Illegitimacy, Natural Law, and Legal Culture
on the Eve of the French Revolution

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In 1779, a lawsuit erupted between nine-year-old François Casse and his distant cousins. The dispute involved the last will and testament of François' father, Antoine Casse, a royal secretary who had amassed a fortune in the West Indies. Antoine Casse had named the cousins as his heirs, but he had bequeathed to his son a particular legacy of 600,000 livres. The catch was that François Casse was an extramarital child — or, to use the less gentle terminology of early modern French law, he was a "bastard." Consequently, the collateral heirs sued to annul the bequest, alleging that "the [legal] incapacity of a bastard [to receive such a gift] is founded on the interest of morals, public decency, and the general good of society... . It is absolute, grounded in public law, in hatred of concubinage."¹ The magistrates of the parlement of Paris disagreed; on 5 June 1779, they upheld Antoine Casse's will in its entirety, even though the particular bequest to François absorbed more than two-thirds of the estate.

The Casse Affair was a minor cause célèbre, reported at length not only in contemporary periodicals such as the Gazette des tribunaux, but also in legal treatises and printed

compilations of case law jurisprudence.² It was nevertheless just one of several late eighteenth-century cases in which French magistrates demonstrated a growing sympathy for extramarital offspring, at least for those not conceived through adultery. Indeed, among six cases involving legacies to natural children reported by the Gazette des tribunaux between 1775 and 1789, the only instance in which the court reduced the gift was when a legitimate child brought suit against his adulterine half-brother. How can one account for this apparent destigmatization of at least some extramarital offspring in the pre-revolutionary decades? To what extent can it be attributed to the broader interests and methodologies of the Enlightenment? How far did the Enlightenment penetrate the judicial milieu of eighteenth-century France, and did that milieu itself contribute to the Enlightenment?

The examples of Diderot’s Dorval, Beaumarchais' Figaro, and Bernardin de Saint-Pierre's Paul all demonstrate that eighteenth-century French literature featured characters born out of wedlock who were cast in a sympathetic light.³ Yet the philosophes never mounted a


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sustained campaign on behalf of extramarital offspring, even after it was publicly revealed that Rousseau had abandoned five of his own to the Paris foundling hospital. Moreover, although judicial briefs took a literary turn in the pre-revolutionary era, most barristers continued to construct legal arguments through reference to local custom, royal statute, case law jurisprudence, and the dispositions of Roman law rather than to works of the philosophes. One aspect of the Enlightenment that did


penetrate pre-revolutionary legal culture, however, was growing politico-economic concern over education, population growth, and child welfare. This concern contributed to the destigmatization of natural children before the law, but only because it had been preceded by a substantial redefinition of illegitimacy within traditional legal culture. While sixteenth- and seventeenth-century French jurists had typically conceived of bastardy as a natural defect, their eighteenth-century colleagues increasingly grounded the socio-political marginalization of extramarital offspring on social interest rather than personal disability. This redefinition of illegitimacy owed something to the exogenous influence of modern natural law theory on eighteenth-century French legal thought, but its ultimate origin rested in the evolving case law jurisprudence of the French courts.

To unfold this story in fuller detail requires turning back to the late sixteenth century, a period in which reform-minded barristers and magistrates attempted to exclude extramarital offspring more fully from the family by intensifying the stigma of illegitimacy. These jurists sought to sacralize French society by enforcing the stringent sexual

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morality of the Catholic Reformation. They also wanted to protect the collective socio-economic interests of lineage families against the passions of wayward members by closing loopholes in a nascent system of parental control over marriage choice.\(^7\) The term "bastard" was useful to these jurists, because with its connotations of mixture, impurity, and degeneracy, it helped to justify the exclusion of a particular class of blood kin from a system of dynastic transmission putatively grounded on divinely sanctioned natural law.\(^8\)


\(^8\) On the customary Germanic conception of paternity as a biological rather than a voluntary bond, see Jacques Mulliez, "Le désignation du père," in *Histoire des pères et de la paternité*, eds.
In 1600, for example, Henry IV departed from historical precedent by ruling that "bastards issued from noble fathers may not attribute to themselves the title and quality of gentleman." Cardin Le Bret, a celebrated apologist of royal absolutism, justified this provision by noting that "bastards take their first and only origin in the soiled womb of their mothers, from which it follows that they have no part in the nobility of their father." By insinuating that the mother's illicit sexuality denaturalized the noble seed of the father, Le Bret justified the exclusion of extramarital offspring from the nobility, reconciling Christian morality with traditional noble emphasis on blood lineage.

The term "bastard" also helped reformers attack maternal inheritance by "natural children" under the provisions of Roman law in provinces such as Dauphiné. Daniel Roche and Jean Delumeau (Paris: Larousse, 1990), 28-33, 38-43; and Lefebvre-Teillard, *Introduction*, 258-60.


Roman law distinguished among *naturales* (those born of a concubine), *spurii* (those born of a prostitute), *adulterini* (those conceived through adultery), and *incestuosi* (those born of incest). Under the final dispositions of the *Corpus iuris civilis* (533 C.E.), the first two classes were permitted to inherit from their mothers, and in the absence of legitimate offspring, fathers could institute their *naturales* as heirs. However, because *adulterini* and *incestuosi* were born "of condemned unions" (*ex damnato coitu*), their parents were forbidden even to nourish them. Roman law was synonymous with "civil law" in France into the seventeenth century, and it continued to enjoy enormous prestige in law faculties throughout the early modern era. It was accepted as common customary law in the so-called "written-law provinces" of the Midi. A useful introduction is Peter Stein, *Roman
After noting how Roman law distinguished among several types of extramarital offspring, the sixteenth-century jurist Jean Bacquet noted, "In France, the word 'bastard' is general and includes all of the above-named Roman types. Whoever is not born of a legitimate marriage and a legitimate wife is called 'bastard,' or to speak more gently and humanely, 'illegitimate' or 'natural.'"\(^\text{12}\) Bacquet further explained that according to divine law and canonical pronouncement, all sexual union outside of legitimate wedlock is condemned and prohibited. From this it follows that bastards cannot inherit at all, and it is observed throughout France that bastards do not inherit, neither from their father, nor from their mother, nor from any kin.\(^\text{13}\)

Finally, the term "bastard" allowed French barristers to attack substantial gifts and legacies that parents made to their extramarital children. While most local customs explicitly excluded extramarital offspring from inheriting intestate estates, many were silent on the question of voluntary gifts and legacies. As the Casse Affair illustrates, some parents took advantage of this silence to transform their natural children effectively into heirs. The reforming jurists of the sixteenth century attacked this practice by

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\(^{12}\) Jean Bacquet, Traité du droit de bâtardise, in Oeuvres, ed. Claude-Joseph Ferrière, 2 vols. (Lyon: Frères Duplain, 1744), 2:146. The droit de bâtardise was the right to confiscate the estate of any extramarital offspring who died without legitimate descendants.

\(^{13}\) Ibid., 2:148.
branding "bastards" as "infamous persons," a class barred by Roman law from receiving gifts.\footnote{Their argument was grounded on the \textit{lex Fratres} of Justinian's \textit{Codex} (3.28.27), which stated that siblings could challenge a will if "the appointed heirs are the least bit tainted with disgrace or infamy."}

In the absence of a civil code or any substantial corpus of royal legislation pertaining to civil law, legal change in early modern France was effected most readily through a reformation of case law jurisprudence.\footnote{In 1738, Chancellor Henri-François Daguesseau (1668-1751) attempted to promulgate a general ordinance to govern civil disabilities, including those suffered by extramarital offspring, but it was defeated by parlements eager to protect local customary traditions. See Marthe Folain-Le Bras, \textit{Un Projet d'ordonnance du chancelier Daguesseau sur les incapacités de donner et de recevoir sous l'Ancien Régime} (Paris: Sirey, 1941); and Robert Delle Donne, \textit{De l'Incapacité de donner et de recevoir frappant les Enfants naturels dans l'ancien droit français} (Paris: Vrin, 1941).} In this respect, the sixteenth-century reformers met with some notable defeats. The parlement of Grenoble, for example, consistently upheld maternal inheritance by natural children in Dauphiné through rulings that spanned the Old Regime. More significantly, the parlement of Paris on several occasions rejected the argument that "bastards" were "infamous" by upholding substantial gifts made to extramarital children in the early seventeenth century. In 1656, however, through a ruling subsequently known as the Decision of Bourges, the parlement of Paris "restored the ancient rigor of the true jurisprudence" by annulling a gift of property from Jean de Bourges, a merchant, to his natural son, a precedent that it upheld in several subsequent rulings.\footnote{Jean-Marie Ricard, \textit{Traité des donations entre-vifs et testamentaires}, new ed., 2 vols. (Riom: M. Dégoutte, 1783), 1:104. Ricard also cited decisions of 1584, 1648, 1652, and 1655 that had upheld gifts of all property to natural children, so the Decision of}
handed down several rulings that limited the practical effects of legitimation by royal rescript – that is, legitimation acquired through the purchase of royal letters-patent from the royal Chancellery. Through this reformation of case law jurisprudence, seventeenth-century French magistrates attempted to sacralize the body politic by limiting the dynastic transmission of both public and private power, property, and identity to patrilineal bloodlines sanctified by the sacramental grace of marriage.

The success of the seventeenth-century reformers came at a price, because they had ultimately been forced to ground the marginalization of extramarital offspring on public interest rather than natural defect. Commenting on the Decision of Bourges in the second edition of his enormously influential Traité des donations entre-vifs et testamentnaires (1685), the barrister Jean-Marie Ricard noted:

It would be a crowning of vice to suffer that a father might transmit his fortune and his inheritance entirely to his bastard, of whom he can think only in loving the fruit of his sin. . . . It is not proper to permit such a person to deprive a family of goods which are destined for it because of a blind passion which has prevented him from seeing what he should do according to the terms of good conduct. . . . It is a question of defending public welfare against particular interest, and of preventing those who have soiled themselves through such

Bourges did indeed inaugurate a new, "reformed" jurisprudence on the issue. For a much fuller discussion of this jurisprudential revolution, including resistance to it in Dauphiné, see Matthew Gerber, "The End of Bastardy: Illegitimacy in France from the Reformation to the French Revolution" (Ph.D. diss., University of California at Berkeley, 2004), 21-213.
unions from ever recognizing the unfortunate fruit which has resulted from them.\textsuperscript{17}

Shifting the stigma of illegitimacy from the "unfortunate fruit" of the union onto the natural father, Ricard’s defense of "public welfare" echoed Solicitor-General Denis Talon’s conclusions in the case: "Even if the jurisprudence on this matter has been variable up to the present, there is a solid foundation for it in the preservation of families and the state."\textsuperscript{18} Eschewing any reference to personal unworthiness (indignité) in extramarital offspring, Ricard grounded their exclusion from inheritance on "a general proposition that in all cases where the reason for prohibiting a gift to someone is founded on public consideration," as in a gift to a concubine, "then all individuals closest to the prohibited person, such as children, are included in the prohibition."\textsuperscript{19}

Originating in the context of courtroom contestation, the theoretical regrounding of illegitimacy on public instead of personal defect gained greater currency in the eighteenth century thanks to the subtle but growing influence of modern natural law theory on French juridical thought. Unlike ancient and medieval jurists, who had viewed natural law as a set of objective relationships among men and animals that could be ascertained only through empirical observation over time, modern natural law theorists like Grotius and Pufendorf viewed it as a

\textsuperscript{17} Ricard, 1:101-3. According to J.-Fr. Michaud, "Judges often placed [Ricard's treatise] on their benches in order to consult it and to motivate their decisions." See "Ricard" in Michaud, Biographie universelle ancienne et moderne (Graz: Akademische Druck, 1966), 546.


\textsuperscript{19} Ricard, 1:101.
universal set of subjective rights that could be deduced \textit{a priori} through individual human reason.\textsuperscript{20} Although French jurists did not fully embrace modern natural law theory until the French Revolution, many came to accept Pufendorf's doctrine that inheritance rights derived from civil law rather than natural law and that such rights were consequently "limited and regulated in different ways according to the apparent interest of each particular state."\textsuperscript{21} The gradual acceptance of this doctrine can be traced through a comparison of the three early modern French jurists most often associated with natural law theory: Jean Domat (1625-1696), François Bourjon (d. 1751), and Robert-Joseph Pothier (1699-1772).

In his \textit{Loix civiles dans leur ordre naturel} (1689-1694), which attempted to ground Roman law on rational principles, Domat argued that "[t]he order that calls children to the inheritance of their parents is completely natural, a logical consequence of the divine order which gives life to men through the birth they take from their parents."\textsuperscript{22} Because Domat derived inheritance rights from natural law, he logically grounded the exclusion of extramarital offspring on natural defect, classifying them along with hermaphrodites, eunuchs, the deaf, the dumb, and the insane as those who suffer "certain defects or vices of conformation stemming from birth." Writing a generation later in his \textit{Droit commun de la France} (1747), François Bourjon argued instead that civil law simply refused to acknowledge any relationship between


extramarital offspring and their parents: "A bastard can only be attached to someone through nature, not through the civil law, and this extends to the right to inherit directly. . . . This disability [to inherit] is grounded on religion, public decency, and the interest of families." Similarly, Pothier wrote in his *Traité du contrat de mariage* (1768), "A kinship is certainly born of illegitimate unions, but this kinship is only a natural kinship. Only a marriage with civil effects can produce a civil kinship. It is this civil kinship that gives to kin a mutual right of active and passive inheritance." Pothier noted that as the arbiter of civil law, the state could exclude from inheritance even certain legitimate offspring, as it actually did in the case of those of born of clandestine or *in extremis* marriages. By grounding inheritance rights on civil law rather than natural law, the modern natural law theorists provided French jurists with a rationale for excluding extramarital offspring from inheritance without reference to any putative personal defect.

Domat, Bourjon, and Pothier all maintained a stringent attitude toward extramarital children, arguing that their exclusion from inheritance was both reasonable and just. However, by grounding this exclusion on public interest rather than nature, Pothier and Bourjon ironically made the extension of inheritance rights to natural children more thinkable. As enlightened concern over child welfare penetrated the judicial milieu in the second half of the

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25 Articles 5 and 6 of the Royal Declaration on the Formalities of Marriage (1639) disinherit of children born of clandestine or *in extremis* marriages: Isambert et al., 16:523-4.
eighteenth century, it altered magisterial understanding of public interest. The evolution can be traced through a comparison of two treatises, the posthumous Traité du domaine (1764) of Jean-Jacques-Auguste Lefèvre de la Planche and Jean-François Fournel's Traité de la séduction considérée dans l'ordre judiciaire (1781).

A king's barrister in the court of royal domains, Lefèvre de la Planche was a traditionalist who grounded his conclusions on case law and local custom. Branding extramarital offspring with personal unworthiness, he argued that such children should not be allowed to hold public office: "Public decency does not permit a person whose brow is imprinted with shame to be invested with a character giving him any sort of power or authority over others or simply attributing to him any public function."26 His editor, Paul-Charles Lorry (1719-1766), disagreed: "In a matter where a man presents only himself, without any need for an inquiry into his origins, where it is a question only of his personal merit and worth, why should anyone envy the state the services that a citizen might render to it?"27 Grounding his arguments on modern natural law theory rather than customary tradition, Lorry concluded that "one can only applaud the severity with which the law prevents natural fathers from reveling in their crime by prohibiting them from placing their bastards on a level with legitimate children." He nevertheless believed that the interest of the state dictated that extramarital offspring should be allowed to exercise any public charge of which they were individually capable.

27 Ibid.
Writing twenty years later, the prominent barrister Jean-François Fournel (1745-1820) went further, arguing that public interest actually demanded that fathers be permitted to institute their natural children as heirs in the absence of legitimate descendants. Although his *Traité de la séduction* (1781) dealt primarily with the legal search for paternity – an action whose incidence mounted in the eighteenth century along with the ratio of illegitimate births – Fournel devoted one-tenth of his treatise to a bitter attack on Ricard's doctrine on gifts made to extramarital offspring.²⁸ Ricard had argued that following a period of inveterate error, the parlement of Paris had restored the "true jurisprudence" of France through the so-called Decision of Bourges, which annulled an *inter vivos* gift of all property from a merchant to his natural son.²⁹ Citing rulings of 26 May 1656 and 14 July 1661 that contradicted the Decision of Bourges, Fournel argued that Ricard had misinterpreted

²⁹ Ricard, 1:104.

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the ruling to suit a personal bias against extramarital offspring:

Ricard persuaded himself that the proscription of bastards and all their descendents was necessary to *the public interest and the conservation of good morals* – a truly unreasonable position that he sought to consecrate through purported decisions that actually had no bearing on the question. The jurisprudence of the sovereign courts has never adopted such a system, and for two reasons. First, it would be extremely unjust toward these unfortunate children, who are not responsible for the fault of their parents. Second, the hatred that Ricard and his partisans have sought to inspire against their compatriots is all the less judicious for falling upon precious citizens who are capable of serving the fatherland (*patrie*) and of themselves becoming the stems of virtuous families.  

Fournel concluded that French jurisprudence on gifts of all property to extramarital offspring still awaited "a solemn decision that will fix [its] current status." He was adamant, however, that particular gifts and legacies made to such offspring were always valid if the children had not been conceived through adultery or incest and if the donor had no legitimate descendants. To support his doctrine, he cited none other than the Casse Affair.  

Fournel's explicit concern for "precious citizens who are capable of serving the fatherland" echoes the rhetoric of contemporary discourse on foundling care and poor relief. As the incidence of child abandonment rose precipitously in the eighteenth century, the monarchy was forced to intervene with new regulations and additional financial support, prompting public discussion of the problem not

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30 Fournel, *Traité*, 293-4 (emphasis in the original).
31 Ibid., 278-9.
32 Ibid., 281.
only in works such as Necker's *Sur l'administration des finances* (1784) and Charles-Antoine-Joseph Leclerc de Montlinot's *Observation sur les enfants trouvés de la généralité de Soisson* (1790), but also in the competitions of royal academies.\[33\] That concern over foundling care also penetrated the judicial milieu is evident from the *Gazette des Tribunaux*, which mentioned actual or attempted child abandonment in four separate trials and infanticide in three.\[34\] As enlightened concern over poverty, education, and child welfare penetrated the judicial milieu, jurists like Fournel came to view social interest differently than predecessors such as Ricard, Bourjon, and Pothier.

The new solicitousness toward natural children had substantial limits. In his conclusions on the Casse Affair, Solicitor-General Séguier distinguished between "simple bastards born 'of parents free to marry' and adulterine

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\[34\] Three mentions of child abandonment stemmed from suits for reparations initiated by seduced women; the fourth involved the "cousin" of a curate who had been forced to leave his home by an archbishop after she had gotten pregnant. *Gazette des tribunaux*, 1:20, 1:354, 2:294, and 11:403-4. The *Gazette* mentioned two cases of infanticide (4:64 and 5:76). A third case, involving a porter who killed infants rather than transporting them to the Paris foundling hospital, was reported in fuller and more gruesome detail (Ibid., 7:351-2).

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bastards," and he noted that "The latter have always been regarded as unable to receive gifts, legacies, and inheritance, because the union which gave birth to them is a crime against the law of marriage." Moreover, the destigmatization of non-adulterine extramarital offspring was in many ways purchased through an intensified stigmatization of their natural mothers, apparently in response to the growing prevalence of paternity suits. Still, by the late eighteenth century, the extension of inheritance rights to extramarital children had become more thinkable not only within French judicial culture but also in works of the Enlightenment. In a discussion of bastardy in Diderot's *Encyclopédie* (1751-1772), Antoine-Gaspard Boucher d'Argis made no suggestion that the legal disabilities suffered by extramarital offspring were somehow unjust. Thirty years later, in the *Encyclopédie méthodique* (1782), Jacques Peuchet described the exclusion of extramarital offspring from inheritance as "a very harsh law," and he questioned "what morality has

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35 Cited in Denisart, 3:283.
36 Paternity suits became a minor public obsession in the two decades preceding the French Revolution, with the *Gazette des Tribunaux* reporting over two dozen of them between 1775 and 1789. While unwed mothers won a majority of these cases, apparent differences in class between plaintiffs and defendants quickly elicited misogynistic allegations of speculation. In his *Traité de séduction*, Fournel argued for the elimination of many rights traditionally enjoyed by unwed mothers.
37 A.-G. Boucher d'Argis (1708-91) was a professional jurist who also re-edited a number of traditional legal works such as the *Institution au droit français* (1692) of Garriel Argou (1640-1703) and the *Recueil des principales questions de droit* (1717) of Barthélemy-Joseph Bretonnier (1656-1727). Diderot was sufficiently dissatisfied with his traditionalist article on "droit naturel" to pen a supplement of his own, but he apparently saw nothing wrong in his article on "bâtard."

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gained by it." Secular concern over child welfare drove this shift in opinion, but so too did the redefinition of illegitimacy through a dialectic of the case law jurisprudence of the French sovereign courts.