity to his argument for simple, clear laws.

[64] Carrese, *The Cloaking of Power* cit., p. 28.

[65] Carrese gives as an example Montesquieu's rejection (*EL*, XIV, 13) of English laws against suicide, (*ibid*, p. 29).

[66] In defence of Montesquieu here, it was far from self-evident to Englishmen in the early eighteenth century that their judges had such weight in the making of law. Gerald Postema points out that the principle of *stare decisis* was largely elaborated in the eighteenth century itself, («Philosophy of the Common Law» cit., p. 589).

[67] *EL*, XXIX, 17; t. II, p. 297.

[68] *Ibid.*

[69] Carrese emphasises, correctly, the fact that in these cases, Judges were abandoning their role to the executive (*The Cloaking of Power* cit., p. 99).

of French law. Montesquieu insists upon the varieties of customary law that existed in medieval France, but he equally describes what Weber would have termed a 'rationalization' in which laws were written down and unified. It is worth quoting at length the height of this move, the fifteenth century:

> Voici la grande époque. Charles VII et ses successeurs firent rédiger par écrit, dans tout le royaume, les diverses coutumes locales, et prescrivirent des formalités qui devoient être observées à leur rédaction. Or, comme cette rédaction se fit par provinces, et que, de chaque seigneurie, on venoit déposer dans l'assemblée générale de la province les usages écrits ou non-écrits de chaque lieu, on chercha à rendre les coutumes plus générales ... Ainsi nos coutumes prirent trois caractères : elles furent écrites, elles furent plus générales, elles reçurent le sceau de l'autorité royale[70].

The reform came from above and it entailed overriding local customs and privileges in the name of uniformity. No doubt, «il ne faut pas tout corriger»[71], nor ought one pursue a perverse conception of uniformity[72], but such radical diversity of customs and privileges cannot persist and Charles VII's example made it a 'grande époque.' Nor does Montesquieu accept as essential the distinction between *droit coutumier* (common law) and Roman law despite their radical differences and their entrenchment in different parts of the country[73]. In a striking passage – itself a historical analogy – Montesquieu argues that the English and Republican Roman Judges are equally invisible; they merely determine questions of fact and then the judge mechanically applies the law[74]. Undermining the distinction between Roman and common law removes a useful resource for combating monarchical centralization.

This is the sort of thing – the centralizing thought, with its rationalist hue[75] –

[70] *EL*, XXVIII, 45; t. II, p. 280.

[71] *EL*, XIX, 6; t. I. p. 330.

[72] See *EL*, XXIX, 18 and XXVIII, 37. In *EL*, XXVIII, 37 (t. II, p. 267) , Montesquieu notes that «Faire une coutume générale de toutes les coutumes particulières, serait une chose inconsidérée, même dans ce temps-ci [...]». Jean Bart, in his brief «Montesquieu et l'unification du droit» (*Le temps de Montesquieu*, eds. Michel Porret et Catherine Volpilhac-Auger, Genève, Droz, 2002, p. 137-146) also quotes this passage, employing it to insist upon Montesquieu's striking rejection of uniformity. Bart's contextualization is most useful and he is generally correct, but he does not discuss Montesquieu's celebration of legal rationalization or national unity.

[73] See *EL*, XXIX, 45.

[74] See *EL*, VI, 3.

[75] Waddicor is perhaps the strongest proponent of this view: *EL* «is the work of a rationalist who tried to deduce positive law mathematically from a few basic concepts», (*Montesquieu and the Philosophy of*

which permits writers like Mark Hulliung to make the generally unsound argument that Montesquieu was a radical modernizer, a champion of the bureaucratic state and a political radical. There is a rationalist, top-down dimension to Montesquieu's thought that is most evident in his silence on the distinctive nature of the common law tradition in the England he so admired[76].

Conclusion

We are confronted, then, with a familiarly divided picture of Montesquieu—one Montesquieu who was particularlist, empirically-minded, and committed to the odd, probabilistic rigour of comparison and analogical reasoning, and another Montesquieu who is rationalist, conceiving of rationally deducible universal norms, political reform from above, and legal reasoning as 'top-down'. Over this distinction we may happy lay the distinction between Montesquieu the reformer and Montesquieu the conservative. Or, let us add another related antinomy, Meinecke's claim that Montesquieu was both an Enlightenment figure and a proto-Romantic historicist. My claim here has been that Montesquieu's historical thought is less fruitfully conceived as a foreshadowing of Herder and Hegel than as a mirror of English common law thought, in which custom finds its reasons through both the logic of functionalism and the constant application of human reason to received institutions. But Montesquieu retained a rationalist, deductive 'Cartesian' tenor of thought that influenced both his subtle retention of natural law and his tendency to think of law and legal reform in centralizing ways, despite his celebration of mediating institutions that check royal power.

Given his conflicting tendencies, it is unsurprising to see Montesquieu subjected to criticism for excesses on both sides. (To borrow a joke of Moses Mendelssohn, Montesquieu is like the man accused by his wife of impotence and by his chambermaid of having gotten her pregnant.) Committed rationalists and convinced empiricists will both tend to think Montesquieu confused; others, in the spirit of Montesquieuan moderation, might be inclined to think that he found a middle way. It is important to note that these divergent tendencies in Montesquieu's thought do not necessarily represent a *contradiction*. It would be perfectly coherent for him to claim, as he might have done if pushed, that analogical reasoning is an essential tool for the legislators of the world in their search for general principles, but a rational legal system will keep this activity out of the judiciary, whose job is to subsume particulars under the general rule prescribed by legislators. This would, however, limit the utility of analogical reasoning by making it the mere handmaiden to general rules. The beauty of common law reasoning is the degree to which analogy with historical decisions both constrains judgment (to the voice of the historical court and the rule of rational consistency) yet leaves it open-ended such that it remains attentive to particulars. If Montesquieu appears to unleash historical analogy on the philosophical world, he ultimately wants it domesticated in the legal world.

Natural Law cit., p. 45). For another example of Montesquieu's wariness of analogical reasoning in law, we could look to his response to casuistry (*LP* 55), where he denigrates the casuist in the same tone as one sees in Pascal – it is mere fiddling to escape the rigours of the law. For an interesting defence of casuistry, see Albert R. Jonsen and Stephen Toulmin, *The Abuse of Casuistry: a History of Moral Reasoning*, Berkeley, Univ. of California Press, 1989.

[76] The degree to which Montesquieu's legal thought fits well in the civilian tradition can be seen in the manner in which it was found congenial by the drafters of the Code Napoléon. See Alfredo Mordechai Rabello, «Montesquieu et la codification du droit privé (Le Code Napoléon)», *Revue internationale de droit comparé*, 52:1, 2000, p. 147-156.