

Postmodernism and the Enlightenment

New perspectives in eighteenth-
century French intellectual history

Edited by
Daniel Gordon



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**NEW PERSPECTIVES IN EIGHTEENTH-CENTURY
FRENCH INTELLECTUAL HISTORY**

EDITED BY DANIEL GORDON

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INTRODUCTION

Postmodernism and the French Enlightenment

DANIEL GORDON

A man does not show his greatness by being at one extremity,
but rather by touching both at once.

—Pascal

Postmodernist thinkers and Enlightenment scholars ought to be in close communication, but in reality they have little to do with each other. On the one hand, we find postmodernist academics whose knowledge of the Enlightenment is limited to a series of derogatory clichés: the Enlightenment glorified “instrumental” reason; the Enlightenment set out to eliminate cultural diversity; the Enlightenment naively idealized history as infinite progress. The bias is acute because “Enlightenment” is to postmodernism what “Old Regime” was to the French Revolution. The Enlightenment, that is to say, symbolizes the modern that postmodernism revolts against. It is the other of postmodernism: not only that which preceded postmodernism but that in opposition to which postmodernism defines itself as a discovery and a new beginning.

On the other hand, the Enlightenment has often attracted scholars who regard *it* with admiration as a new and fortunate beginning. This admiration reached a high point in the period from the early 1930s to the early 1970s, and particularly among liberal intellectuals of German Jewish origin for whom the Enlightenment symbolized the alternative to racism and totalitarianism. For Viktor Klemperer, a professor of Romance languages in Dresden and a Jew who managed to survive the entire Nazi period in Germany, images of the French Enlightenment

sustained the will to live in dark times.¹ Ernst Cassirer's *The Philosophy of the Enlightenment*, first published in 1932 and still the most thoughtful book on the subject, took shape as an act of resistance against the cult of the state and an effort to salvage the aesthetic and moral integrity of European culture.² The work of Peter Gay, who came to the United States as a young refugee from Hitler, represents one of the last great expressions of this effort to set up the Enlightenment as the positive face of modernity.³ While postmodernism is critical of modernity *in toto*, these figures presented eighteenth-century thought as a redeeming path into the future.

Since the wide appeal of postmodernism began in the 1970s, when the great wave of pro-Enlightenment scholarship was coming to an end, the two conceptions of the Enlightenment, critical and ideal, did not directly confront each other. The lack of direct contact between theory and erudition continues to this day, for in recent years the central questions in eighteenth-century studies have been not about the structure of Enlightenment thought but about the origins of the French Revolution. This shift from the study of the Enlightenment as an intellectual effervescence in its own right to the study of ideas as a cause of revolutionary politics has powerfully changed the nature of the scholarly discourse. In the works of Robert Darnton, Keith Baker, Sarah Maza, Dale Van Kley, and other leading specialists, one can detect a broadening of the range of sources consulted but also a thinning out of the intellectual history of the period. By streamlining eighteenth-century culture to the point where it can be viewed in relation to a specific outcome, the Revolution, scholars have forged a kind of history that does not require dwelling on the exquisite sophistication of eighteenth-century writing. None of the books by the scholars named above includes extended discussion of the ideas of Voltaire, Montesquieu, Diderot, or Rousseau.⁴ This is not to say that the Enlightenment is nothing other than the ideas of a few great authors. There is considerable room for play in the definition of the Enlightenment as a period in cultural history—considerable room to include institutions as well as texts, hack writers as well as canonical theorists, and impersonal processes of change as well as the intentions of individuals. But it would be meaningless to define the Enlightenment without some extended discussion of its greatest minds. The reluctance of so many prominent historians to dwell on the eighteenth century's most complex and nuanced thinkers clearly signifies that the very problem of how to interpret Enlightenment thought has dropped down to the bottom of the agenda for American scholars. A generation of historians in the United States (roughly speaking, those now in their 50s and 60s) has treated the eighteenth century as a studio for filming the process by which absolutism turned into democracy. The major thinkers

of the Enlightenment play only cameo roles, or no role at all, in these moving pictures of the rise of a democratic public sphere, the process of desacralization that allegedly undermined kingship, and the formation of Jacobin ideology. Historians would rather discuss a popular pamphlet than a subtle play or a systematic treatise, for the simpler the message, the easier it can be inscribed in a story that must rapidly approach its denouement in 1789. Today, in fact, there are very few historians with an intimate knowledge of the writings of the major *philosophes*.

Tracing the straight genealogy of the Revolution and ignoring the subtle turns of Enlightenment thought made sense to a generation of scholars who were politically charged by the 1960s. Avoiding the liberal predicaments of Montesquieu, Voltaire, and Diderot and focusing instead on the stark terms of Revolutionary ideology (“virtue,” “the people,” and so forth) appealed to a generation of academics that was not only passionately political but also rigidly disciplined by the idea of progress through academic specialization—hence embarrassed by the literary quality of traditional intellectual history and unresponsive to the literary and unspecialized character of Enlightenment thought itself. In search of a determinate subject around which it could organize archival research while deploying the new methods of statistics and cultural anthropology, these historians found the subject they needed not in the philosophic depths of the period but in its interests, ideologies, mentalities, and discourses—these being terms used to reduce the intellectual field to a clear and simple structure that serves political narrative.

This approach is subject to one of the great pitfalls of historical scholarship—teleology. It is also unclear how our intellectual life has been enriched by historians who have set aside the French Enlightenment and conferred so much status on the problem of Revolutionary origins. Why do we need increasingly detailed accounts of the ideological battles that led to the Revolution? We are told that understanding everything about the Revolution is of vital importance because the Revolution was the beginning of “modern” politics. But it has reached the point where the term “modern” is used like a mantra to give prestige to a field of research and to avoid being precise about its reason for existing. François Furet brilliantly demonstrated the subject’s importance for his generation by writing not only about the origins and course of the Revolution but also about its legacy to the radical French Left, of which he was initially a passionate member and later a passionate critic. American scholars, in contrast, have dug into the problem of the origins of the Revolution, but because the Revolution has no obvious legacy in this country, they have not been able to climb out of the hole of academic specialization. The field has become existentially vague: scholars working on the origins of the Revolution have

not taken steps to relate their interpretations to the problems and passions of their readers.

Inevitably a reaction has occurred. The work of Dena Goodman seems to mark a generational turning point, a renewed enthusiasm for the ideals of the Enlightenment.⁵ Among scholars who, like Goodman, have done their Ph.D.s since the 1980s, there is a rising interest in the nuances of Enlightenment thought as distinct from its ideological distillations. The stock precepts of 1960s and 1970s historiography, which included the denunciation of intellectual history as a type of “elitism,” are no longer binding upon a generation that regards “history from below” as what older historians—members of the establishment—like to do. The prospect of spending decades studying the French Revolution has also proved less alluring for a generation not active in the 1960s and thus less intrigued by the idea of revolutionary change. There is, however, a serious interest in the permanent tensions of being a self-conscious person living in a complicated social order.

The *philosophes* were the first to make such tensions the continuous theme of their work, and the essays in this volume display a fascination with the problem of how to give public form to ambivalence. Nearly all the contributors to the volume belong to the post-’60s generation described above. (The exception is Arthur Goldhammer, a freelance writer and translator whose previous academic career was in mathematics and whose independent spirit, one could say, makes him part of every, or no, generation.) Here, I believe for the first time, is a set of essays by scholars who have done patient research about eighteenth-century thought but who are also theoretically astute and aware of the postmodernist tradition. Up to now, the accusations of postmodernist thinkers against the Enlightenment have been ignored, or have been dealt with only in a most superficial or contradictory way, by the older generation of scholars that shifted the historiography over to the question of Revolutionary origins and took little interest in the Enlightenment’s own questions. Robert Darnton has taken on the postmodernist challenge in a broadly interpretive essay called “George Washington’s False Teeth.” But as Jeremy Popkin has observed, Darnton’s hostility to postmodernism has little connection to his own scholarship, which is itself postmodernist in its effort to deconstruct the canon and explore marginal discourses. When facing postmodernism’s critique of the Enlightenment, Darnton also falls back upon a view of the period that surprisingly resembles the interpretation of Peter Gay, whom Darnton otherwise repudiates in his scholarship.⁶

The discontinuities noted by Popkin, I would add, are symptomatic of an un confronted contradiction in the older generation of French historians: a contradiction between its own scholarly agenda, which is hos-

tile toward any form of cultural or intellectual history that shows veneration for classic authors and texts, and its discomfort with postmodernist philosophies that take this spirit of negativity to its most radical conclusions. Unable to articulate this discomfort without undermining their own scholarly agenda, many specialists of eighteenth-century French history have reinforced the prejudice of postmodernism against the Enlightenment instead of critically scrutinizing this bias.

The contributors to this volume, in contrast, face the postmodernist challenge to Western culture head-on, both theoretically and empirically. At some point in his or her essay, each author has identified how a leading postmodernist author has characterized a specific theme in Enlightenment thought (some examples are the sense of time in the Enlightenment, the attitude toward European colonies in the Enlightenment, conceptions of economic self-interest and the market in the Enlightenment). The author then dwells on the theme in question and compares the postmodernist account to his or her own scholarly account of how the theme really operated in Enlightenment thought.

In the area combining scholarship and theory arises interpretation, provocative and unorthodox. Unorthodox—because the point of this volume is not to reject skepticism, concern for difference, and everything else that the most conservative critics of postmodernism repudiate. The authors establish the limits of postmodernism's vision of the past, but they do not uncritically worship the Enlightenment. Most have themselves been affected by the postmodernist sensibility. But unlike so many practitioners of "cultural studies," they have not been affected *only* by postmodernism. They are open to the idea that past thinkers can supply as much insight as contemporary ones. They believe the dilemmas experienced in the Enlightenment were as profound as those experienced by Foucault, Lyotard, and de Man. Sometimes, in fact, the dilemmas were the same—but there is no doubt about who dramatized them more acutely and with greater literary flair!

The Enlightenment, then, has not been superseded. It is perhaps not sufficient, but it is not obsolete. While not providing solutions to all our problems, it does provide an introduction to sophistication and clarity, without which nothing can be solved. The essays in this volume, which cover a wide range of topics, reveal a common spirit. The authors sympathize with the honest anxieties of contemporary criticism, but they dispense with its habitual condescension toward the past. Instead of urging us to go beyond the Enlightenment, they encourage us to define our position within its legacy.

The idea for a volume on this subject came from Stuart L. Campbell, the editor of *Historical Reflections*. Most of the essays appeared in their

current form in volume 25 (summer 1999) of this journal. Some of the contributors, I among them, have revised their contributions. The essay by Sophia Rosenfeld appears for the first time. I am very grateful to Professor Campbell for initiating this project and for his insightful suggestions and corrections along the way.

NOTES

1. Viktor Klemperer, *Ich will Zeugnis ablegen bis zum letzten: Tagebücher 1933–1945*, 2 vols. (Berlin, 1995). The diary is sprinkled with reflections on the French Enlightenment and notes toward a magnum opus on the subject. Klemperer did in fact publish several works on the Enlightenment after the war.
2. Ernst Cassirer, *The Philosophy of the Enlightenment* (Princeton, 1979; first pub. in German, 1932). For Cassirer's critique of the modern cult of politics, see his *The Myth of the State* (New Haven, 1961; first pub. in 1946). See also Daniel Gordon, "Ernst Cassirer," in *Oxford Encyclopedia of the Enlightenment*, ed. Alan Kors (New York, publication pending).
3. In addition to Gay's numerous books on the Enlightenment, see his *My German Question: Growing Up in Nazi Berlin* (New Haven, 1998).
4. One could claim that Darnton's essay, "Readers Respond to Rousseau" in *The Great Cat Massacre* (New York and London, 1984) is an exception. But this essay deals more with the popular impact of Rousseau's thought than with its internal structure. Darnton, the most influential American scholar of the Enlightenment, is well known for his critique of Peter Gay and for his argument that the previous generation of scholars spent too much time studying the "high" ideas of the Enlightenment. See *The Darnton Debate: Books and Revolution in the Eighteenth Century*, ed. Haydn T. Mason (Oxford, 1998), vol. 359 of *Studies on Voltaire and the Eighteenth Century*.
5. Dena Goodman, *Criticism in Action* (Ithaca, 1989); *The Republic of Letters* (Ithaca, 1994).
6. Robert Darnton, "George Washington's False Teeth," *New York Review of Books*, 27 March 1997, pp. 34–38. Jeremy Popkin, "Robert Darnton's Alternative (to the) Enlightenment" in *The Darnton Debate*, pp. 105–28.

MONTESQUIEU IN THE CARIBBEAN

The Colonial Enlightenment between *Code Noir* and *Code Civil*

MALICK W. GHACHEM

The physiognomies of governments can be best detected in their colonies, for there their features are magnified, and rendered more conspicuous.¹

—Alexis de Tocqueville, *The Old Regime and the Revolution* (1856)

[R]esistance is never in a position of exteriority in relation to power.²

—Michel Foucault, *The History of Sexuality: An Introduction* (1976)

For all the influence French thought has had in promoting innovative scholarship in the rest of the world, French historians have by and large neglected to cultivate their own garden insofar as colonial history is concerned. Tocqueville's suggestion that colonialism yields a magnified picture of the true tendencies of the state is just now beginning to bear fruit on the other side of the Atlantic. In France itself, however, an apparent failure to integrate the experience of empire into French history generally has deprived the profession of an important opportunity.³ To the best of my knowledge, not a single major scholar of the French Revolution has produced important work on colonial history. The prognosis for postrevolutionary history is only slightly more encouraging. Conversely, those French historians who actually *have* spent time in the colonial archives display little evidence of sustained interest in the dynamics of metropolitan history. In some instances this lack of interest

stems from a conscious decision to privilege the “agency” of subject populations who for long went without a written history of their own. Considered as a whole, the history of the French empire remains a classic example of a *dialogue des sourds*.

This neglect is both puzzling and deeply rooted in French culture. Empire and its attendant phenomena, including slavery, were a major concern of the philosophes and their nineteenth-century successors. This is to say nothing of such canonical modern intellectuals as Albert Camus, whose novels and short stories are at once unequaled models of colonial writing and acute explanations for the failure of such writing to take hold in French consciousness. In recent years a spate of successful novels and films about former French colonies from Martinique to Algeria to Vietnam has produced an unmistakable cultural efflorescence, fueled by immigration and the tensions associated with a rapidly changing demographic profile.⁴ In the face of these contemporary reminders of a remarkably rich and endlessly fascinating heritage, French historical writing seems determined to preserve the insularity and lack of adventurousness that have consigned colonialism and the foreign to a distinctly marginal place.

THE POSTMODERN AND THE POSTCOLONIAL

The polarization between “domestic” and “overseas” history so characteristic of the French situation is only one manifestation of a more disquieting problem that transcends national boundaries. Anglo-American historians have also failed by and large to engage Tocqueville’s argument about the relationship of colony to metropole. This failure has much to do with the influence of postmodern thought on the writing of colonial history in recent years, an influence that has tended to push in two closely related directions.

First, postmodern thought has directed attention away from the study of formal law and institutions in favor of constantly multiplying “sites” of nongovernmental, “immanent” authority. The paradigmatic thinker in this respect is of course Foucault, whose famous injunction to “conceive of sex without the law, and power without the king” has become a rallying cry of the burgeoning school of “postcolonial” studies in the United States and in Britain.⁵ Foucault’s unveiling of what he termed the “juridico-monarchic” image of power and its continuing stranglehold on postabsolutist understandings of society seemed to discredit an older historiography centered on the institutional and bureaucratic workings of the colonial state. “Our historical gradient,” he wrote,

carries us further and further away from a reign of law that had already begun to recede into the past at a time when the French

Revolution and the accompanying age of constitutions and codes seemed to destine it for a future that was at hand.⁶

The impulse to “expel” law from history resonated perfectly with the postcolonial determination to restore “agency” to the “subaltern” populations of the European empires.⁷ But despite all the focus on indigenous resistance to the imposition of metropolitan authority, it is not at all clear that recent scholars of empire have listened to Foucault’s warning that “there is no binary and all-encompassing opposition between rulers and ruled at the root of power relations.”⁸ Indeed, it may be precisely because of its categorical emphasis on resistance that postcolonial writing has largely failed to do justice to Foucault’s nuanced but elusive thesis: “[R]esistance is never in a position of exteriority in relation to power.”⁹

In an interview published after the first volume of *The History of Sexuality* appeared, Foucault sought to mollify the anti-institutional thrust of his theory, claiming that he did not mean to say the state is irrelevant.¹⁰ This may be true, but it skirts the ways in which Foucault’s essentialist concept of the “juridico-monarchic sphere” and his reduction of law to prohibition vastly oversimplified the legal history of the Old Regime.¹¹ The same could be said for a second direction in which postmodern thought has tended to push the study of law and colonialism in recent years. Less directly tied to Foucault, the view that “the Enlightenment project” consisted in the effort “to develop . . . universal morality and law . . . for the rational organization of everyday social life” has overtaken postmodern and postcolonial studies to an even greater degree than the “normalization of power” thesis.¹² The Enlightenment is said to have imposed a “homogeneous,”¹³ “totalizing discourse”¹⁴ of universalism and rationality on the rest of the world. This imperialist, abstract “fiction” is often contrasted with the “heterogeneities” of the local, the particular and the concrete, values at the expense of which the Enlightenment project is feared to have triumphed. “It is part of the embarrassment of [Enlightenment] bourgeois ideology,” writes Terry Eagleton, “that it has never really been able to reconcile difference and identity, the particular and the universal.”¹⁵

In the face of this barrage of accusations, the *philosophes* themselves appear more often than not as the disembodied, protomythic founders of modernity than as objects of local, particular, and concrete historical investigation. It would be unreasonable to expect scholars who are primarily interested in the technologies of power in the nineteenth and twentieth centuries to undertake detailed, archival investigations into the work of eighteenth-century intellectuals. But given all of the talk about Enlightenment universalism and rationalism,

it is striking that discussion about the *philosophes* and their legacy remains at such a high level of abstraction, as though epigrammatic assertions about the nature of eighteenth-century thought suffice to account for something mysteriously called the “project of modernity.” A similarly detached posture has characterized treatments of what the Enlightenment may have had to say about the forms of colonialism it actually *did* know (as opposed to those it supposedly made possible, or at least helped to justify, in a later age).

In this context, Montesquieu’s influence as a theorist of colonial law during the final decades of the Old Regime assumes an unexpected importance. If this is not a role historians often associate with Montesquieu, that may be partly because it provides a useful corrective to the postmodern vision of Enlightenment legal theory as antithetical to the principles of local custom and the particular. It is true that many of the *philosophes* and *physiocrats* saw in the more than 360 customary traditions of the Old Regime an ingrained recipe for legal archaism and political obstructionism. But for Montesquieu, those same traditions represented the wisdom of a society that had agreed to tailor its laws to satisfy the diverse interests of culturally autonomous regions.¹⁶ Customary law appeared all the more significant against the backdrop of the “foreign” imports with which it was hopelessly entangled: Roman and canon law. In the *Persian Letters*, he asked:

Who would think that the oldest and most powerful kingdom in Europe has been governed for more than ten centuries by laws which were not made for it? If the French had been conquered it would not be hard to understand, but it is they who have been the conquerors.¹⁷

With characteristic irony, Montesquieu thus advocated one particular strand of Enlightenment legal theory, the one that glorified local, homegrown law over both archaic and “superstitious” laws, in the face of a much more vocal strand of criticism that championed uniformity over custom.¹⁸

For reasons having as much to do with the iconic status of the Civil Code in French political culture as with postmodern images of the Enlightenment, codification and uniformity have been traditionally portrayed in Weberian terms as going hand in hand: “right reason” and the “logically abstract” vindicating the universalist values of a polity dedicated to the rights of individual persons rather than the interests of particular groups and regions.¹⁹ But to a generation of legal reformers in prerevolutionary Saint-Domingue, the greatest of France’s eighteenth-century colonies, the contradictions inherent in a code of customary laws were not quite so apparent. This was not a mere failure of insight,

but rather a reflection of a peculiar legal sensibility that created and sustained its own canons of coherence and legitimacy. In the 1770s and 1780s a group of colonial jurists approached the daunting task of codifying French law *outré-mer* through the hallowed prism of Montesquieu's radically contextual legal sociology. Under the aegis of a project carried out in the name of universal applicability and conformity, timelessness and centralization, these jurists sought to create a space in which to carry out a politics of the local and the particular, the contingent and the historical.²⁰ In their writings, it is possible to detect the contours of a latent polarization *within* Enlightenment legal theory itself, a paradoxical synthesis of custom and uniformity that has been largely erased from legal-historical memory.

THE DIALECTIC OF THE COLONIAL ENLIGHTENMENT

Associated to varying degrees with the monarchy and its colonial bureaucracy, the jurists of Saint-Domingue also identified passionately with a "creole" *parlementaire* tradition that toyed repeatedly in the eighteenth-century with the possibility of autonomy from France.²¹ This tradition found expression in a veritable deification of what the colonists typically called "local knowledge" (*connaissances locales*). Shorthand for a kind of secondhand, native legal sensibility to which only creole lawyers could stake claim, local knowledge was the centerpiece of the jurists' effort to construct a theory of colonial society that would underwrite their demands for autonomy from the metropole.²² At its most basic level, the colonial Enlightenment consisted in the "crystallization of a fatal distinction between metropolitans and creoles."²³ The jurists of Saint-Domingue cultivated this distinction with a dedication bordering on the obsessive, knowing that it was their single most powerful weapon in the campaign to organize the legal life of the colony around the principle of local custom. If there was a "dialectic of Enlightenment" to be found in the eighteenth-century French colonies, then, its parameters must surely be located in the relationship between creole self-consciousness and the jurisprudence of the particular.

The language of colonial autonomy clearly bore a strong family resemblance to the judicial rhetoric of provincial resistance to the monarchy, a subject that has spawned a whole industry of secondary works on the Old Regime. Beginning well before the Fronde (1648–53) and extending even beyond Maupeou's ill-fated muzzling of the Parlement of Paris (1771–74), French magistrates repeatedly frustrated attempts to unify and standardize the laws of the metropole. Moreover, it is worth noting that many members of the colonial elite originally hailed from commercial centers, such as Bordeaux, that were also

strongholds of *parlementaire* resistance in the early modern period.²⁴ But the possible connections in this regard, though tantalizing, take us beyond the subject at hand.²⁵ For however much metropolitan magistrates may have had in common with their colonial counterparts, the two groups were set apart by a complicated legal and political gap that transcended the issue of physical distance.

Montesquieu neatly symbolized this gap at a number of levels. To begin with, he bore witness to a traditional metropolitan distrust of the colonists, a skepticism especially evident among the ranks of the Bordeaux judiciary. In Montesquieu's view, France would never be able to rely on the loyalty of a population that felt victimized from all angles by the *exclusif*, that much despised metropolitan monopoly on trade with the colonies.²⁶ Montesquieu's notorious antislavery polemics furnished an even sharper thorn of contention, for the obvious reason that without slavery the entire system of colonial trade would amount to little more than a minor enterprise. The colonial magistrates were not necessarily ardent apologists for the Caribbean labor system, but as plantation owners they generally had enough of a financial stake in slavery to view *De l'esprit des lois* as an especially unwelcome form of interference.²⁷ Or did they? For somehow despite these formidable barriers, Montesquieu found an audience in the colonies that seemed utterly to dwarf his rather muted reception in France itself.

The paradox is a revealing one and serves, in its own right, as a concentrated repository of the contradictions of colonial law. From the perspective of the colonists, however, Montesquieu's overwhelming appeal is not very difficult to explain. Though they could hardly turn a blind eye to the chapters on slavery, the creole jurists were able to impose an adamantly selective reading on the book as a whole. And in this regard they were hardly the last exemplars of an approach to which *De l'esprit* has always been vulnerable, chopped up as it is into so many digestible sections, false starts, and half-baked ruminations. The book's manifest celebration of discontinuity and eclecticism helps to account in part for its ironic fate in the Caribbean, where Montesquieu's opening appeal—"not to judge, by a moment's reading, the labor of twenty years; to approve or to condemn the entire work, and not just individual sentences"—clearly fell on deaf ears.²⁸

To say that the colonists' reading of *De l'esprit* was selective, of course, is not to imply that it lacked an internal coherence. Montesquieu's theory of *moeurs* furnished this coherence in all its needed quantities, and then some. Once translated into English as *mores* (which is derived from the Latin *mores*), the term is stripped of all the connotations that make it such a suggestive concept in the original language.²⁹ This is because the word *moeurs* bore an intimate connection to the Continental tradition of

customary law. Roughly half of part 3 of *De l'esprit des lois* is an extended sermon about the perceived tendency of legislators to “confuse” law with either *moeurs* or manners. For Montesquieu, *moeurs* were prepolitical and hence immune to sudden changes and excessive tinkering by the science of legislation. Inescapably local in character, they were a function of the climate and terrain of a region.³⁰ “The difference between laws and *moeurs*,” he wrote, “is that laws rule the actions of the citizen, [whereas] *moeurs* rule more over the actions of man.”³¹ In contrast to manners, which were external in nature, *moeurs* expressed the inner character of a person, that vaguely ineffable essence that seemed to elude all but the greatest of legislators.

On the other hand, while laws and *moeurs* were separate categories, they were not to be seen as unrelated.³² Nor were the environmental sources of *moeurs* to be confused with mechanistic causes.³³ For if that were so, then legislators would have to give up all hope of influencing the customs of a nation in a positive direction, a hope Montesquieu was determined not to surrender. In a free country, where the laws necessarily bear a strong connection to *moeurs* and manners, it was sufficient for legislators to “inspire other *moeurs* and manners” if they wanted to bring about reform:

In general, people are very attached to their customs; to deprive them forcefully of their customs is to make them unhappy; thus one must not change customs, but rather engage people in changing their customs themselves. Any penalty that does not derive from necessity is tyrannical. The law is not a pure act of power; things indifferent by their nature are not part of its jurisdiction.³⁴

Montesquieu rather glosses over the precise manner in which these incentives are to be generated, perhaps because he knew that the line between gentle inducement and coercive pressure was hard to distinguish. But he insisted that the line was real, and that any nation choosing to flout this distinction was a despotic one, its people no better than slaves.

Not surprisingly, the subject of slavery filled the other half of the same section that discussed *moeurs*. Sandwiched between the books on climate and the soil, Montesquieu's reflections on slavery formed an integral component of his theory of customary law, which is yet another reason for wondering how the colonists managed to exploit the latter without also stoking the fire of the former. Montesquieu's emphasis on the varieties of slavery clearly provided one way out of this dilemma: political servitude was not the same thing as civil or domestic slavery, though all three tended to reinforce each other in the state of despotism. More reassuringly, from the colonists' perspective, the ideology of custom *itself*

generated a loophole by which to justify the New World labor regime. Slavery was contrary to both nature and civil law, but “there are countries where the heat weakens the body, and so impairs one’s courage, that men are only brought to carry out onerous duties by the fear of punishment; in these countries slavery is less shocking to reason.”³⁵ Where this was the case, however, political servitude was sure to follow.

The loophole in Montesquieu’s theory of slavery was thus not entirely open. But it would suffice for a colonial audience that, after all, had more to do with its time than think of ways to resolve the ambiguities of the Enlightenment. Faced with a choice between the letter and the spirit of Montesquieu’s text, colonial jurists were quite happy to opt for the latter and to leave textual exegesis to the academy. In so doing, they were not only acting in accord with an ancient legal tradition—privileging the *mens* (spirit) rather than the particularity of the laws³⁶—but also shifting the ground of political debate in the colonies. Familiarity with local *moeurs* became not simply the foundation of “good” law but a prerequisite for the very ability to speak about colonial law. In the process, law itself came to be defined not in terms of a set of doctrines, still less in terms of an aggregation of ordinances and decisions, but rather in terms of a legal sensibility, an *esprit*. To reflect this spirit was to display authentic proof of one’s “*créolité*.”³⁷

One of the first and most important creole jurists to take up this battle cry was Emilien Petit, a distinguished member of the Saint-Domingue judiciary.³⁸ In his *Droit public, ou Gouvernement des colonies françaises*, Petit described three “general principles for the government of the colonies.” The second item on this list of cardinal virtues read: “a knowledge of local places and laws must be the basis of all administration.” In Petit’s view, the colonies were in the potentially despotic hands of unenlightened bureaucrats “chosen in Europe.” For these officials, local knowledge was a kind of experience they “do not even suspect to be necessary, an experience that none of them brings to the place, and that they can only acquire by means of a period of residence they are not permitted.”³⁹ Petit went on to suggest a number of policies, including the establishment of indigenous *conseils d’administration*, which would ensure the harmonious adjudication of colonial disputes. “These principles,” he concluded, “are neither foreign nor contrary to the legislation of France for the government of its provinces, nor even [to the legislation] for the government of its colonies.”⁴⁰

As this last comment suggests, Petit was willing to go only so far with his criticisms of the existing order. A royalist at heart, he believed that “the choice of laws to transmit to the colonies, [and] their adaptation to the local, belong solely to the sovereign legislator.” Moreover, said Petit, the king was fully cognizant of the peculiar conditions of colonial life,

conditions that made his overseas possessions “so different from the objects of legislation in the ancient parts of the kingdom.”⁴¹ Other jurists were less certain that the scope of the problem was confined to ignorant agents chosen by the Ministère de la Marine. The unofficial leader of this motley band of radicals was Michel René Hilliard-d'Auberteuil, whose *Considérations sur l'état présent de la colonie française de Saint-Domingue* was published in 1776. D'Auberteuil was actually born in France where he was educated as a lawyer before moving to Saint-Domingue to ply his trade as a colonial *avocat*.⁴² But his sometimes vituperative attacks on the royal bureaucracy and his passionate defense of colonial autonomy earned him a prominent place in the creole legal community of Saint-Domingue.

The *Considérations*, suppressed in both France and the colonies by an *arrêt du conseil* of 1777,⁴³ did more than any other single work of the colonial Enlightenment to advance a jurisprudence of *créolité*. It consisted of a series of polemics predictably centered on “the difference that exists between the climate of Saint-Domingue, the *moeurs* and undertakings of the colonists [on the one hand], and the climate of the interior of France [on the other].”⁴⁴ Like Petit, d'Auberteuil insisted that eliminating metropolitan “ignorance of the local” was a precondition of positive legal reform. But he went further in his analysis of the underlying problem, invoking language that was scarcely distinguishable from Montesquieu. Laws are legitimate only by virtue of an organic connection to the local community from which they spring.

Usages and customs, which derive from [the law of nations] (*droit des gens*), are dictated by necessity: they owe their creation to the nature of climates; they are directed by local situations: thus it is absurd to try to establish Customs by means of fiction, and to seek the rule for one country's usages in the usages of another. . . .

Only local knowledge, which is acquired solely by means of long observation, can lead to good laws.⁴⁵

In a later age, this passage would have been vulnerable to charges of plagiarism.⁴⁶ In prerevolutionary Saint-Domingue, on the other hand, regurgitations of *De l'esprit des lois* ran little risk of saturating their market. Between the “*moeurs* of Creoles” and “those of Frenchmen transplanted in the Colony,” in short, there was no room for negotiation: only polarization.⁴⁷

To be fair to d'Auberteuil, he was not entirely uncritical of Montesquieu's formulation of custom, nor was he afraid to challenge the *philosophe's* theory of slavery. In a remarkable passage of the *Considérations*, he accused Montesquieu of confusing questions of “law” with questions of “fact” (“*il a presque toujours jugé le droit par le fait*”).