

# Personal Corruption & Corrupting Laws: Montesquieu's Twofold Theory of Corruption

[http://doi.org/10.21272/bel.4\(4\).76-83.2020](http://doi.org/10.21272/bel.4(4).76-83.2020)

Mario I. Juarez-Garcia, ORCID: <https://orcid.org/0000-0002-5320-8169>

Doctoral Candidate, Philosophy Department & Center for the Philosophy of Freedom, University of Arizona, Tucson, AZ, USA

## Abstract

Traditional views tend to identify the problem of corruption in the dishonesty of public officials. The main purpose of the research is to recover Montesquieu's view of corruption and show that there are at least two different causes of corrupt behaviors. In *The Spirit of Laws*, Montesquieu distinguishes "two kinds of corruption: one, when the people do not observe the laws, the other when they are corrupted by the laws; the latter is an incurable ill because it lies in the remedy itself." Recent studies about Montesquieu's account of corruption do not pay much attention to this distinction. This paper unpacks the two kinds of corruption. The first kind tracks a problem of individuals who use their public office for private gain. The second track is the deficiency of the laws that contradict social behaviors and, therefore, are obeyed exclusively out of fear and violated whenever possible. The distinction is relevant to the anti-corruption literature because it implies two different ways to eradicate corruption. Corruption as a problem of individuals can be solved with better enforcement of the law: improving monitoring systems, better rewards for honesty, or higher punishments. Personal corruption can be dealt with what Celine Spector calls "a legislative arsenal." However, improving enforcement mechanisms is unlikely to solve the problem in corrupting laws, given that people violate the law due to the high standards that it imposes on them. The solution for the second kind of corruption is to remove or modify the corrupting law. Montesquieu promoted the separation of powers and the spirit of moderation in the legislators to avoid corrupting laws. The result of this investigation is the importance of distinguishing between the situations in which more coercion can eradicate corruption and those in which more force against corruption leads to despotism.

**Keywords:** Corruption, Legislation, Moderation, Montesquieu, Separation of Powers, Spirit of the Laws.

**JEL Classification:** B12, D73.



This work is licensed under a Creative Commons Attribution 4.0 International License

**Cite as:** Juarez-Garcia, M.I., (2020). Personal Corruption & Corrupting Laws: Montesquieu's Twofold Theory of Corruption. *Business Ethics and Leadership*, 4(4), 76-84. [http://doi.org/10.21272/bel.4\(4\).76-84.2020](http://doi.org/10.21272/bel.4(4).76-84.2020).

© The Author, 2020. This article is published with open access at Sumy State University.

## Introduction

In *the Spirit of Laws*, Montesquieu writes: "there are two kinds of corruption: one, when the people do not observe the laws, the other when they are corrupted by the laws; the latter is an incurable ill because it lies in the remedy itself."<sup>1</sup> Recently, Montesquieu's account of corruption has been carefully studied, yet the importance of this distinction has not received sufficient attention (Krause, 2002; Sparling, 2016). This paper unpacks the distinction. The first kind of corruption tracks a problem of individuals; call it personal corruption. The second tracks a deficiency of the laws; call it corrupting laws. These are distinct phenomena that call for different responses. The main goal of this paper is to argue that Montesquieu's distinction is key to understanding that sometimes corruption is a problem of the laws, not a problem of personal wrongdoing. The distinction reminds us of an alternative way to think about corruption as a vice of the legislators, and not only a vice of public officials or citizens, which typically is the basis of current theories of corruption (Nye, 1967; Huntington, 1968; Klitgaard, 1988; Tullock, 1996; United Nations, 2004; Rose-Ackerman and Palifka, 2016; Okonjo-Iweala, 2017; Ceva and Ferretti, 2018).

The first section briefly summarizes the conditions that, according to Montesquieu, make the government a source of social order. The second section explains both kinds of corruption. The third section shows that

<sup>1</sup> Montesquieu ([1748] 2017), 6.12. Hereafter, the text will be cited as EL, the first number indicates the book, the second number, the chapter.

political corruption is sometimes an outcome of corrupting laws. The last section describes three strategies for combating the two kinds of political corruption. In *The Spirit of Laws*, the term corruption is used over 140 times and refers to various phenomena: moral rotteness, political downfall, natural decadence and many others. Book eight is devoted explicitly to prove that the source of corruption – the decline – of a regime is expansionism (EL, 8.20). Grasping its meaning is particularly challenging. The aim of this paper is not to provide a unitary account of Montesquieu's idea of corruption. This paper only aims exclusively to explain Montesquieu's distinction between personal corruption and corrupting laws to invite current corruption theorists to identify the cases in which the law corrupts.

## Two Conditions for Political Order

Before engaging with corruption, one must have in mind Montesquieu's abstract model for social order. For Montesquieu, two conditions make a government a source of order: that the principle determines the government's nature and that laws do not contradict the general spirit.<sup>2</sup> The first condition uses the conceptual pair principle/nature (EL, 3.1). On the one hand, government *nature* refers to the number of people who participate in the legislation. In a republic, a group of people legislate; if everyone decides the laws, then it is a democratic republic; if only a group holds this power, then it is an aristocratic republic. In a monarchy, only one person rules, but some fundamental laws limit him or her; in a despotic regime, only one person governs and there are no limits to his or her power. The first two regimes are moderate, the last one is immoderate.<sup>3</sup> On the other hand, the *government's principle* is the passion that motivates the governed to obey the law voluntarily; in this sense, it *sets in motion* the government. Robert Sparling explains this term clearly "every political arrangement has some social-psychological force that makes individuals behave in such a way as to preserve the regime – the principles are the affective basis on which people's energies turn towards obedience" (Sparling, 2017: 160). The point is that, without general voluntary observance of the law, the government is not a source of order.

According to Montesquieu, different passions motivate obedience to different legislative structures. Hence, the first condition is procedural: the principle can be understood as the motivation to respect the law if it is made within the right legislative procedure. The following are the principles that correspond to each nature. In a democratic republic (where everyone has an equal say in public business<sup>4</sup>), the government is a source of order only if people have political virtue – which is "love of the homeland and of equality" (EL, xli). The principle of an aristocratic republic is moderation (EL, 3.4), honor is the principle of the monarchy (EL, 3.2), and fear is the principle that sets in motion a despotic government (EL, 3.9). A historical example is useful to understand the importance of the principle. Montesquieu evokes Oliver Cromwell's failure to establish a democratic republic in England after the civil war: "It was a fine spectacle in the last century to see the impotent attempts of the English to establish a democracy among themselves. [...] the people, stunned, sought democracy and found it nowhere" (EL, 3.3). The absence of love of equality in English society made it impossible to establish a democracy in England. If people lack the adequate principle for a particular nature, it is impossible to impose such a legislative structure. Therefore, the first condition for the government to be a source of order is:

### C1. *The motivational principle determines the nature of the government.*<sup>5</sup>

Another conceptual pair requires explanation: law/general spirit, to explicate the second condition. Montesquieu distinguishes between (positive, *made*, written) laws and the *general spirit* of a society. On the one hand, laws are the regulations that legislators write they are the product of human will. On the other, general spirit refers to the social behavior and beliefs resulting from multiple factors in the environment: "Many things govern men: climate, religion, laws, the maxims of the government, examples of past things, mores, and manners; a general spirit is formed as a result" (EL, 19.4). While the law is man-made, the general spirit is the outcome of the circumstances, and, hence, it is not the result of human construction but an adaptation to the environment. We might compare the general spirit to our current concept of culture. This distinction is first and foremost theoretical: the public spirit is analytically distinguishable from legislators'

<sup>2</sup> Montesquieu's inquiry is inductive: he studies and compares actual political formations from the past and infers an abstract framework for the conditions under which people generally obey the law and accept law enforcement. Therefore, the terms "necessary" or "sufficient" will not be used.

<sup>3</sup> Judith Shklar argues that the distinction between moderate and immoderate regimes is "the most significant of [Montesquieu's] distinctions between regimes." (1987, 85).

<sup>4</sup> Montesquieu's idea of democracy refers to ancient democracies (where everyone has a say in any public business), and therefore, it is not equal to modern democracies, that, in his typology, would not be democracies, but governments characterized by the separation of powers.

<sup>5</sup> One does not need to embrace every detail of Montesquieu's framework to grasp the idea of principle/nature. One just needs to understand that people recognize the authority of law enforcement agencies due to motivation X in a democracy, and people recognize authority in a monarchy due to motivation Y, and X is different to Y.

law. Such a difference helps us understand that, before laws are formulated, there are truths about the laws that people will voluntarily observe (EL, 18.8).

The second condition is not just procedural, but it depends on the content of the law. People subjected to a law tend to observe it when it does not make it impossible to follow the general spirit. Conversely, if the law makes it illegal to behave according to the general spirit, it will be generally violated (EL, 29.16). A simple example may be useful here to explain this condition. In Munich, typically, people cross the street at the corner; jaywalking is, then, prohibited by the general spirit, because, due to the environment (extreme heat, the sprawling distance between blocks, large avenues, and deficient public transportation), people do not walk on the street so often. Hence, a law that forbids jaywalking in Munich is easy to enforce the few pedestrians and even fewer jaywalkers. Conversely, in New York City, everyone jaywalks, the general spirit does not consider it a problem partly because of the environment (short city blocks, severe traffic, and a decent public transportation system); therefore, the law that forbids jaywalking is rarely observed or enforced. The lesson is that people generally observe laws when they result from the legislator's accurate understanding of the general spirit. The second condition that makes a political regime a source of order is:

*C2. The law does not contradict the general spirit.*<sup>6</sup>

When C1 and C2 are satisfied, the governed usually follow the law issued by the legislators, and the few violators generally accept law enforcement. The political regime, then, can enforce the positive law when the principle of the government defines its nature and the positive laws (the apparent laws according to Althusser) does not contradict the general spirit (the actual law). For Montesquieu, when either C1 or C2 do not hold, corruption occurs.

## Two Kinds of Corruption

The starting point to make sense out of Montesquieu's twofold theory of corruption is the following sentence: "the corruption of each government almost always begins with that of its principles" (EL, 8.1). The disturbance of the affective motivation to observe the law – the passion discussed above – affects the government's capacity to enforce it and, hence, leads to political downfall. The recent studies of Montesquieu's account of corruption have not studied his twofold view of corruption (Krause, 2002). "There are two kinds of corruption: one, when the people do not observe the laws, the other when they are corrupted by the laws; the latter is an incurable ill because it lies in the remedy itself" (EL, 6.12).<sup>7</sup> This paper takes the distinction seriously.

**Personal Corruption.** One kind of corruption occurs "when people don't observe the laws," which is a risk for C1. Call it personal corruption. In this case, individuals violate the motivational principle of the government. Montesquieu has a broad view of what counts as a violation of the principle; when someone breaks any law, that person violates the principle.<sup>8</sup> For example, when, in a democracy, someone jaywalks because she is in a hurry, she disrespects the law made by everyone as an equal, then she indirectly violates the equality of the democratic procedure of legislation. She shows that her urgency to cross the street is more important than the opinion of her peers. When the violation is marginal and there are just a few *rotten apples*, personal corruption is not a major problem. The government's obligation corrects this behavior and reminding the violator that she must observe the law, even if she does not comply with it voluntarily. For Montesquieu, the risk of personal corruption is that people violate the law *en masse*, because, when this happens, it means that the governed are acting following a different motivating principle, that their passion (motivating principle) to observe the law has changed, and C1 is not satisfied. The idea is that the government must enforce the law when there are only a few violators to prevent the contagion which may alter the principle.

What changes human passions? There are multiple seeds of corruption extrinsic to the political structure (EL, 5.19). In other words, elements in the environment may alter the government's principle without people being aware of it. A clear example is a luxury in a democratic republic: since luxury promotes the "desire to distinguish oneself" (EL, 7.1), it spreads the love of inequality, which undermines the principle of a democratic republic (EL, 7.2). Once this happens, one can anticipate the decay of democratic republics since the love of equality is undermined and C1 no longer holds.

<sup>6</sup> I take that this is just another way to say, in Montesquieu's terms, that the positive law must be moderate. For more on moderation, see Carrese 2016.

<sup>7</sup> Roger Boesche (1990) pays attention to this distinction, albeit in an incorrect way. He argues that there are two types of despotism, one produced by fear and the other by ambition. Yet, I hold that his interpretation is misguided. Montesquieu is clear: the principle of despotism is fear. Ambition produces a moral distortion but does not lead to despotism *per se*. However, this distinction does apply to the two kinds of corruption, which is a more general phenomenon.

<sup>8</sup> "There is no crime that is not equally an instance of political corruption" (Sparling 2017, 161). Sparling is making the point about violation in democracies, however when, in a monarchy, people disobey the law, they are violating the principle of honor.

**Corrupting Laws.** The other kind of corruption occurs when people “are corrupted by the laws”, which indicates a violation of C2. Call this kind of corruption corrupting laws. In Montesquieu’s terms, a law that contradicts the general spirit is immoderate. When enforced at any cost (e.g., with overbearing punishments), immoderate laws lead people to violate them. In a moderate regime, if a new law contradicts the general spirit (C2 is not satisfied), people will not observe it voluntarily; in response, the law enforcer may then increase the punitive force to make the governed obey. Punishments become more severe if...

*A legislator who wants to correct an ill often thinks only of that correction; his eyes are open to that objective and closed to its inconveniences. Once the ill has been corrected, only the harshness of the legislator is seen; but a vice produced by the harshness remains in the state; spirits are corrupted; they have become accustomed to despotism (EL, 6.12).*

When punishment becomes too exacting, the only motivation to observe the law is to avoid punishment. The law corrupts because the governed, who generally prefer to violate it, observe the law only out of fear of sanctions. The subjects become prisoners of laws that they fear.<sup>9</sup> Imagine that a righteous mayor intends to enforce the jaywalking prohibition in New York City and convince the legislators and the law enforcement agencies to double down on efforts to free New York City from the epidemic of jaywalkers. How severe must the punishments be for enforcing this prohibition? Perhaps if jaywalking were punished by the death penalty with public executions, New Yorkers would observe the jaywalking prohibition only to preserve their lives. They would walk in more congested sidewalks just to survive. Then, fear becomes the motivating principle of the government. For Montesquieu, corrupting laws are more dangerous than personal corruption because fear cripples the society’s motivation to obey the law: when people obey a law out of fear, the governed “become accustomed to despotism” (EL, 6.12). Hence, when C2 does not hold, C1 is altered as well. When the law contradicts the general spirit, governments need to update their legislative structures to fulfill C1. Thus, governments slide towards despotism (EL, 19.14). In sum, Montesquieu distinguishes two kinds of corruption: when the problem lies in the individual who violates the law (a risk to C1 even if C2 holds), and when a law that contradicts the general spirit (C2 is violated) transforms every government into a despotic regime (to fulfill C1). To demonstrate how Montesquieu’s distinction is illuminating for our understanding of political corruption, we need to dig deeper into the implications of corrupting laws.

### When Laws Corrupt

As an observer of the past, Montesquieu is aware that political regimes rise and fall. The corruption – the decline – of institutions appears as a necessary stage of the life of every political system. The normative status of corruption – as the decline of a political regime – is then unclear. Montesquieu’s normative claim about corruption is only one: “It is not a drawback when the state passes from the moderate government to moderate government, as from republic to monarchy or from monarchy to republic, but rather when it falls and collapses from moderate government into despotism” (EL, 8.8). But why is falling into despotism undesirable whereas passing from one moderate government to another is not? The distinction between personal corruption and corrupting laws is key to understanding why it is a *drawback* when a moderate government becomes a despotic regime, but not when one moderate government passes to another form of moderate government. Montesquieu does not condemn personal corruption because its results are predictable; conversely, he condemns corrupting laws because they transform every government into a despotic regime which yields unpredictable social reactions.

When personal corruption occurs – i.e., when violations of the law are marginal and their cause is extrinsic to the political system, one can expect what kind of regime will arise. For instance, if, in a democratic republic, people start to value luxury, which alters the love of equality, since individuals strive to look different and superior to their fellow citizens, love of inequality hence emerges as a motivating principle. This society must update the nature of its government to the new principle to satisfy C1. In this case, a democratic republic is to be transformed into a monarchy (EL, 7.4). Within Montesquieu’s framework, generally, a corrupt principle in one regime constitutes an adequate principle for another government. In other words, when the seeds of corruption are extrinsic to the political system, people can anticipate the transformation that a regime needs to undertake and update its nature to satisfy C1.

Corrupting laws represent a more complicated challenge, however. As said, since fear becomes the principle, the government should be transformed into a despotic regime (to satisfy C1). However, given that reactions to fear are multiple and hard to predict, it is not easy to maintain the despotic regime as a source of order. According to Montesquieu, the main issue is that *fear is corrupting by its nature* (EL, 8.10). What does this

<sup>9</sup> This is the opposite of what Shklar (1987, 89) calls “liberalism of fear”.



mean? Typically, fear is considered damaging because it provokes psychological distress, undermines one's rational capacities, and destroys social skills. Sparling affirms that, for Montesquieu, fear harms the human psyche, distorting human passions in a more fundamental way than luxury or inequality: it damages the very human nature (Sparling, 2017). This interpretation is only partially correct. Montesquieu's epistolary novel, *The Persian Letters*, shows a more complex understanding of fear.

*The Persian Letters* is partly centered on Uzbek's harem, where a system of fear is to keep wives and eunuchs under control. In this micro despotic regime, subjects react to fear in different ways. Eunuchs obey because they fear for their lives. Nevertheless, Roxane, one of Uzbek's wives, exhibits a courageous reaction to fear.<sup>10</sup> In her case, fear does not lead to blind obedience in exchange for survival, but to love (for her lover) affection, strategy and courage.<sup>11</sup> Fear leads to isolation and obedience, but revolt and solidarity, as well. It is what fear being corrupting by nature means: there is no single but myriad and unpredictable reactions to fear. It is never at the basis of voluntary obedience. When people obey (exclusively) out of fear, they constantly violate the laws whenever the enforcer is absent (EL 6.13; Gilmore and Sullivan, 2017). Some people who fear the despot may pretend to obey her while secretly looking for ways to overthrow her. It may also be the case that, moved by their equal position of subordination, fear triggers the people to revolt against the despot, and then equality becomes the new principle that paves the road to a democratic republic. Yet again, it is also possible that factors in the environment (external to the political regime) stabilize and perpetuate a despotic government, which is China's case (EL, 8.21). When laws corrupt, it is predictable that fear will not be a lasting principle and, hence, a despotic government (that does not satisfy C2) will rarely satisfy C1. In other words, *contra* some natural law interpreters of Montesquieu (Sparling, 2017), the problem of fear for Montesquieu is not that it damages the psyche of the subject of the regime, but that it does not work as a principle of social stability.

One of these various reactions to fear is deactivating the government's punitive apparatus to shun punishments and preserve the general spirit – the existing law. One way of doing this is to tempt the law enforcement officials' interests to defect from their duties, which ultimately produces general impunity. In other words, to deactivate the fear created by laws, the governed purchase law enforcers. Bribery is the quintessential example of this kind of reaction to fear to convince police officers not to enforce laws. Political corruption then occurs. Although it looks like the instantiation of personal corruption (a morally deviant agent using her public office for private gain), the purpose of this corrupt behavior is not the same. When laws corrupt, bribes are not exclusively for the public officials' gain, but also for the people living under immoderate laws, who would live in fear if honest public officials enforced the laws. Public office is then used for private gains and a certain public gain: the powerlessness of immoderate laws. As Montesquieu says, "atrocities in the laws prevents their execution. When the penalty is excessive, one is often obliged to prefer impunity" (EL, 6.13).

Consider once again the hypothetical case of jaywalking in New York City. If law enforcement agencies intended to sanction those who jaywalk with severe punishment, instead of obeying in silence, New Yorkers may try to deactivate the governmental punitive apparatus. One way to achieve this is by bribing police officers, who, when accepting, become corrupt. Yet, this corruption is not only for their gain but also for New York City pedestrians who can move faster on the sidewalks without fearing for their own life thanks to the corrupt officials. Nathaniel Gilmore and Vickie Sullivan summarize Montesquieu's point clearly: "The laws whose extremity is meant to correct all human wickedness cultivate that very wickedness" (Gilmore and Sullivan, 2017: 463). In other words, sometimes, political corruption is a way to deactivate immoderate laws. When this happens, corrupt individuals are not to be blamed: laws are the problem.

## Different Corruptions, Different Responses

The distinction then implies different strategies for dealing with different kinds of political corruption.

**A Legislative Arsenal.** For personal corruption – any crime in Montesquieu's terms – the adequate strategy to control it is straightforward: enforcing the law. Every government must preserve its principle using a "legislative arsenal" (Spector, 2013). Different seeds of corruption are at the origin of personal corruption in different regimes. Therefore, each kind of government must find the most effective way to legislate and punish personal corruption behaviors. For example, luxury must be forbidden in democratic republics (EL, 7.2). According to Montesquieu, the efficiency of mechanisms of control also varies from regime to regime. For instance, censorship is useful in republics, but it must not exist in monarchies since moderation must come

---

<sup>10</sup> Consider the following excerpt of a letter from Roxane to Uzbek: "I might have lived in servitude, but I have always been free. I have reformed your laws by those of nature, and my spirit has always remained independent. [...] We were both happy: you believed me deceived, and I was deceiving you." Montesquieu ([1721] 2017), Letter 161.

<sup>11</sup> Robin underlines: "fear is intimately connected to the broad range of sympathies, desires and aspirations that motivates ordinary men and women" (2000, 355).

from the principle of honor alone (EL, 5.19). The main idea is that a government must use coercive force and punishments to preserve the correspondence between its motivating principle and its nature (C1) to remain a source of order. The same holds for political corruption – the use of public office for private gain – an instance of personal corruption. The government must punish corrupt officials. A hierarchical structure that monitors public officials' behavior is an adequate and effective strategy to eliminate marginal cases of political corruption, i.e., only a few *rotten apples* in the government. Again, in this, the essence of Montesquieu's anti-corruption measures seems like current anti-corruption principal-agent strategies (Klitgaard, 1988; United Nations, 2004). However, responses to corrupting laws are more subtle and complex because punishments are in fact, the problem. Montesquieu affirms that corrupting laws are “an incurable ill because it lies in the remedy itself” (EL, 6.12). The *immoderation* of the law is the problem. Then, the main strategy to deal with and prevent corrupting laws (and political corruption that arises from there) is to preserve moderation in legislation.

**Separation of powers.** A powerful mechanism against immoderate legislation is the separation of powers. According to Montesquieu, a lesson from history is that moderate governments are those in which the power is divided: “In most kingdoms in Europe, the government is moderate because the prince, who has the first two powers [legislative and executive powers], leaves the exercise of the third [the power of judging] to his subjects” (EL, 11.6). Separating powers in different branches, creating checks and balances, and multiplying jurisdictions make it extremely difficult for an individual or a group to centralize political power and legislate against the government's actual behavior and beliefs (the general spirit). In other words, the separation of powers preserves C2. It is Montesquieu's main contribution to our liberal democracies. His insight, via the American framers, literally changed the world (Madison, [1788] 2001).

Since today we live in liberal democracies, many skeptical readers might find the hypothetical example of New York City jaywalking prohibition simplistic and unrealistic, precisely because, in these systems, there is an easier way to react to an immoderate law. Citizens can elect representatives who promise to eliminate the law; then, a responsive congress would abolish it despite the righteous intentions of those who intend to impose it (say, the executive branch). Therefore, the phenomenon of corrupting laws would rarely arise in liberal democracies. If this is right, this paper is not particularly illuminating for our current political situation. Allow me to respond to those skeptical readers. The New York City jaywalking prohibition is a simplistic case; however, Montesquieu's distinction is useful for illuminating complex legislative situations. Consider more challenging and more realistic examples. Drug prohibition creates political corruption (bribes for politicians, police officers, judges, or even militaries) in almost every liberal democracy. Even if it is damaging to everyone involved (producers, consumers, traffickers, law enforcement agents, and so on), and, hence, contrary to the general spirit (to people's actual behavior), voters, politicians, and intellectuals still defend the prohibition as a correct law and prefer to double down on the efforts to punish politically corrupt actions than to remove the prohibition on drugs. In other words, the public thinks that political corruption can only be personal corruption, and they blame corrupt officials instead of blaming corrupting law. The skeptical reader could reply that progress has proved possible, at least in the case of the recreational use of marijuana. True, but consider how astonishingly slow its legalization has been: more than 50 years passed since marijuana became a drug of massive consumption in the United States. Perhaps the jaywalking prohibition in New York City is a simplistic example, but it is a proxy for understanding more complicated situations. Liberal democracies with divided powers are not immune from corrupting laws. Therefore, Montesquieu affirms that the English regime “will perish when the legislative power is more corrupt than executive power” (EL, 11.6).

**A legislative spirit of moderation.** For Montesquieu, “a corrupt legislative power” is one that legislates without moderation. The key passage to understanding *The Spirit of Laws* is: “I say it, and it seems to me that I have written this work only to prove it: the spirit of moderation should be that of the legislator” (EL, 29.1). Montesquieu holds then that every legislator's principle, regardless of the nature of the government, must be moderation (EL, 3.4). If “the corruption of each government almost always begins with that of its principles” (EL, 8.1), and if the legislator should hold the principle of moderation (EL, 29.1), it follows that the constitution of balanced powers will perish when the lawmakers lose the moderation principle (Carrese, 2016). A “corrupt legislative power” arises when legislators use the law to impose a religious command (EL, 25.12), an abstract design (EL, 29.6), or an idea of perfection (EL, 29.6) that contradicts the actual behavior of the governed (EL, 29.16). When legislators lose sight of the principle of moderation, they write corrupting laws, which, as said, may lead to political corruption. The third strategy against corruption is, then, to maintain the legislators' moderation to preserve C2. But how can legislators know when they are immoderate? When political corruption is widespread and people and law enforcers, in general, prefer impunity to law enforcement, lawmakers must take these violations into account and surmise that they are the product of an immoderate law. A legislator who follows Montesquieu's advice surrenders to the evidence that it is not possible to enforce an

immoderate law and, hence, must eliminate it. For Montesquieu, the way to deal with corrupting laws is to assuage penalties or maybe even to destroy the laws:

*A wise legislator would have sought to lead men's spirit back by a just tempering of penalties and reward. [...] And, if this legislator had feared that men's spirits, accustomed to being checked only by cruel penalties, could no longer be checked by a gentle one, he would have acted silently and imperceptibly and would have moderated the penalty for the crime in the most pardonable cases until he could manage to modify it in every case (EL, 6.13).*

Consider a historical example as a case of corrupting laws, the Prohibition era in the United States. Widespread corruption was the result of making alcohol illegal. "Cynics predicted that corruption would accompany Prohibition, but even they were surprised by the massive scope of the graft and malfeasance" (Funderburg, 2014: 340). Prohibition agents made fortunes, and people were eager to bribe them in exchange for a drink. In 1927, to fight corruption, Congress ameliorated the hiring process of police officers imposing exams to increase the agents' quality. The measure did not work, and corruption continued. The problem was not the people but the imposition of a law that contradicted the general spirit – the American people's informal norms. No matter if the law was made to make people better or to make them flourish. It was an immoderate law because it was against people's behavior. In 1933, Congress finally recognized that the law was impossible to enforce and eliminate Prohibition. They could have acted so fast if they have known that sometimes laws are the source of corruption and not the people.

### **Conclusion, Future Research, and Implications**

Personal corruption (when people do not observe the laws) and corrupting laws (when laws corrupt people) are two distinctive phenomena. Nowadays, political corruption (public office for private gain) is treated exclusively as an instance of personal corruption. Montesquieu's framework is useful for grasping how political corruption can be an outcome of corrupting laws, as well. When people obey the law exclusively out of fear, the law must be changed, not the people. When political corruption is marginal (there are only a few *rotten apples*), it is a case of personal corruption and must be controlled with sanctions (to preserve C1). However, if the violation of a law is widespread and those who are in charge of enforcing the law are systematically corrupt (e.g., everyone in the same public office ends up using it for private gain), one must infer that it is the result of an immoderate law; in this case, corrupting laws should be identified and eliminated. Political corruption resulting from corrupting laws, then, must be understood as information for the legislators about the adequacy of the laws because the legislator must "conform as much as possible the conscious laws that he gives to the people to the unconscious laws that govern them" (Althusser, 1958: 37).

Conceiving some corruption cases as a problem of the law opens interesting ways for future theoretical research on corruption. For example, what types of laws incentivize people to corrupt public officials? How can we distinguish a corrupting law from a law that might succeed in changing social behaviors? Which legislative mechanisms would prevent corrupting laws? Can further limits on legislation avoid the appearance of corrupting laws? More importantly, understanding corruption as a problem of legislation, instead of enforcement, calls into question some fundamental assumptions of the modern states: Is it immoral to bribe those who try to enforce corrupting laws? Are police officers justified in enforcing laws that harm people? Is it convenient to require that police officers enforce the law independently of its content? Would it be beneficial to hire public officials who have a more significant commitment to justice than the law? These are many questions that merit a response if we take the idea that some laws corrupt seriously. My paper is a general invitation for further research on those cases in which "acting ethically is against the law" (Hasnas, 2006).

The distinction between personal corruption and corrupting laws may also carry important practical implications, especially for development theory and anti-corruption mechanisms. First, nowadays, one of the main goals of development institutions (e.g., The World Bank) is the fight against corruption in developing countries. The idea of corrupting laws suggests that corruption is not necessarily a result of a weak state or social norms (some scholars argue that the problem of corruption is the result of informal norms that normalize corrupt practices), but as said, the result of inadequate legislation. Significant sums of money are destined to create monitoring institutions to improve enforcement, but this would be a waste if corrupting laws are the issue. Development theorists, then, must enquire about mechanisms for good legislation. Furthermore, this would be a general lesson for those interested in anti-corruption policies, including those voters who care about eradicating corrupt officials from their country. When people lack an understanding of how laws corrupt, they believe that every instance of corruption results from a perverted moral character; hence, they will applaud the centralization of power in a strong leader who promises to eradicate corrupt behaviors using more coercion.

Donald Trump became President with the promise of “draining the swamp”, Xi Jinping not only reached power but extended his time in office due to his fight against corruption. Andres Lopez in Mexico and Jair Bolsonaro in Brazil used similar electoral narratives to win elections. However, the centralization of power would not work when the problem is one of the corrupting laws. It would make it more challenging to implement two efficient strategies against corrupting laws: the centralization of power contravenes the separation of powers and bolsters the leader's hubris as the only answer to a corrupt society. When people applaud those politicians, who promise to double down on widespread violations of the law, one can predict that corrupt practices will be reinforced. Montesquieu's main lesson about corruption is that, when the public does not distinguish between personal corruption and corrupting laws and, hence, deems centralized power as the only solution to eradicate corruption, despotism might be right around the corner.

### Acknowledgements

I thank David Schmitz, Lauren Beall, Allen Buchanan, Jerry Gaus, Patrick Harless, Avital Hazony-Levi, Stan Husi, Stuart Warner, and audiences at the APA-Center Division Meeting and the University of Arizona for their invaluable feedback.

**Funding.** There is no funding for this research.

### References

1. Althusser, L. (1958). *Montesquieu, la Politique et l'Histoire*. [Montesquieu, Politics and History]. Paris: Presses Universitaires de France, 944 p. Available at: [https://www.persee.fr/doc/rfsp\\_0035-2950\\_1960\\_num\\_10\\_4\\_392603\\_t1\\_0944\\_0000\\_002](https://www.persee.fr/doc/rfsp_0035-2950_1960_num_10_4_392603_t1_0944_0000_002).
2. Aron, R. (1965). *Main Currents in Sociological Thought*. New York: Basic Books.
3. Boesche, R. (1990). Fearing Monarchs and Merchants: Montesquieu's Two Theories of Despotism. *The Western Political Quarterly*, 43(4), 741-761. <https://doi.org/10.1177/106591299004300405>.
4. Carrese, P. (2016). *Democracy in Moderation: Montesquieu, Tocqueville, and Sustainable Liberalism*. New York: Cambridge University Press. <https://doi.org/10.1017/CBO9781316392775>.
5. Ceva, E. & Ferretti, M.P. (2018). Political Corruption, Individual Behavior and the Quality of Institutions. *Politics, Philosophy, and Economics* 17, 216-231. <https://doi.org/10.1177/1470594X17732067>.
6. Funderburg, J. (2014). *Bootleggers and Beer Barons of the Prohibition Era*. Jefferson, NC: McFarland & Company, 421 p. Available at: [https://franklin.library.upenn.edu/catalog/FRANKLIN\\_9962113233503681](https://franklin.library.upenn.edu/catalog/FRANKLIN_9962113233503681).
7. Gilmore, N. & Vickie, S. (2017). Montesquieu's Teachings of the Dangers of Extreme Corrections: Japan, the Catholic Inquisition, and Moderation. *The Spirit of the Laws, American Political Science Review*, 111(3), 460-470. <https://doi.org/10.1017/S0003055417000107>[Opens in a new window].
8. Hasnas, J. (2006). *Trapped: When Acting Ethically Is Against the Law*. Washington, DC: Cato Institute. 120 p. Available at: <https://www.perlego.com/book/532644/trapped-when-acting-ethically-is-against-the-law-pdf>.
9. Huntington, S. (1968). *Political Order in Changing Societies*. New Haven, CT: Yale University Press. Available at: [https://projects.iq.harvard.edu/files/gov2126/files/huntington\\_political\\_order\\_changing\\_soc.pdf](https://projects.iq.harvard.edu/files/gov2126/files/huntington_political_order_changing_soc.pdf).
10. Jesseph, D. (1996). Hobbes and the method of natural science. *The Cambridge Companion to Hobbes*. Edited by Tom Sorell. Cambridge: Cambridge University Press. <https://doi.org/10.1017/CCOL0521410193>.
11. Klitgaard, R. (1988). *Controlling Corruption*. Berkeley: University of California Press. <https://doi.org/10.2307/1961721>[Opens in a new window].
12. Krause, S. (2002). The Uncertain Inevitability of Decline. *Political Theory*, 30(5), 709-714. <https://doi.org/10.1177/0090591702030005004>.
13. Kurkchian, M. (2003). The Illegitimacy of Law in Post-Soviet Societies. *Law and Informal Practices: The Post-Communist Experience*, edited by D. Galligan and M. Kurkchian. Oxford: Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199259366.001.0001>.
14. LeDoux, J. (2013). The Slippery Slope of Fear. *Trends in Cognitive Science*, 17(4), 155-156. <https://doi.org/10.1016/j.tics.2013.02.004>.
15. Mackie, G. (2018). Effective Rule of Law Requires Construction of a Social Norm of Legal Obedience, in *Cultural Agents Reloaded: The Legacy of Antanas Mockus*, edited by C. Tognato. Cambridge, MA: The Cultural Agents Initiative at Harvard University Press. pp. 313-334.



16. Madison, J. [1788] (2001). The Federalist. No. 47 in *The Federalist Papers*, edited by G. W. Carey and J. McClellan. Indianapolis: Liberty Fund, 249-255. Available at: [https://files.libertyfund.org/files/788/0084\\_LFeBk.pdf](https://files.libertyfund.org/files/788/0084_LFeBk.pdf).
17. Montesquieu [1721] (2017). *Persian Letters*, Translation by S. Warner, and S. Douard. Indiana: St. Augustine's Press. Available at: <https://www.staugustine.net/our-books/books/persian-letters/>.
18. Montesquieu [1748] (2018). *The Spirit of the Laws* translated and edited by A. Cohler, B. Miller, H. Stone. Cambridge: Cambridge University Press. Available at: <https://trove.nla.gov.au/work/507216?selectedversion=NBD10203410>.
19. Mungiu-Pippidi, A. (2013). Controlling Corruption Through Collective Action. *Journal of Democracy*, 24(1), 101-115. <https://doi.org/10.1353/jod.2013.0020>.
20. Nye, J. (1967). Corruption and Political Development: A Cost-Benefit Analysis. *The American Political Science Review*, 61(2), 417-427. <https://doi.org/10.2307/1953254>.
21. Okonjo-Iweala, N. (2017). *Fighting Corruption is Dangerous*. Cambridge, MA: MIT Press. <https://doi.org/10.7551/mitpress/11131.001.0001>.
22. Robin, C. (2000). Reflections on Fear: Montesquieu in Retrieval. *American Political Science Review*, 94(2), 347-360. <https://doi.org/10.2307/2586016> [Opens in a new window].
23. Shklar, J. (1987). *Montesquieu*. Oxford: Oxford University Press. 144 p. Available at: <https://www.passeidireto.com/arquivo/81306985/judith-n-shklar-montesquieu-oxford-university-press-usa-1987/23>.
24. Sparling, R. (2017). Montesquieu on Corruption: Civic Purity in Post-Republican World. In Kellow, G. and Leddy, N. (Eds.), *On Civic Republicanism* (pp. 167-170). University of Toronto Press. Available at: <https://utorontopress.com/us/on-civic-republicanism-3>.
25. Spector, C. (2013). Corruption, translated by P. Stewart, in *A Montesquieu Dictionary*, directed by C. Volpilhac-Augier. Available at: <http://dictionnaire-montesquieu.ens-lyon.fr/en/article/1376473889/en>. Accessed 23 November 2020.
26. Rose-Ackerman, S. & Palifka, B. (2016). *Corruption and Government: Causes, Consequences, and Reform*. Second Edition, Cambridge: Cambridge University Press. <https://doi.org/10.1017/CBO9781139962933>.
27. Tullock, G. (1996). Corruption Theory and Practice. *Contemporary Economic Policy*, 14(3), 6-13. <https://doi.org/10.1111/j.1465-7287.1996.tb00619.x>.
28. United Nations (2004). *The Global Program Against Corruption: UN anti-corruption toolkit*. <https://www.un.org/ruleoflaw/blog/document/the-global-programme-against-corruption-un-anti-corruption-toolkit>. Accessed October 2019.
29. Warren, M. (2004). What Does Corruption Mean in a Democracy? *American Journal of Political Science*, 48(2), 328-343. <https://doi.org/10.1111/j.0092-5853.2004.00073.x>.