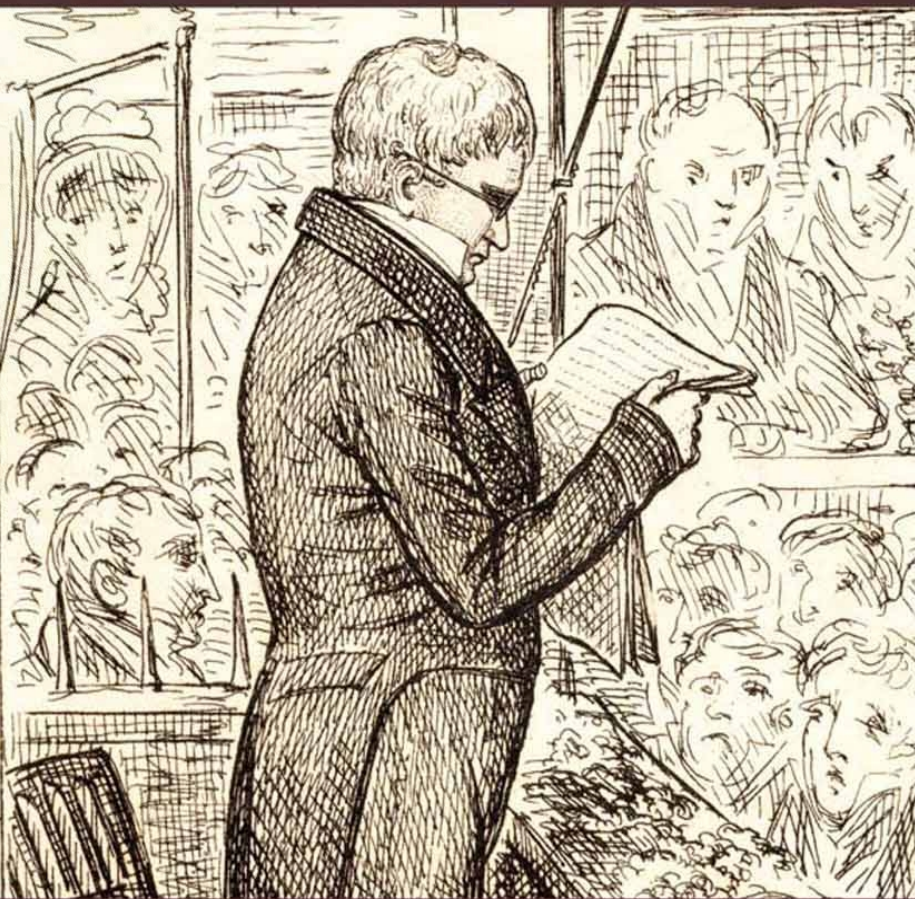


Legitimacy and Illegitimacy in Nineteenth-Century Law, Literature and History

Edited by Margot Finn, Michael Lobban
and Jenny Bourne Taylor



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Edited by

Margot Finn

Michael Lobban

and

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May 2009

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1

Introduction: Spurious Issues

Margot Finn, Michael Lobban and Jenny Bourne Taylor

At the beginning of the Third Epoch of Wilkie Collins's novel, *The Woman in White* (1859–60), the hero, Walter Hartright, writes of himself and his accomplice, Marian Halcombe:

We are numbered no longer with the people whose lives are open and known... We two, in the estimation of others, are at once the dupes and the agents of a daring imposture. We are supposed to be the accomplices of mad Anne Catherick, who claims the name, the place, and the living personality of Lady Glyde....

In the eyes of reason and of law, in the estimate of relatives and friends, according to every received formality of civilised society, 'Laura, Lady Glyde' lay buried with her mother in Limmeridge churchyard. Torn in her own lifetime from the list of the living, the daughter of Philip Fairlie and the wife of Percival Glyde might still exist for her sister, might still exist for me, but for all the world besides, she was dead.... socially, morally legally – dead And yet alive!¹

Wildly popular, *The Woman in White* is now generally considered to be the first, and in many ways the most successful, example of sensation fiction. Sensation novels were notorious for transposing the exotic settings of gothic fiction into the modern everyday world, generating extreme emotional and nervous responses by exploiting the tensions that lay at the heart of the upper-middle-class family – above all by playing on the fragile line that separates a 'legitimate' from an 'illegitimate' identity. In *The Woman in White*, Laura Fairlie,

the rich, privileged heiress cajoled into a dynastic marriage with her late father's old friend Sir Percival Glyde, becomes the victim of her husband's conspiracy to appropriate her wealth by substituting her with her uncanny double, the working-class Anne Catherick, and incarcerating her in Anne's place in a lunatic asylum. The twist of the story hangs on the fact that even after Laura is rescued by her sister Marian and presented to her uncle, he is unable to recognise her. As Walter Hartright realises, once the social, economic and perceptual frameworks that distinguished Anne from Laura have broken down, 'Strangers, acquaintances, friends even...might have doubted if she were the Laura Fairlie they had once seen, and doubted without blame' (p. 443). Anne Catherick herself is doubly illegitimate: weak-minded, obsessive and paranoid, she is finally revealed to be Laura's unacknowledged half-sister, while the 'secret' that she unwittingly held, and for which she was incarcerated, was that Sir Percival himself was not only a bastard, but had forged his parents' name in the marriage register to gain his title and land.

The Woman in White is a striking example of the uses of illegitimacy as a narrative device, and the power of the novel hinges on its success in bringing together apparently disparate understandings of the term. First, the two secrets of illegitimate origins at either end of the social scale imply distinct concepts of the legitimate family: Sir Percival's concealed bastardy emphasises the centrality of formal legitimacy over blood ties alone for the transmission of wealth and property; while Anne's hidden relationship with her sister plays on the moral as well as the biological bonds of kinship. Secondly, Laura's loss of both legal identity and coherent subjectivity highlights what it means to be a social person, while the struggle to restore her to name and sanity is bound up with Walter Hartright's own social transformation from lower middle-class drawing master to the father of a propertied heir. The powerful effects of *The Woman in White* relied on the directness of its multiple narrative voices, each witness giving evidence as in a court of law, but in ways which emphasised the unstable and provisional nature of evidence and truth. And beyond the text, the sensation novel more widely was regarded as a bastard genre, the product of an increasingly commercialised and globalised literary marketplace, which mingled elements of the Newgate novel, gothic fiction, realism and popular melodrama and promiscuously brought together very different audiences.

The Woman in White thus placed bastardy at the centre of a nexus of concepts of identity, truth, deception and imposture, and throughout his career Collins both probed the legal construction of an 'authorised' identity and extended its boundaries. In *No Name* (1862), for example, Magdalen Vanstone attempts to steal back her place through performance and imposture when the Vanstone sisters are discovered to be bastards through the vagaries of English common law. *Man and Wife* (1870) was written in the immediate aftermath of the 1868 Royal Commission into the confusing and contradictory laws of marriage in England and Scotland and Ireland and plays on the slippery definitions of marriage and legitimacy that the Commission attempted to address. Collins's early story, 'Fauntleroy' (1858), gives a sympathetic account of the last man to be hanged in England for forgery, while his last, uncompleted novel *Blind Love* (1889) hinges on the substitution of a living man with a corpse in the service of an audacious insurance fraud. The runaway success of sensation fiction, together with the wider preoccupation with the discovery of hidden kinship through illegitimate origins that pervades nineteenth-century literature, suggests that these connections would have resonated powerfully with the large and diverse novel-reading public of the mid nineteenth century. It implies, too, that the widespread preoccupation with the idea of legitimacy in the broadest sense, its enactment, its ideological underpinning and its ultimate fragility, spanned a wide range of social and legal practices, cultural forms and institutions.

The word 'illegitimate' is initially defined in the *Oxford English Dictionary* as 'not in accordance with or authorised by law; unauthorised, unwarranted, spurious'. This is then broken down into two further definitions – 'not born in wedlock, bastard', and 'not in accordance with rule of reason; not correctly induced or inferred'. This interdisciplinary collection of essays takes this slipperiness of meaning as its starting point. Animated by scandals, scoundrels and impostors, it explores questions of identity, trust and deception in nineteenth-century Britain, probing how illegitimacy throws open definitions and concepts of what is 'legitimate' itself. The essays range between social history, legal history and fiction, and while they raise different questions they are linked by a set of common themes. How is a legal identity created and maintained? What does it mean legitimately to belong – in a family, and in a place? What

social and cultural tensions exist between different legal codes, between formal and informal, contractual and affective, concepts of legitimate relationships and identity, and how do these contribute to our understanding of the family? What are the cultural reactions to fraud and imposture, whether used for economic gain or social advantage? How might self-consciously illegitimate behaviour operate as a form of opposition to the dominant codes of legitimate society and what kinds of political agendas does this open up? Above all, what are the tensions among what contemporaries considered morally legitimate, what they considered as legally legitimate, and what they considered as legitimate in social practice? This introduction will tease out some of these underlying questions and set out a historical context for the essays by briefly investigating how this flexible concept expanded its public and private meanings during the nineteenth century.

The boundaries of belonging: family, place and nation

The first three essays included in this collection focus on the question of legitimacy and illegitimacy in the context of personal identity. They explore the question of how far a person's identity and standing in her family, her locality and in the wider world was determined by legal rules, and how far ideas of identity and legitimacy transcended law, and were determined by ties of emotion. Our starting point is therefore with the concept of bastardy, looking at the position of those whose claims challenged the security or identity of the family.² As social historians have frequently stressed, the distinction between legitimate and illegitimate birth marks the intersection of a range of economic, social and cultural practices, including the codes surrounding inheritance and property transmission; customs governing naming, genealogy and kinship; concepts of reproduction and the control of sexuality, and religious and moral systems.³ These practices and meanings were underpinned by different kinds of legal rules and structures, as well as distinct wider concepts of legitimacy. As David Beetham has argued, legitimacy in the wide sense always depends on the ability of dominant political and social systems to underscore formal legal conventions with the dual authority of ideal normative principles and broad social consent; but it is extremely seldom that these elements are unproblematically aligned.⁴

The unsettled status of bastardy illustrates these tensions forcefully. The legal system had long attempted to set down clear rules which would ensure that patrimonial property would descend to legitimate heirs. 'All well-regulated Governments have laid down and settled certain Rules of Propagation as necessary to the very Being of Human society', noted Matthew Bacon in 1736. 'Hence the Solemnity of Marriage was established, not only to prevent Lewdness, but as a Regulation, without which there could be no distinction of families, and consequently no Encouragement for Industry, or Foundation for Acquiring Riches.'⁵ The child born outside marriage was therefore defined as *fillius nullius* – nobody's child – under common law. He or she had no legal next of kin, and could not succeed to titles or to any hereditary position as a member of family. The rule that illegitimate children could not inherit was modified in practice by testamentary freedom, under which bastards could acquire property through family settlements or personal gifts. Peter Featherstone's illegitimate son Joshua Rigg in George Eliot's *Middlemarch* (1870), who is left the property promised Fred Vincy, is a striking fictional example of this practice.⁶

In contrast, canon law, which defined the family as an affective and social unit underpinned by natural law principles, regarded it as a moral duty for parents to support their children regardless of their legitimacy, and early modern ecclesiastical courts heard suits brought against fathers of illegitimate children for payments.⁷ English law did recognise the duty of a father to maintain his illegitimate child, under the poor law statutes dating back to Elizabeth's reign, though the intention behind this legislation was to minimise costs to the parish rather than to cement the bond of parent and child. But the notorious bastardy clauses of the 1834 Poor Law Amendment Act removed any obligation of support from the father, placing the entire burden on the mother.⁸

Children born outside wedlock were unambiguously illegitimate at common law. Whereas both European civil law and canon law (which remained the basis of Scottish laws of marriage and legitimacy after the Act of Union in 1601) allowed children whose parents married after their birth (provided no impediments existed) to be retrospectively legitimised, English common law staunchly forbade this, ruling that a person born illegitimate remained so for life.⁹ This rule of indelible bastardy (which had been famously upheld by the

barons at the Statute of Merton in 1236 and was only repealed by the Legitimacy Act of 1921) was seen, like the common law notion of coverture, as an anachronistic hangover of feudalism by some writers by the mid nineteenth century. The liberal lawyer J.S. Wharton for example described it in 1853 as ‘denying to parents an opportunity of redressing a wrong, and thus visiting, in spite of everything, the sins of the fathers upon the children’, and his view is directly echoed by the Vanstone’s lawyer in Wilkie Collins’s *No Name* in 1862.¹⁰ The common law’s insistence on indelible bastardy also highlighted discrepancies within the United Kingdom, in particular between England and Scotland, over who was and was not legitimate: ‘Nothing could be more absurd than for a person to be a bastard in one country and lawful in another, merely by crossing a river or passing a mountain, the boundary of their respective territories’, argued counsel in the case of *Shedden v. Patrick* in 1803 (a legitimacy dispute which ran until 1869).¹¹

The situation was more complex when it came to the position of ‘adulterine bastards’, or children born within marriage as a result of the wife’s adultery – the subject of Margot Finn’s essay on the Barlow divorce case. English law famously had a double standard, according to which a husband could seek a divorce on the grounds of his wife’s adultery, while a wife could not complain at law of her husband’s infidelity.¹² This double standard may be explained by a desire to secure stable patrilineal inheritance through continuous blood lines: wifely infidelity was regarded as ‘the highest invasion of property’, for it introduced spurious issue into the heart of the family. Nonetheless, both English and European law followed the Roman law principle that *pater est quem nuptiae demonstrant* – ‘he is the father, whom wedlock declareth’. There was a presumption that the child born to a married woman was the legitimate offspring of her husband; and the desire for social stability and continuity made this presumption a very difficult one to overturn.¹³ Shakespeare’s *King John* for example, opens with an investigation into Philip Falconbridge’s legitimacy, and while the trial results in Philip ‘the Bastard’ actively choosing noble illegitimate status by claiming Richard Coeur de Lyon as his natural father, King John still emphasises the common law *status quo*: ‘Sirrah, your brother is legitimate; /Your father’s wife did after wedlock bear him, /And if she did play false, the fault was her’s; /Which fault lies on the hazards of all husbands which marry wives’

(1.i. 116–20). Indeed under common law the legitimacy of a child born within wedlock could only be rebutted – even if the wife had clearly had a lover – if there was proof of the husband’s impotence, his separation for his wife by a judicial decree or his absence from the realm at the time of the child’s conception.¹⁴

While this legal presumption of legitimacy was aimed to provide clear rules to determine the status of children born to a married woman, it caused much disquiet to numerous aristocratic families, who feared that their fortunes would fall into the hands of spurious issue. The rule was successfully challenged in the Banbury peerage case, a case which had begun in 1661 and was only settled in 1813. By deciding that the presumption was a factual one, rather than a legal one, and one which could be dislodged by evidence, the House of Lords smudged the bright lines which the common law had sought to draw for adulterine bastardy. The Banbury case was notorious both for its longevity and for the fact that it involved the bastardisation of children without an accompanying Parliamentary divorce. Sir William Knowles, Earl of Banbury, had died apparently childless, aged 85, in 1632. His widow, the Catholic Lady Jane Howard, over thirty years his junior, had quickly married Edward Lord Vaux, also a Catholic, and soon after produced two young children who had undoubtedly been born during her first husband’s lifetime and who, she claimed, were Sir William’s lawful issue. The case fell into abeyance during the Civil Wars and the Commonwealth, but when Lady Jane’s son Nicholas attempted to take his seat in the Convention Parliament leading up to the Restoration, his legitimacy was successfully challenged by his peers. There followed the presentation and scrutiny of at least eight petitions by Nicholas and his descendents, before their claim of his legitimacy was finally defeated in 1813.

Yet although Nicholas’s descendants finally lost, and the case rang the death-knell on the common law’s presumption of legitimacy in cases where circumstantial or medical evidence suggested otherwise, a strong rearguard action was launched in the final debates on the Banbury case in the Lords. Thomas, Lord Erskine, arguing for the claimant, resolutely defended the law under which the presumption of legitimacy applied, ‘whatever moral probability may exist of the adulterer being the father’. ‘Women are not shut up here, as in the eastern world, and the presumption of their virtue is inseparable from their liberty’, he insisted. ‘If the presumption were once overthrown,

the field would be laid open to unlimited inquiries into the privacy of domestic life: no man's legitimacy would be secure, and the law would be accessory to every species of imposture and iniquity.¹⁵ 'We must not overlook the dangers of trusting too implicitly on circumstantial evidence' argued Sir Samuel Romilly, also defending the Banbury claim. 'If the connection between cause and effect in the material world has so long baffled every philosophical enquirer, surely we ought to approach with similar diffidence an investigation into the moral world?'¹⁶

The arguments surrounding the Banbury claim in the early nineteenth century demonstrate that Lawrence Stone's description of the increase in Parliamentary divorce as symptomatic of the rise of affective individualism is in many ways far too simplistic. Both the defendants and opponents of Nicholas Knowles's claim laid more emphasis on the social and affective definition of paternity over biological bonds. The counsel for the claimant warned of the hornet's nest that might be opened up by denying the liberty of English women; the Crown's counsel, Lords Ellenborough, Eldon and Redesdale argued that Sir William had never publicly acknowledged his son – indeed had apparently been unaware of his existence. This is not to say that biological paternity was considered unimportant, only that other definitions of the family were equally in play. A few years after the Banbury case was resolved, the public was excited by the Gardner peerage case in 1825. Here two claims were made to a barony: the first by the son of Captain Gardner's first wife, whose legitimacy was disputed; the second by the son of his second spouse. The first Mrs Gardner had left her husband's ship at the end of January 1802, and was delivered of a child on 8 December that year. Could a pregnancy really last 311 days? After much medical evidence was heard on the length of gestation, the title passed to the second son.¹⁷

Margot Finn's discussion of the scandal that surrounded the family of Sir George Barlow two years after the conclusion of the Banbury case also reveals the complex relationship between law and feeling in shaping family identity. Her account of this imperial family culminates in Sir George Barlow's suit against his young ward and relation, Major George Edward Pratt Barlow, for criminal conversation with his wife Eliza, in an action which culminated in a statutory divorce. Young George admitted the charge, but the proceedings (to determine damages) allowed the jury to hear two stories about the

adulterous relationship. On the one hand, there was a story of the romantic love of two individuals to each other and their natural son. On the other, there was a tale of trust betrayed, and the wider betrayal of a larger family network, held together by an intricate network of relationships across the empire, which did not rest on the foundations of simple affective individualism.

As Finn shows, neither the law nor the Barlow family was won over by the lovers' appeals to the heart. Eliza was expelled, along with her lover, and their child. The bonds of love were not to be permitted to unsettle the norms of conduct needed to hold together an imperial family. It was this imperial structure which had at once created the confusing ties and roles within the extended legitimate family and which determined the illegitimacy of Eliza Barlow's excessive romantic affection for her husband's ward. In the event, it was the morality of the imperial family, and its demand of loyalty and trust, which determined the illegitimacy of the couple's conduct, and their son's status, as much as the law did. For the child of the affair, Frederick, remained at *law* – if not in the world – a legitimate heir of Sir George Barlow, since the cuckolded Indian civil servant was not permitted by law to give evidence in any suit to bastardise the boy.

Josephine McDonagh's study of *Bleak House* (1852–3) shows that mid-nineteenth-century novelists like Dickens offered a very different view of the rival demands of dynastic lineage and romantic affections, and of the role of law in their determination, than was favoured by the Barlow family. Law itself, in the form of the Court of Chancery, stands famously condemned in the novel: a symbol of Old Corruption, fleecing all who come to it, it seemed to encapsulate the very illegitimacy of the unreformed legal system. In this world, true authenticity is found in the heart of Esther Summerson, the illegitimate child. Literary representations of illegitimacy in this era frequently highlight the natural child as the source of 'true legitimacy'. The privileging of natural affection and romantic love over the repressive codes of formal law and the worn out claims of hereditary privilege is one of the key strategies for consolidating the cultural and emotional authority of the novel itself.

While Esther's excessively self-effacing narrative dramatises her internalisation of her marginality, her higher legitimacy is also borne out by her performance of feminine virtue, and her standing outside the framework of an anachronistic and soul-destroying legal system.

The contrast between the virtuous bastard son and the corrupt or incontinent heir (reversing the kind of legitimate/illegitimate opposition that is found in the Edmund/Edgar pairing the Shakespeare's *King Lear*) is a significant thread running through the mid-century novel. It is perhaps most starkly portrayed in Dickens's *Oliver Twist* (1837–9), in which the orphaned and abandoned love-child resists the criminalisation that his legitimate half-brother, the degenerate product of a loveless marriage, sets up for him. It can be found in the contrast between the two Allan Armadales in Collins's novel of 1866, and it re-emerges in the doubling of the two Ralph Newtons, the profligate and directionless legitimate heir under the entail and the idealised and much loved natural son, in Anthony Trollope's *Ralph the Heir* (1870).¹⁸

McDonagh's essay also explores the ties between identity and place. As she shows, it is not only the Chancery which manifests the illegitimacy of the existing system of law in *Bleak House*, for Dickens uses the novel to present a critique of the settlement requirements of the Poor Law. While the Poor Law gave a basic entitlement to support for the pauper – albeit an increasingly harsh one in the age of the new Poor Law of 1834 – a parish faced with the claims of a pauper could remove her to her place of 'settlement', which was the parish legally liable for that pauper. The laws relating to settlement was complex, and provided much fodder for lawyers. They were also – as McDonagh argues – 'unsettling' for the pauper, who could be removed to a place where she had not resided for years, if at all. In addition, their persistence was seen by critics as manifesting the stranglehold which the past held on the present, tying both individuals and the nation to past identities which had nothing to do with their present lives. In place of the false identities imposed by the ties of ancient settlement, or the strictures of the law of bastardy which left the blood relatives unsettled in the legal family, the novel offered a vision of bonds of sentiment, which could create ties of affiliation both in the affective family, and in the wider nation.

Where in *Bleak House* the law and the patriarchal family determined by rules of law both stand condemned, in Rohan McWilliam's study of later nineteenth-century impostors, we encounter rogues seeking to exploit the uncertainties of the law of marriage to claim a new identity. Claims about secret marriages in the distant past could be unsettling for established families, including (as McWilliam's discussion of Olivia Serres's claim shows) the royal family itself.

A secret history could reveal that the world was not as one had thought it was. This could be unsettling for those whose identity was challenged, and alluring for those who could imagine themselves finding their 'true' identity to be one of grandeur and fortune. Claimants, imitating the truly noble, long lost heir found in literature, could attract large popular followings. In this way, they could both undermine the enduring authority of hereditary privilege, acting as a focus for radical impulses, and reinforce the status quo in his or her aspirations for advancement.

The legitimising narratives impostors used drew on literary conventions which pervade both sensation fiction and the realist novel. In George Eliot's *Felix Holt* (1866), for example, the discovery of the hidden origins of Esther Lyon, and with it her claim to Transome Court, is set alongside the revelation of Harold Transome's secret biological illegitimacy. Harold's spuriousness reinforces both the emptiness of his political Radicalism and the essential fictiveness of the Transome's claim to the estate. But Esther's claim, like Harold's, is equally tenuous: both highlight the problem of how to 'find a clue of principle amid the labyrinthine confusions of right and possession'.¹⁹ Finally the Transomes retain their dubious possession of the estate while Esther chooses the 'higher legitimacy' of marriage to the working-class hero Felix Holt. Trollope's *Lady Anna* (1874) reworks this theme. Josephine Murray's obsessive quest to prove her daughter's claim to be the legitimate daughter of Earl Lovel (her profligate husband who had pronounced their marriage invalid) is both supported as a *cause celebre* by the political radical Thomas Thwaite, and is finally abandoned when Anna refuses to give up her betrothal to Thomas's son Daniel.

As McWilliam argues, impostor narratives have a timeless quality; but they are shaped by their historical context and dramatise contemporary anxieties and fantasies. Imposters are often charismatic, fascinating figures, who refuse to accept their legitimate roles; who both violate fundamental forms of social trust, and demonstrate (as Collins does) that social identity itself is unstable and labile, loosely held together by performance and the manipulation of perception. Sir Percival Glyde, the villain of Wilkie Collins's *The Woman in White*, inextricably links the illegitimacy of the spurious heir, the impostor and the forger; but the hero Walter Hartright is also the victim of a conspiracy to dismiss his claims on Laura's behalf as the work