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No Name

Lawrence M. Friedman

Stanford University, School of Law, lmf@law.stanford.edu

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NO NAME

Lawrence M. Friedman*

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I. INTRODUCTION

N*O Name* is one of Wilkie Collins's major novels, written at the height of his career.¹ At the beginning of the novel, we meet the Vanstones, members of the English landed gentry. Andrew Vanstone and his wife live with their two daughters, Norah and Magdalen, in a large and comfortable country house, with the usual crew of servants. The Vanstones seem to be a loving and happy family. But tragedy strikes with the suddenness of lightning. Andrew Vanstone dies in a railroad accident. His pregnant wife, crushed by the news, dies shortly afterward in childbirth. Her baby lives for a few hours; then it too dies.

All this is bad enough, but more tragedy is ahead for the two surviving daughters. It turns out that the Vanstones had not actually been married. Andrew, in his salad days, had gone overseas, and entered into a disastrous marriage with a completely unsuitable woman. The two soon separated; he returned to England and formed a relationship with the woman everybody assumed was his wife. They lived together in a completely conventional relationship. Nobody knew their secret—certainly not their daughters. Andrew made out a will, with ample provision for his daughters. Then, Andrew found out that his unsuitable first wife had finally died. The Vanstones were now free to marry, and they did so (secretly, of course). Under English law, however, this legal marriage rendered Andrew's prior will null and void. Andrew realizes he needs a new will but dies before he can execute it. When his wife also dies, the new baby, who was their legitimate child, inherited everything. This baby, as we noted, lived only a few hours, but that was enough time for the property to pass to the child. Andrew's two daughters were illegitimate; they inherited

* Marion Rice Kirkwood Professor, Stanford University School of Law. I want to thank Will Setrakian for his help and Robert W. Gordon for his helpful comments.

1. WILKIE COLLINS, *NO NAME* (Dover Publ'ns, Inc. 1978) (1862).

nothing. On the baby's death, all of the property vested in the nearest (legitimate) relative: Uncle Michael Vanstone, Andrew's brother (and his deadly enemy). Michael refuses to do anything for his nieces. Nora and Magdalen are, legally speaking, bastards, "children of nobody," women without a name, penniless, and abandoned in a cruelly stratified world.

This is only the beginning of the story; the plot is complex and absorbing, and Magdalen Vanstone plays the most significant role in the drama. But the whole story hinges on that element which the title of the novel suggests: the legal status of no-name children, that is, children born out of wedlock. What rights do they have with regard to inheritance and social status, particularly as these rights pertain to families who are part of the landed gentry?²

Fifteen years later, in 1879, Anthony Trollope published his novel *John Caldigate*.³ It is very different from *No Name* in style and in plot development. But there is at least one interesting parallel; Caldigate, the main character, was (like the Vanstone daughters) born into the landed gentry. As a young man, he wasted his opportunities and went deeply into debt, to the great disgust of his father. John Caldigate, financially desperate, sells off his inheritance rights, and with a friend, sails away to Australia where he plans to seek his fortune in the gold mines of the outback. On shipboard, he meets a fascinating woman, Euphemia, with a mysterious past and a questionable reputation. Despite warnings from the captain and others, he forms a close connection with Euphemia, and this connection continues in Australia. In the mining region, Caldigate, against all odds, strikes it rich and returns to England a changed man, wealthy and ready to resume his place in polite society. Caldigate is now free (he believes) to marry the young, pure, and well-bred Hester Bolton; he fell in love with her before he left, and always dreamed of making her his wife. The marriage takes place; they are happy. Hester loves Caldigate intensely, and in due course she gives birth to a child.

But then disaster strikes; Euphemia pops up unexpectedly in England, and she makes a sensational claim: John Caldigate, she insists, is actually her husband. She brings witnesses who swear that the marriage took place in Australia. Caldigate, in other words, has committed the crime of bigamy. A sensational trial follows. Hester's family, horrified at the state of affairs and convinced that Caldigate is guilty, demands that Hester move out of Caldigate's home, return to her family, and live with them. She cannot continue in a relationship now shown to be sinful. Hester resists, but the situation seems almost hopeless. At the trial, Caldigate is found guilty of bigamy and is thrown into prison.⁴ In the end, however (spoiler alert), he is totally vindicated; Euphemia and her friends are

2. There is a big literature about Collins and his work. On the particular theme discussed here, see Jessica Cox, *Representations of Illegitimacy in Wilkie Collins's Early Novels*, 83 *PHILOLOGICAL Q.* 147 (2004).

3. 1 ANTHONY TROLLOPE, *JOHN CALDIGATE* (Dodd, Mead & Co. 1907) (1879).

4. 2 ANTHONY TROLLOPE, *JOHN CALDIGATE* 201 (Dodd, Mead, & Co. 1907) (1879).

shown to be perjurers, John Caldigate is released from prison, and he is reunited with the loving and faithful Hester. Presumably, they live happily ever after.

These two novels rest on certain assumptions about Victorian society. One obvious point is the double standard; this, of course, is nothing new. John Caldigate, to be sure, has committed a crime (if Euphemia is telling the truth): he is a bigamist. Hester, in that case, would be an innocent victim. If John Caldigate was indeed married, then Hester has been living in sin; Caldigate has destroyed the basis of her life, destroyed her position in society, and vitiated the values that made her a respectable woman. She would, in a sense, have no name any longer. She could not be Mrs. Caldigate; that name has been forfeited. And her child, too, would have no name.

And what of John Caldigate? Of course, he too suffers: he must go to prison. Yet, once he is shown to be innocent, all is forgiven; he resumes his life with Hester. Still, although he never actually *married* Euphemia, they had a sexual relationship in Australia. Absolutely nothing is made of this in the novel. A respectable marriage has wiped out all of Caldigate's previous sins. In *No Name* too, Collins treats the Vanstones as entirely sympathetic characters—even though Andrew, like John Caldigate, entered into a sexual relationship with a woman, and even married her, before he met and married the woman who became the mother of his daughters. Nor does Collins criticize Mrs. Vanstone; he seems willing to excuse her for living in sin. Yet Mrs. Vanstone, as far as we know, never had sex before her "marriage," unlike her husband Andrew. Presumably, she would have been judged harshly for this behavior. If she, like him, had sown "wild oats," Andrew would probably not have married her at all. And in *John Caldigate*, Hester's sexual purity is not only assumed, it is clearly essential to the plot.

Of course, Victorian society was complex, with many layers and nuances, and Victorian literature no less so. Literature (and perhaps Victorian literature especially) is both revealing and concealing. Its assumptions and attitudes provide us with data, of a sort, about what makes society tick—perhaps not as good as opinion polls, but no such polls existed then. These two novels, and many others, turn on the issue of no-name children and their parents. Of course, the novels have to be read with great caution. Victorian literature is the product of a fairly narrow group of writers—poets and authors hardly make up a random sample of the English population—not to mention the impact of taboos and self-censorship on literature, both very salient factors in Victorian England. Most novels deal with the lives of the landed gentry, and our two novels are no exception. It would be risky to put too much faith in what novels tell us, even about the gentry—their hopes, dreams, aspirations, lusts, and fears. Victorian literature tends to gloss over important themes—the sins and side-effects of the Industrial Revolution, colonialism, and the lives of servants and tenant farmers. Victorian literature, as

is well known, was also extraordinarily prudish. You have to read between the lines to find any evidence of sexual behavior. A Martian who came to Earth could well be persuaded that storks brought Victorians their babies. And the Martian might wonder why so much fuss was made of legitimacy and illegitimacy, and what it all could possibly mean. Readers and critics today, of course, tend to see sex in almost everything, even the novels of Jane Austen. But that says something about the peculiar lens through which contemporary readers look at the world.

Actual Victorians, of course, did not come from Mars. They were able to read the tea leaves, so to speak. They knew about sex. They practiced it. And they also understood the rules, customs, and norms of sexual behavior. They understood very well the double standard: one standard for men and another standard for women. In a way, it was much more than a double standard; it was a triple, quadruple, multiple standard. It was a standard that varied by class as well as by gender, and class itself was, and is, a multiplex concept. But, the basic double standard for *class* was perhaps as important, and as salient, as the double standard for *gender*.

No Name and *John Caldigate* paint a particular picture—an important picture—of male and female sexuality and male and female relationships. It is a picture from the standpoint of the upper class. The working class—the farmers, the tenants of the landed gentry, the factory workers, the domestic servants—hardly figure in these novels. They are present, but not central to the story, and they come on stage only insofar as they interact with members of the upper class. They may, however, appear as victims. This is often the case. The mothers of no-name children, women who are seduced and abandoned by their lovers, sometimes emerge as objects of sympathy. The fathers of these children appear as cads, as villains, as thoughtless at best, cruel and heartless at worst, or in a curiously neutral light. John Caldigate, after all, is the hero of the book that carries his name. Euphemia, his lover, never had a child, but even if she had given birth to Caldigate's child—a no-name son or daughter—Caldigate could still remain the hero of his novel. If an upper-class father produced children with women from the lower social orders, like Euphemia, the women and children had no real claim on the men. Certainly, they had no legal claim. And, of course, no claim for a respectable marriage.

II. LAW AND ORDER

Victorian morals, Victorian sexuality, Victorian manners: these are the subjects of an enormous literature. The question here is about the role of the legal system in Victorian England. In what ways did it respond to the prevailing morals and the prevailing norms of gender and sexuality? And in what ways did both the formal law and the living law reveal contradictions and paradoxes?

On the surface, much of the formal law was unisex; men and women were treated the same. Bigamy and adultery, for example, were crimes

for men and women alike.⁵ The children of unmarried parents were no-name children; it did not matter who the parents were. The double standard is not part of the cold texts of statutory law, yet at times it pokes through the surface and is plain to see. It was blatantly evident in the Matrimonial Causes Act of 1857, the act of Parliament that provided for judicial divorce in England for the first time.⁶ Under this law, a wife's adultery gave her husband grounds for divorce, but a wife could divorce her husband only if he was guilty of what could be called aggravated adultery—adultery coupled with some further sin, such as sodomy, bigamy, incest, cruelty, or desertion.⁷ A husband's simple, garden-variety adultery was no grounds for divorce. But *any* adultery at all gave the husband the right to shed his wife.⁸

For no-name children, the formal law was clear. As Blackstone put it, “very few” legal rights “appertain to a bastard.”⁹ They “can inherit nothing, being looked upon as the son of nobody, and sometimes called filius nullius.”¹⁰ Legally speaking, they have “no father.”¹¹ Even if the parents marry later on, the child is still without rights—is still a bastard, still a no-name child.¹² “Filius nullius,” nobody's child, meant, initially, no right even with regard to his mother's property. A no-name child, in short, could inherit nothing at all.

Of course, inheritance rights mean something only when there is something to inherit. This left out most people in Victorian England, practically speaking. Land, securities, and property of any kind was highly concentrated among the rich and well-born. Hence, the real thrust of the rule about no-name children was to protect those who had assets, especially members of the landed gentry, and even more so, *men* who were part of the landed gentry. It made these men immune from claims produced by their no-name children, the product of any “wild oats” they might have sown. Unless a father decided to recognize an illegitimate child and treat it as his own, he could discard such a child like yesterday's

5. *E.g.*, Confession of Faith Ratification Act 1690, (RSP 1690/4/33) Pt. XXIV, §§ 1, 5 (Scot.).

6. Matrimonial Causes Act 1857, 20 & 21 Vict. c. 85, § 6 (Eng.).

7. *Id.* § 27. A husband could petition to have his marriage dissolved if his wife had “been guilty of Adultery”; she could, however, only petition if her husband “ha[d] been guilty of incestuous Adultery, or of Bigamy with Adultery, or of Rape, or of Sodomy or Bestiality,” or adultery together with “Cruelty” that would have entitled her to a legal separation, or adultery “coupled with Desertion, without reasonable Excuse, for Two Years or upwards.” *Id.*

8. The courts, however, did mitigate the double standard of the Matrimonial Causes Act of 1857; case law stretched the concept of cruelty, for example, in such a way as to make it easier for women to divorce their husbands. See Rebecca Probert, *The Controversy of Equality and the Matrimonial Causes Act 1923*, 11 CHILD & FAM. L.Q. 33, 36 (1999).

9. 1 WILLIAM BLACKSTONE, COMMENTARIES *447.

10. *Id.*

11. *Id.*

12. In civil law countries, if the parents married, the children became legitimate by virtue of the marriage. *Id.* at *442. But in English law, as Blackstone put it, it was an “indispensable condition” that the child had to be “born, after lawful wedlock.” *Id.* at *443. This doctrine is what doomed the Vanstone daughters to no-name status.

newspaper. Morally, socially, and legally such children had no claim. If John Caldigate had impregnated Euphemia Smith, her child (as we said) would have had no status whatsoever.

Did elite men suffer any consequences from their extra-marital affairs? Surely they did at times; too much debauchery was not good for a man's reputation. Victorian England, despite the double standard and a healthy dose of hypocrisy, was probably sincere (at least in part) in its prudish and repressive attitudes. Men transgressed, but for the most part discreetly. Society (and law) found it possible to forgive most of the trespasses of upper-class men (at least heterosexual trespasses). Men were men, after all, and they had strong sexual appetites. Nice women (supposedly) lacked these appetites. If the mother of a no-name child had a lower social position than the father, the no-name child could be ignored. The mother was a "fallen woman," and society condemned fallen women. Similarly, no-name children could be shunned and stigmatized; they had no position in society, and their betters were by no means expected to show them sympathy or understanding. Not officially, at any rate.

But societies are complex organisms. Even Blackstone reflected a certain level of moral complexity. The law, he pointed out, once barred bastards from high office or "dignity" in the church, but this "doctrine" had become "obsolete."¹³ No-name children could not inherit property from their parents, but any other "distinction" between the "innocent offspring" of their parents' "crimes" would be "odious, unjust, and cruel."¹⁴ In Elizabeth Gaskell's powerful novel *Ruth*, the main character, Ruth Hilton, is a young and innocent woman—a girl, really.¹⁵ She is a penniless orphan, without family or connections, earning a miserable living in a thankless job. She is, we are told, very beautiful, and this attracts the attention of a wealthy young man, Henry Bellingham, who falls in love with her; or, in any event, he finds her sexually attractive. Ruth loses her job when her cruel and intolerant employer sees her out alone with Bellingham. She is left with nowhere to go, no job, no hope, no family. For want of an alternative, she gives in and goes off with Bellingham. Living with him, she becomes, in short, a fallen woman. Heroines in Victorian novels did not often make such a choice.¹⁶

"Heroine" may be the wrong word; Ruth is the main character in the novel, but she is, above all else, a victim. The affair with Bellingham ends badly. He falls dangerously ill, at which point his imperious and domineering mother arrives on the scene. She blames Ruth for the whole miserable scandal. It must be her fault. She is obviously a woman "utterly without shame."¹⁷ Apparently, any thought of blaming her son is beyond Mrs. Bellingham's mental powers. She shuts Ruth out of Henry's room—

13. *Id.* at *447.

14. *Id.*

15. ELIZABETH CLEGHORN GASKELL, *RUTH* (Garland Publ'g, Inc. 1975) (1853).

16. GEORGE WATT, *THE FALLEN WOMAN IN THE NINETEENTH-CENTURY ENGLISH NOVEL* (1984). See especially Chapter 2, the chapter on *Ruth*.

17. GASKELL, *supra* note 15, at 181.

and his life. As he convalesces, his mother demands that he end the affair. Weakly, he agrees. Mrs. Bellingham sends Ruth a heartless letter; her son, she says, has now become “happily conscious” of the errors of his ways.¹⁸ Ruth, a shameless woman, should now repent; otherwise, she would bear not only her own guilt but also the guilt of “any young man whom [she] may succeed in entrapping into vice.”¹⁹ Mrs. Bellingham encloses in the letter a “bank-note of fifty pounds.”²⁰

Ruth, presumably unknown to Henry, was already pregnant. She finds refuge with a kind family, the Bensons, a brother and sister who take her in. She later gives birth to a son. The Bensons, knowing what might be in store for her, induce her to pose as a widow in the community; otherwise, she would be utterly shunned. And, worse yet, the severe curse of illegitimacy would be visited on her son. The plan works for a while. Ultimately, though, the secret does come out; Ruth’s sin becomes common knowledge, and her son Leonard is revealed to be a no-name child. The consequences, in the end, are quite tragic.

Ruth was a bold and pioneering work. But illegitimacy—and no-name children—figure frequently in Victorian literature. Illicit sex and its consequences run like a scarlet thread, or, as it were, a scarlet letter through many important works of the period. No-name children, along with orphans, wards, foundlings, and foster children pop up as characters in novel after novel. In Dickens’s *Bleak House*, for example, Lady Dedlock, one of the main characters, had given birth to an illegitimate daughter. Mothers and children, as in *Ruth*, are often treated sympathetically. Nonetheless, the situation of the no-name child was always precarious. Such a child could not inherit—having no claim on the father’s status, his rank in society, or his property.

In Wilkie Collins’s early novel, *The Dead Secret*, the plot pivots on the status of no-name children.²¹ Rosamund, the young heroine, grows up thinking she is the daughter of Captain Treverton and his wife. Mrs. Treverton died when Rosamund was only a child. She is raised in comfortable surroundings, in a house tended by servants. Yet early in the novel, we learn that there is some sort of terrible family secret. Mrs. Treverton, as she lay dying, confided the secret in writing to her maid, Sarah Leeson. Sarah hides the note in a ruined chamber of the ancestral Treverton home. Only toward the end of the book is the note discovered and the secret revealed (most readers would have guessed at least part of it). Rosamund, it turns out, was not really a Treverton at all. She was, in fact, illegitimate. The maid, Sarah Leeson, was actually her mother, and her biological father was a workman who died in an accident. Mrs. Treverton, who could not have children, passed Rosamund off as her daughter, fooling the world (and her husband).

18. *Id.* at 187.

19. *Id.*

20. *Id.* at 188.

21. WILKIE COLLINS, *THE DEAD SECRET* (Oxford Univ. Press 1997) (1856).

By the time Rosamund learns the “dead secret,” she has grown up and gotten married. Her husband, Leonard, is blind. When the secret is revealed, she forfeits her inheritance. Collins, however, is able to provide us with a happy ending: Rosamund, unlike the Vanstone daughters, loses only her money; she retains her place in society. Her blind husband, Leonard, who has plenty of money of his own, remains loyal to her and chooses to ignore the taint on Rosamund’s birth.²² Hence, Rosamund, despite her no-name status, is permitted to cross class lines. Perhaps breeding and culture, and a life spent among people of breeding and culture, made the difference between Rosamund and other no-name children of Victorian literature.

Rosamund is a sympathetic figure, perhaps because of the very secret that could have been her undoing. Most no-name children were not brought up as Rosamund and the Vanstone daughters were. Yet, no-name children are often sympathetic figures in the literature, and Victorian authors could display kindness, and empathy too, toward women like Ruth, who are mothers of these children. There is a kind of paradox in Victorian society. Law, legal rules, and legal institutions—which, after all, always in some sense reflect social norms—seem brutal and unforgiving to no-name children. The literature is much more forgiving, in a way that suggests that opinion in the larger society might also have been split.

Another (early) Collins novel, *Hide and Seek*, dramatically illustrates this split in attitude.²³ In the novel, Mary Grice gives birth to a no-name child; the father, one Arthur Carr, is out of the country at the time. Mary’s aunt is horrified by Mary’s “deadly sin,” which (in the aunt’s view) spells “ruin in this world and . . . ruin in the next.”²⁴ The aunt intercepts all of Arthur’s letters to Mary and destroys them, with disastrous consequences for poor Mary. Yet other characters in the novel, including Mary’s father and brothers, though unable to prevent misery and death for Mary, treat her as an innocent victim. After Mary dies, her no-name child is accepted, raised, and loved by other characters in the book.

The actual behavior of the law confirms this paradox or contradiction. The legal treatment of neonaticide, the killing of newborn children, is a surprising piece of evidence. The children in question were almost invariably bastard children, whose mothers snuffed out their lives at birth out of sheer desperation. This was a crime much discussed, and much de-

22. In *Dead Secrets: Wilkie Collins and the Female Gothic*, Tamar Heller discusses certain aspects of Collins’ work, including the novel in question. TAMAR HELLER, *DEAD SECRETS: WILKIE COLLINS AND THE FEMALE GOTHIC* (1992). Heller points out that Mrs. Treverton and her maid “attack[] both patriarchal privilege and class hierarchies by fraudulently installing an illegitimate and working-class child as heir to the [presumed] father’s estate.” *Id.* at 2. The reader learns very little about Rosamund’s actual father; he was of the same class as the mother, and the two were, apparently, genuinely in love. It is interesting that Collins gives Rosamund a blind husband—a man who is, necessarily, dependent on her because of his physical disability.

23. WILKIE COLLINS, *HIDE AND SEEK: OR, THE MYSTERY OF MARY GRICE* 224 (Dover Publ’ns, Inc. 1981) (1854).

24. *Id.*

plored, throughout the nineteenth century. A coroner in Liverpool, in 1856, estimated that there were 300 cases of neonaticide a year in the city.²⁵ In 1862, a writer in *The Observer* noted a “shocking increase of infanticide,” which had reached “fearful dimension.”²⁶ One district coroner in London claimed, in 1866, that in one year he held some eighty inquests on children “found dead in the streets.”²⁷

Neonaticide was a dark and secretive act. Most of the time it succeeded: there was no arrest, no trial, no punishment. Pathetic little bodies were found floating in the Thames or discovered in back-alleys. These were no-name babies in the most literal sense. Sometimes, however, the mother was unable to keep her sin a secret—unable to give birth and dispose of the body without getting caught. Some of these young mothers were arrested, accused, and put on trial. There are about 200 of these cases in the Victorian records of the Old Bailey (the central criminal court of London). In these cases, the defendant-mother was virtually always a domestic servant, always unmarried, and presumably seduced and abandoned. The charge against her was murder. The law made no formal distinction between one kind of murder and another, no distinction between deliberately killing a newborn baby and deliberately killing anybody else. And murder was a capital crime; these young women faced the gallows. Yet, perhaps surprisingly, the defendants were almost never convicted of murder. The records are stark and unequivocal. Almost half of the women (45%) were acquitted.²⁸ Another group (38%) “were found guilty of concealing the birth” of a bastard child, a separate crime that earned short sentences at most.²⁹ The death sentence was almost never imposed.³⁰ The jurors, in that period, were all men. So too were the judges, who also at times showed astonishing leniency.³¹

The literature and the Old Bailey cases suggest that the class structure of English society is the key to understanding an apparent contradiction or conflict between two points of view, two attitudes toward no-name children and their mothers. It may seem odd to cite the Old Bailey cases as evidence of sympathy toward no-name children. After all, the children in these cases were not only dead, their own mothers had smothered

25. Lawrence M. Friedman, *The Misbegotten: Infanticide in Victorian England*, in *THE LEGAL PROCESS AND THE PROMISE OF JUSTICE: STUDIES INSPIRED BY THE WORK OF MALCOLM FEELEY* 183 (Rosann Greenspan, Hadar Aviram & Jonathan Simon eds., 2019).

26. *Id.*

27. *Id.*

28. *Id.* at 180.

29. *Id.*

30. *Id.* at 180–81.

31. On the Old Bailey cases, in general, see Ann R. Higginbotham, “*Sin of the Age*”: *Infanticide and Illegitimacy in Victorian London*, 32 *VICTORIAN STUD.* 319, 324 (1989); Friedman, *supra* note 25, at 180–81; George K. Behlmer, *Deadly Motherhood: Infanticide and Medical Opinion in Mid-Victorian England*, 34 *J. HIST. MED. & ALLIED SCIS.* 403 (1979); Margaret L. Arnot, *Understanding Women Committing Newborn Child Murder in Victorian England*, in *EVERYDAY VIOLENCE IN BRITAIN, 1850–1950*, at 55 (Shani D’Cruze ed., 2000). On infanticide in Victorian literature see IAN WARD, *SEX, CRIME AND LITERATURE IN VICTORIAN ENGLAND* 101–08 (2014).

them, buried them, thrown them in the river. The no-name babies were invariably victims in these cases. The evidence suggests that society put very little value on their lives. But the main lesson of the cases is sympathy and understanding for the mothers—and for the sins of the mothers, the sins that resulted in the birth of no-name children.

The rules about legitimacy, and their enforcement, were vitally important for upper-class men, especially the landed gentry. The rules protected them from claims brought by lower-class women. They protected the right of these men to “sow wild oats,” without risking their property rights or their place in society. The rules also protected the rights of elite women—the wives and mothers of men who “sowed wild oats.” They made sure that lower-class women, and their no-name babies, would not displace elite women or threaten their status.

Of course, sex outside of marriage was common enough. But it was (officially) condemned as immoral, and it was stamped with illegality. Upper-class society tended to blame the women for these transgressions. Women were the sinners—they were the corrupters, the Jezebels, creatures who dragged down the men. In *Ruth*, that view was forcefully expressed by Henry Bellingham’s mother. Ruth must have led her son down the path of vice; Henry himself was surely blameless. A speaker in the House of Commons, in 1834, made a similar point: “[W]ant of chastity” was a crime and a sin for men as well as for women, but the crime and sin were “greater in a woman”; her error “corrupted society at its very root.”³² And what was the “very root” of society that the fallen woman corrupted? It was the system, the structure, the world of the landed gentry, and the England that the landed gentry dominated and controlled. It was a world which assumed the rigid separation of the classes.

Voices in the House of Commons, and in the genteel pages of the national press, were upper-class voices. How widely ordinary people accepted and shared the views of these voices is another story. In *Ruth*, the Bensons are noble and sympathetic souls; they take Ruth in, shelter her, befriend her, love her. But they do not reject the rules of Victorian society. They accept the idea that divine law forbids sex outside of marriage, and they realize that Ruth will be stigmatized for her sin and that the stigma will extend to her no-name child as well. But they leaven the rules with mercy and forgiveness. They recognize that young, poor, vulnerable women face terrible dilemmas. They accept both sin and redemption from sin. Ruth herself, in Mrs. Gaskell’s novel, also accepts the rules laid down by law and religion. She is deeply troubled by her consciousness of sin. She comes to feel that she deserves her own cruel fate. Her no-name son is innocent and blameless. She is not. She tries to redeem herself with piety and penitence, and with good works—good works (tending the sick)

32. Diane M. Davison, *The Bastardy Controversy of Nineteenth-Century Britain* 60 (1982) (M.A. thesis, Lehigh University) (ProQuest) (quoting Lord Althorpe speaking in the House of Commons in 1834).

which end up killing her.³³

Mrs. Gaskell paints Ruth as a victim—victim of a rigid and unfair social code. Mrs. Gaskell also assumes that in society some people, like the Bensons, will be understanding and forgiving, while others will shun and condemn mother and child because they violated laws of God and man. Of course, *Ruth* is a work of fiction. But Mrs. Gaskell obviously thought it reflected reality. It is not only people from polite and upper-class society that condemn Ruth and her son. Mrs. Gaskell seemed to believe that ordinary people—working people, neighbors, locals—would often come to the same moral conclusions and act accordingly. Some, though, will embrace the theme of reform and redemption. How many are in one camp and how many are in the other is unknown and unknowable.

Yet, the Old Bailey records, and other sources, suggest that acceptance and understanding may have been fairly widespread—if not for “fallen women” as such, then for the idea of reform and redemption. The Magdalen Asylum “for Penitent Females,” dating from the eighteenth century, was a charitable institution that took in and worked with “fallen women,” provided they had not fallen too far.³⁴ The London Foundling Hospital, also from the eighteenth century, accepted abandoned and otherwise destitute children, many of them (perhaps most of them) no-name children. These institutions worked with “women who had never sold their bodies, but who had simply had non-marital liaisons sometimes with illegitimate children as a result.”³⁵ The goal was to reclaim women who had been virtuous; women who had simply fallen off the cliff of respectability but could yet be redeemed.

The women in the dock at the Old Bailey, accused of infanticide, were working women—domestic servants—women who had “strayed,” not women who regularly sold their bodies or who made a career or habit of sexual adventures. These were the sort of women who evoked pity from judges and jurors; women who were eligible for the Magdalen Asylum. They were not women of the streets but members of that army of women who worked their fingers to the bone scrubbing and cleaning the houses of rich families, cooking their food and polishing their silver, washing

33. In the novel, Ruth, years later after her secret is revealed, is once more thrown together with Bellingham (his name has changed for some reason that the author never tells us). He claims he still loves her and is even willing to marry her and provide for their child, but Ruth rejects him, partly out of a sense that their relationship had been too deeply drenched in sin. When he falls dangerously ill once more—Victorian characters are prone to sudden illnesses at crucial points in the novels—she nurses him. It leads to her death. After she dies, Bellingham offers to provide money for Leonard, his son (and Ruth’s). But Benson rejects the idea; Leonard is already provided for, and Benson thanks God that Bellingham has “no right, legal or otherwise, over the child.” GASKELL, *supra* note 15, at 302. It is a final irony in the novel: Leonard’s status as a no-name child will enable him to spend his life with people who love him and avoid any contact with his biological father.

34. Samantha Williams, ‘A Good Character for Virtue, Sobriety, and Honesty’: *Unmarried Mothers’ Petitions to the London Foundling Hospital and the Rhetoric of Need in the Early Nineteenth Century*, in *ILLEGITIMACY IN BRITAIN, 1700–1920*, at 86–87 (Alysa Levene, Samantha Williams & Thomas Nutt eds., 2005).

35. *Id.* at 91.

their clothes, combing their hair, sewing their clothes, toiling away for long hours for pitifully small pay—mostly ignored and invisible to their betters. The Old Bailey records tell us virtually nothing about the fathers of the no-name babies these women were accused of killing. Most likely, they were poor themselves. Perhaps they too were domestic servants, footmen, or grooms, or workmen—members of that horde of the laboring poor of London. Men, most probably, who either could not, or would not, take responsibility for their children.

For the young women in domestic service, pregnancy was an utter disaster. They had committed an unforgivable sin. They violated the rigid code that their employers adhered to (or claimed to). Pregnancy almost certainly meant loss of their job. Even worse, it meant forfeiting the right to a decent reference, which meant no chance to get a position somewhere else. What comfortable middle- or upper-class household would take in a woman with a no-name baby, and if they did, who would care for the child? If the mother had no family able and willing to accept her, she faced economic disaster, starvation, or a life on the brutal streets of London. Only a few could find refuge with the Magdalens; only a few could deliver their baby to the Foundling Hospital. For most, there seemed to be no way out. No way except a desperate act of secret violence.

The women in the Old Bailey records were victims of circumstance. But they were also victims of a clash of cultures. They lived narrow, pinched lives in the downstairs world of domestic servants. They were utterly dependent on the goodwill of their employers, the “gentlefolks” they worked for—dependent, too, on the norms and rules of that class. They were suspended in social space between these two worlds. Only rarely was it possible for them to cross the border between the two worlds. Of course, crossing the border was not a rare event for upper-class men. They crossed the lines on a regular basis—for sex. There was a thriving sexual underworld. But so long as visiting this underworld was only a “fling,” or “wild oats,” or a discreet visit to the better class of prostitutes, it probably escaped strong disapproval—for men. The rules of the game were well understood. To be sure, once in a while, some rich, well-born man actually married a woman from the downstairs world; once in a while a rich, well-born woman eloped with a footman or a groom. Such marriages were perfectly legal. But they scandalized polite society.³⁶ More common, of course, were well-born men who kept mistresses or who had long-term relationships with women who were lower down on the social scale.³⁷

36. WATT, *supra* note 16, at 59–64. In *Lady Audley's Secret*, Mary Elizabeth Braddon's sensational novel—and a runaway bestseller—Lady Audley was a woman from a lower-class background, who married (or purported to marry) into the aristocracy, and who ultimately committed such crimes as bigamy and murder. MARY E. BRADDON, *LADY AUDLEY'S SECRET* (Virago Press Ltd. 1985) (1862).

37. GINGER S. FROST, *LIVING IN SIN: COHABITING AS HUSBAND AND WIFE IN NINETEENTH-CENTURY ENGLAND* (2008).

Despite powerful norms, structures, and traditions, the world was rapidly changing during the nineteenth century. The old order faced crisis conditions: the market economy, the Industrial Revolution, and the rapid increase in technology. These forces—like the cataclysm that killed off the dinosaurs—weakened the rule of the landed gentry and loosened the grip of the aristocracy on power and prestige. New money pushed its way to the forefront, and competed with the “good families,” the “old families.” New money contested the dominant role of “breeding” and “heritage,” and blurred the sharp distinction between “gentlemen” and “ladies” on the one hand, and everybody else on the other. Money earned in “trade” was considered inferior, socially speaking, to money and position based on land and family. But there was no denying the universal power of money. Some old families saddled with debt, some heirs who had gambled away or mismanaged their fortunes, found themselves forced to bow down to the sovereignty of cash. Sons without prospects, and unmarried daughters, angled to ally themselves in marriage with the nouveau riche.

The struggle for money is another dominant theme of Victorian literature. Nowhere is this portrayed with more power than in Anthony Trollope’s great novel, *The Way We Live Now*.³⁸ A major figure in this novel is August Melmotte. Crude, bloated, but reputed to be enormously rich, Melmotte came out of nowhere; he had no family background, and he lacked the polished manners of a gentleman. But his reputation for great wealth, and his lavish lifestyle, allowed him to climb the social ladder; it got him a seat in Parliament and won him the company of high-born members of the decaying aristocracy. His only child, a daughter, was actually a no-name child, but since people believed she would inherit a limitless fortune, she attracted suitors like moths to a flame.³⁹ Melmotte’s fortune, such as it was, rested on fraud, chicanery, and ultimately forgery; when the house of cards collapsed, he had no way out except to swallow poison.

August Melmotte represented the end of an era, the collapse of a society; he was an extreme, hyperbolic figure. His career was a threat to the values of the old order, but those values seemed to be rapidly decaying on their own. Fallen women and their no-name children were another (perceived) danger to social order. They threatened the moral basis of English society and, in a sense, its legal basis as well. Melmotte’s daughter, a no-name child, represented money, and that justified everything in the end. Still, for a member of polite society to cross class lines—to marry

38. ANTHONY TROLLOPE, *THE WAY WE LIVE NOW* (Alfred A. Knopf ed., 1950) (1875).

39. In this, there is an interesting parallel to *John Caldigate*. Paul Montague, one of the few decent characters in *The Way We Live Now*, ends up winning the hand of Henrietta Carbury, daughter of Lady Carbury, one of the main figures in the novel. But Paul had had an affair with an American woman, and it is only when that affair is broken off that he is free to marry Henrietta. See generally, TROLLOPE, *supra* note 38. As in *John Caldigate*, Paul’s sexual history does not impair him in the marriage market, nor does it prevent him from playing the role of a hero in the novel.

across class lines—was, in the first place, scandalous, and it was also an act of defiance to convention. A mere affair across class lines, on the other hand, was less threatening or not threatening at all—if it was discreet and clandestine, and so long as the sinner was an upper-class male. Sin could be tolerated, so long as nobody tried to legitimate or justify it, so long as the blame and the consequences landed heavily on the woman, and so long as her no-name children had no rights.

In many ways, two separate codes of law dealt with illegitimate children. In most cases, mother and father were both working-class people: farmers, servants, or factory laborers. Their no-name children, whether in the city or in the country, did not pose a social problem of the sort that arose in *Ruth*, *John Caldigate*, or *No Name*. Nor, perhaps, were the mothers as desperate as the domestic servants who killed their newborn babies. In local communities, a more mundane issue was key: who would pay for the upkeep of these children? The burden might fall on the community itself, on the local rate-payers—unless, that is, money could be squeezed from the father, perhaps in bastardy proceedings. This issue led to hefty debate in the nineteenth century. The *Poor Law Report of 1834* demanded reform in bastardy proceedings. It spoke in harsh and unyielding tones. It was also deeply misogynist; the “female in these cases,” it asserted, was “generally the party most to blame.”⁴⁰ But blame or no blame, a pregnant and unmarried woman could go before a magistrate and try to fix responsibility on the man who impregnated her.

We can thus distinguish three types of situations where children were born out of wedlock. Most of the time, this was the world of the poor laws and bastardy proceedings. But if class lines were crossed, polite society shunned the woman; she risked economic disaster, the children were no-name children, and the father, for the most part, escaped scot-free. There was also a third situation: both father and mother came from respectable society. After all, illicit sex occurred at every level of society.

A respectable woman of the middle-class or above was supposed to guard her virginity like a precious jewel until the night of her honeymoon. She was also supposed to remain virtuous and faithful to her husband ever after. Obviously, these rules could be broken, and often enough they *were* broken. A woman from a good family, engaged to be married, might be tempted to sacrifice her chastity. Alas, virginity once lost is lost forever. If the man broke off the engagement, or worse, if he ran off or married another woman, his jilted fiancée now found herself in trouble. She had been “ruined.” Worst of all, she may have gotten pregnant and given birth to a no-name child. She did have one form of legal recourse: she could bring an action for breach of promise of marriage. The theory was simple: an engagement was a contract, an exchange of promises, as much a binding agreement as a contract for the sale of a horse. If one partner broke the contract, the other partner had the right to sue for

40. Cox, *supra* note 2, at 148 (citation omitted) (citing THE POOR LAW REPORT OF 1834 (S.G. Checkland & E.O.A. Checkland eds. Penguin Books 1974)).

damages, just as if a seller never delivered a promised horse, or a buyer failed to come up with the purchase money.

Breach of promise was, in principle, unisex. A jilted man had the same rights as a jilted woman. But, in practice, only women sued for breach of promise; cases brought by men were vanishingly rare. One study found that women brought 97% of the cases; the handful of men who sued usually lost their cases.⁴¹ In principle, too, breach of promise was available to litigants at any level of society. But the defendants in reported cases were mostly men of some substance. There were quite a few reported cases, and in many of them, plaintiffs and defendants were more or less middle class and more or less equal in rank. But it is dangerous to rely on reported cases; they are appeals cases, and they may not reflect what happened at the trial court level. In general, to bring a lawsuit of this kind was a drastic step to take. It meant airing dirty laundry in public. A woman who sued for breach of promise was admitting that she broke the rules: She had had sex outside of marriage. Many times, too, she had given birth to a no-name baby.

Did working-class women ever sue working-class men for breach of promise? At the trial court level, apparently, there were a fair number of cases.⁴² Perhaps middle-class morality was percolating downwards. To be sure, a jilted woman had a genuine grievance. A long engagement that ended without a wedding took her off the marriage market, perhaps during her most promising years. Whatever her social position, she suffered much more than the man. She could hurt a man's ego if she backed out of an engagement, but sexual intercourse did not "ruin" a man as it did a woman. The jilted woman, who had slept with her fiancé, was now used goods. A no-name child made her situation even worse. Breach of promise was, at best, a flawed solution to the problem. The law offered a chance at some money, but it could not repair the underlying damage.

Juries in the nineteenth century were sometimes quite sympathetic to the woman-plaintiff. Sometimes, they awarded hefty damages for breach of promise. Lawyers and jurists, however, were of two minds on the subject. Two images conflicted: in one, the woman was clearly a victim, naïve perhaps, perhaps innocent and vulnerable. A man had seduced her, tricked her, then walked away from his moral duty, leaving her to suffer the consequences. In one English case in the 1870s, a young German immigrant, Maria Bessela, worked in a hotel in Liverpool.⁴³ Her employer's son (she claimed) promised to marry her; she lived with him, got preg-

41. Ginger S. Frost, 'I Shall Not Sit Down and Crie': Women, Class and Breach of Promise of Marriage Plaintiffs in England, 1850–1900, 6 *GENDER & HIST.* 224, 225 (1994). Another study, of over 300 English cases in the nineteenth century, found a slightly higher percentage of male plaintiffs (8%); though 80% of the women won their lawsuit, less than a third of the men did. Susie L. Steinbach, *Promises, Promises: Not Marrying in England 1780–1920*, at 210–14 (May 1996) (Ph.D. dissertation, Yale University).

42. See Frost, *supra* note 41, at 227–28.

43. *Bessela v. Stern* [1877] 2 CPD 265 at 265 (appeal taken from Q.C.). The main issue was whether there any corroborating evidence to support the woman's claim. A jury awarded her damages; the Court of Common Pleas held against her, but on appeal, the

nant, and had a child. A jury awarded her £100 for breach of promise. If Maria was telling the truth, she was a woman whose man, who ranked higher than she did on the social scale, had done her wrong, had cheated and lied to her. But there was a powerful counterimage: the shameless and cunning woman, the gold digger, the woman who was herself a predator, and who used the law as a form of blackmail. Henry Bellingham's mother painted a similar picture of poor Ruth, that of a depraved and immoral creature who lured men to their doom. Throughout the century, the image of the gold digger, the seductress, the blackmailer, tainted the image of suits for breach of promise.

Class differences between a plaintiff and defendant strengthened the gold-digger image. The cases almost never involved a rich woman suing a poor man. In the usual situation, the woman plaintiff was relatively poor, and the male defendant relatively prominent or rich. In these cases, the hint or suspicion of blackmail or gold-digging was apt to hang like a cloud over the case. In breach of promise litigation, the double standard of Victorian law was often reflected. If both plaintiff and defendant were class equals, an action for breach of promise could seem both fair and appropriate. But if there was a significant class difference, elite men looked like victims; if the "promise" crossed class lines, elite men seemed under threat. These cases severely damaged the image of breach of promise, led to the odor of disrepute, and ultimately destroyed the action of breach of promise.

Victorian literature, beginning as early as the 1830s, at times treated breach of promise as a joke, at times as a miscarriage of justice. Charles Dickens, in the *Pickwick Papers* (1836), ridiculed the action. In Gilbert and Sullivan's wildly popular operetta, *Trial by Jury* (1875), breach of promise is the butt of the humor. At the end of the operetta, the judge himself jumps off the bench and claims the plaintiff, Angelina, for his bride.

For Parliament, however, breach of promise was no laughing matter. In 1879, a member from Durham, Farrer Herschell (later a Lord Chancellor), moved to abolish the action altogether, except where the plaintiff could show "actual pecuniary loss."⁴⁴ He did not propose such legislation (he said) in a "spirit of levity," perhaps thinking of *Trial by Jury*.⁴⁵ Breach of promise was "evil in its tendency," and "mischievous in its result."⁴⁶ It was "scandalously abused" and "struck its roots deeper into the social system . . . than might at first sight appear."⁴⁷ When Herschell spoke of harm to the "social system," he was clearly thinking of actions that crossed class lines. He specifically mentioned a lawsuit "brought

case was reversed, and judgment for plaintiff was entered. *Id.*; see also FROST, *supra* note 37, at 154.

44. HC Deb (6 May 1879) (245) col. 1867 (Eng.).

45. *Id.*

46. *Id.*

47. *Id.*

against a clergyman of the age of 65.”⁴⁸ The plaintiff, aged 35, was an “abandoned woman who had been convicted of theft”; she had threatened other men with breach of promise.⁴⁹ Also in the House of Commons, Sir Eardley Wilmot defended breach of promise. It was, he said, a valuable tool for “[y]oung ladies in the higher class of life.”⁵⁰ These “young ladies” were severely disadvantaged “during the period of their engagement”; an engaged woman “was a wallflower—she could not waltz, she was kept very much to herself,” and she suffered greatly if the engagement was broken off.⁵¹ The action could be “beneficial” because of its “deterrent” effect on men who might “otherwise, from mere wantonness, trifle with the affections of women.”⁵² The debate turned, in other words, on the class analysis of breach of promise. Herschell’s motion eventually carried.⁵³ The stronger argument, in other words, was the argument that elite men needed protection, against grasping and predatory women from the lower orders of society.

III. GETTING A NAME

Even in the high days of Victorian morality, there was, as we saw, a certain amount of sympathy for sinful mothers, and even more for innocent no-name children.⁵⁴ And, as we mentioned, the system was always more complex than the formal rules would suggest. There was a sharp distinction between situations that crossed class lines and those that did not. The law of breach of promise, at least implicitly, made this distinction as well.

Rules that applied to “gentlefolk” rested on two pillars: first, a code of morality, and second, a class system. Historically, the landed gentry enjoyed what amounted to a monopoly over wealth and power in England. Both pillars showed signs of decay over the course of the nineteenth century. Eventually they crumbled into dust. Victorian morality is now ancient history. Today, virginity is not what it used to be. Sex before marriage, for women as well as men, no longer scandalizes anyone. For respectable women, sexuality does not have to begin abruptly as a ritual on the honeymoon night. High death taxes, the welfare state, and universal suffrage have all altered the class structure and the culture it rested on. There is still gross social inequality, but the landed gentry are no longer solely in charge. Tourists, for a fee, visit great houses where dukes used to live; the armies of servants that kept these houses going, and the

48. *Id.* at col. 1868.

49. *Id.*

50. *Id.* at col. 1876.

51. *Id.*

52. *Id.*

53. *Id.* at col. 1887.

54. Marriage rules in English law contributed to the no-name problem; if a man married the sister of his dead wife, that marriage was void and the children were illegitimate. Some couples in this situation were perhaps unaware of the pitfalls of marriage and legitimacy law. See FROST, *supra* note 37, at 23–24.

vast fortunes that sustained these houses, have mostly vanished with the wind.

It is no surprise then that no-name children are no more. Children born out of wedlock have rights; they have a name and a place in society. This was a gradual process. They became, first of all, children of their mothers. In a sense, this was always the case for working-class children. The law gave all children the right to inherit from their mothers, if there was anything to inherit (usually there was not). Working-class fathers had long been obliged to support their no-name children—so long as you could find and name the father. They could inherit, too, from a father who acknowledged them. In 1969, the Family Law Reform Act gave illegitimate children the same rights of inheritance as children that were “born legitimate.”⁵⁵ Generally speaking, today, it makes less and less difference to a child, in terms of rights and duties, whether its parents were married or not.

A. NO NAME IN AMERICA

The focus thus far has been on no-name children in Victorian England. How different was the situation in the United States? There were no-name children in the United States as well. This was especially true in the American South during slavery. The law was crystal clear: children of a slave mother were themselves slaves from birth. It made no difference if the father was a slave or free. Slave women, of course, were in no position to resist sexual demands from white men, including their owners. As a result, there were, in fact, thousands of no-name children on southern plantations. As Mary Chesnut wrote in her Civil War diary, southern men “live all in one house with their wives and their concubines, and the mulattoes one sees in every family” look suspiciously like the white children in the big house.⁵⁶ Slaveholding fathers usually ignored these children. There were occasional exceptions; fathers who recognized their sons and daughters, loved them, freed them, and treated them as if they were legitimate. In the 1830s, a slave owner in Tennessee, Isaac Rawlings, had a son, William, by a slave woman; Isaac set William free, raised him, and in his will named him his heir and executor of his estate when he died.⁵⁷ But this did not happen very often. White fathers produced no-name children who picked cotton, cooked, and sewed in the master’s house and were bought and sold as slaves. Thomas Jefferson had a long-term relationship with a slave woman, Sarah (Sally) Hemings, and several children were born from this union. Sally Hemings was herself a mixed-race child. Her mother was the daughter of Jefferson’s own father-in-law. Jefferson never

55. Family Law Reform Act 1969 c. 46, § 14, (Eng.). Under Section 14(2), the parents of the child, if the child dies intestate, are “entitled to take any interest . . . to which that parent would have been entitled if the child had been born legitimate.” *Id.* § 14(2).

56. MARY CHESNUT, MARY CHESNUT’S CIVIL WAR 29 (C. Vann. Woodward ed., 1981).

57. See BERNIE D. JONES, FATHERS OF CONSCIENCE: MIXED RACE INHERITANCE IN THE ANTEBELLUM SOUTH 28 (2009).

openly acknowledged his slave children, but he did give them special treatment; he emancipated two of them during his lifetime (they were light-skinned enough to “disappear” into the “white world”), and he arranged in his will to set two others free.⁵⁸

Outside of the slave-holding south, what was the situation? Stigma is not easy to measure. Perhaps it was less of a disgrace to have a no-name child in the United States compared to England. It may have been easier for a woman to move from one place to another and pass herself off as a widow. There are no databases comparable to the Old Bailey records, so we have less information about the way judges and juries treated women accused of killing their newborn children. Fragmentary evidence, mostly from newspapers, does suggest that these women, on the whole, were not treated harshly; their fate was more or less parallel to the fate of women in Victorian England.⁵⁹

In Nathaniel Hawthorne’s novel, *The Scarlet Letter*, Hester Prynne is the mother of a no-name child.⁶⁰ The consciousness of sin weighs heavily upon her; the community condemns her, and she is forced to wear the scarlet letter, advertising for all time her disgrace.⁶¹ Hawthorne deliberately placed his novel in the distant colonial past. There were no scarlet letters in nineteenth-century society. No-name children were indeed a social problem but not so much as a symbol of sin, rather as a financial issue: who would pay for them? Unless a father could be found and ordered to pay, the burden would fall on taxpayers in the local community.

Respectable women, middle-class women, did not face the poorhouse and local bastardy proceedings. As in England, breach of promise was open to these women. As in England, too, this was a controversial cause of action. On the one hand, juries could be quite generous with damage awards. And some judges were sympathetic: a man who “ruined” a good woman deserved punishment; courts were not “disposed to make smooth the path of a seducer.”⁶² On the other hand, one heard the usual arguments on the other side: breach of promise was an open door to blackmailers and gold diggers. These arguments—and, more fundamentally, perhaps, the sexual revolution—ultimately won out. In an age that did not treat “love children” as pariahs, in which loss of virginity came to mean less and less, and in which couples lived together without bothering

58. On the relationship between Jefferson and Sally Hemings, ANNETTE GORDON-REED, *THE HEMINGSSES OF MONTICELLO: AN AMERICAN FAMILY* (2008) is a comprehensive study. For the quote in the text, and Jefferson’s will, see *id.* at 648.

59. See LAWRENCE M. FRIEDMAN, *CRIME WITHOUT PUNISHMENT: ASPECTS OF THE HISTORY OF HOMICIDE* 60–87 (2018).

60. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Harper & Bros. Publishers 1950) (1850).

61. The scarlet letter was not an invention of Hawthorne’s; for example, under a New Hampshire statute of 1701, an adulteress was to wear “for ever . . . a Capitall Letter: A: of two inches long.” 1 *LAWS OF NEW HAMPSHIRE: PROVINCE PERIOD 676* (Albert Stillman Batchellor ed., 1904).

62. LAWRENCE M. FRIEDMAN, *GUARDING LIFE’S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY* 114 (2007).

to get married, “heart balm” lawsuits had no place. They were gradually abolished. By 2000, breach of promise was gone except for a few fossilized remains.⁶³

American society, outside of the South, had no equivalent of the English landed gentry. Most people were farmers or shopkeepers, smallholders, ordinary folks. There were few large landowners other than the government. Large land grants existed, but the buyers were wholesalers whose goal was to sell off the land in retail chunks. A large middle-class mass owned property in America. Hence, inheritance rules affected vastly more people than in England. In the United States, too, no-name children did not inherit. Fathers could leave land or money to these children by will, but the children had no intestate rights (and most people died without a will). One rather peculiar American institution, the common law marriage, did save some children from no-name status. Under this doctrine, if a man and a woman simply *agreed* to be husband and wife, they were validly married, legally married, legitimately married. No license was required, no witnesses, no document, no minister or priest, no judge, no ceremony at all. A couple could “marry” in total secrecy, leaving no record or evidence behind. This was, essentially, a legal fiction. Whether any couple ever said the magic words is dubious. In fairness, record-keeping in the nineteenth century was often quite poor. Moreover, this was a restless country; people tended to move about. It would be hard to prove that a couple who moved from Vermont to Ohio, where they lived and died, had actually gotten married in Vermont.

In practice, the doctrine meant this: a couple that lived together, and *acted* as if they were married, would be treated as if they were married in fact. The law would assume they had mumbled the verbal formula to each other. Their children, then, were legitimate. They could inherit the farm, the house, and whatever money was left behind. The doctrine reflected the reality of America’s land-tenure system: land ownership by a middle-class mass. In fact, a man and a woman might be simply living together, without any pretense of marriage. Or they may have thought, for whatever reason, that they were somehow legally married when, in reality, they were not. A doctrine of common law marriage might have saved the rights of the Vanstone daughters in *No Name*, but there was no such doctrine in England.⁶⁴

Not every state recognized common law marriages, and it was useful only in certain situations. It was no help to *most* no-name children. Most of these children did not come out of long-term, conventional relationships. Most were children of old-fashioned sin: fornication, affairs, flings, or downright adultery. But common-law marriage did reflect an attitude

63. JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 90–106 (2011).

64. There were, however, customary and ritual forms of marriage, mostly used by ordinary people. Lord Hardwicke’s Act 1753 attempted to regulate marriage and get rid of these irregular forms of marriage. See STEPHEN PARKER, *INFORMAL MARRIAGE, COHABITATION AND THE LAW 1750–1989*, at 29–30 (1990).

less judgmental, less harsh, than the standard Victorian attitude. And, just as in England, the rights of illegitimate children increased over time. Early in the nineteenth century, states began to give no-name children the right to inherit from their mothers.⁶⁵ By the end of the nineteenth century, this had become quite general. Bastardy proceedings, as in England, were ancient and familiar ways to make fathers pay. No-name children gained the right, too, to inherit from fathers who acknowledged them, or whose paternity was established in court.⁶⁶ The stigma of illegitimacy gradually declined. As an Illinois court put it in 1919, it was wrong to “visit the sins of the parents upon the unoffending off-spring”; to give these children rights was more “consonant with the finer sense of justice and right.”⁶⁷

In the late twentieth century, as in England, the “sins of the parents” were hardly sins anymore. The phrase “living in sin” has basically disappeared from the language. Victorian morals have been consigned, by and large, to the ashcan. Thousands—maybe millions—of couples live together without bothering to get married. What was once considered shameless, is now shameless in a different sense: behavior without shame. In most developed countries, illegitimate children enjoy rights that would have been unthinkable in the nineteenth century.⁶⁸ *Levy v. Louisiana*, a Supreme Court case, was a sign of changing times.⁶⁹ Louise Levy had five children, all of them illegitimate.⁷⁰ The children lived with her and she “treated them as a parent would,” she supported them by working as a “domestic servant,” she took them to church on Sunday, and she enrolled them in a local parochial school.⁷¹ After she died, the children brought a wrongful death action. The courts in Louisiana turned down their claim. Apparently, Louisiana law gave illegitimate children no right to inherit and no right to bring a claim for wrongful death. The Supreme Court reversed; Justice Douglas, writing for the majority, declared the Louisiana law unconstitutional. The children were Louise’s “in the biological and in the spiritual sense; in her death they suffered wrong in the sense

65. For example, under Tennessee law in 1819, if a woman died intestate, “leaving natural born . . . children, and no legitimate . . . children, such natural born child or children shall take . . . the estate real and personal of . . . their mother.” 1819 Tenn. Pub. Acts ch. 13; *see also* 1825 Md. Laws ch. 46.

66. 1850 Cal. Stat. ch. 96 (describing that when a father acknowledges an illegitimate child as his own, the child can inherit in cases of intestacy); 1850 Cal. Stat. ch. 385 (describing how a child may become legitimate through a father’s acknowledgement).

67. *Morrow v. Morrow*, 124 N.E. 386, 387 (Ill. 1919).

68. *See, for example, Marckx v. Belgium*, a decision of the European Court of Human Rights, in which the Court struck down a strikingly retrograde law of Belgium which operated to the disadvantage of the rights of illegitimate children, even with regard to their legal relationship to their mothers. App. No. 6833/74 Eur. H.R. Rep. 330 (1979).

69. *See Levy v. Louisiana*, 391 U.S. 68 (1968). In a companion case, *Glonn v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73, 76 (1968), the plaintiff was a mother, suing for the wrongful death of her illegitimate son; as in *Levy*, the Supreme Court struck down the Louisiana law which did not allow such a claim.

70. *Levy*, 391 U.S. at 70.

71. *Id.*

that any dependent would.”⁷² The rights and duties of fathers were not at issue in the case. Still, the court’s attitude was clear: illegitimate children were no longer social pariahs.

B. ADOPTION

In common law systems, there was no such thing as the formal adoption of children, unlike civil law systems with their roots in Roman law. To inherit land, or a title of nobility, nothing counted except a blood relationship. Formal adoption did not enter English law until 1926.⁷³ American law acted much sooner. This was probably because of the American social structure, and, in particular, the American land tenure system. There was no equivalent to the landed gentry of England in the United States. Millions of families owned at least a small piece of land. Formal inheritance law, consequently, affected countless families and not just a small elite. Moreover, orphans were common: women died frequently in childbirth, and both men and women fell victim to plagues and epidemics. If a family took in an orphan, for whatever reason, and raised the child as their own, this child was, in a sense, a no-name child; it had no rights to inherit. Property could be left to this child by will, of course, but most people died intestate. Common law marriage was no help for these orphans. Yet common law history provided no path to formal adoption.

Nonetheless, dotted among the “private laws” passed by state legislatures, were laws that amounted to ad hoc adoption laws. For example, a private law in Alabama in 1846 changed the name of Mary Melinda Emily Eliza Osborn to Mary Melinda Emily Eliza Horton; it also “constituted” her the “legal heir and representative of Hugh W. Horton, of the county of Macon,” with the same rights as if she had been a “natural heir.”⁷⁴ It is hard to tell from statutes of this type exactly who children like Mary Melinda were. Many, no doubt, were orphans taken in and raised by relatives or neighbors. But some, no doubt, were illegitimate. A private law could give them a basic form of legitimacy. A Mississippi law, also of 1846, went further: it granted local courts the power to change names and, on request, to legitimate a person’s “offspring, not born in wedlock.”⁷⁵ “Offspring” of this type would have the right to inherit. Massachusetts, in 1851, took the next step: it passed a general adoption statute.⁷⁶ Under this law, there was no need to go to the legislature: adoptive parents could file a petition in court; if the court granted the petition, the child became formally and legally part of the adoptive family. By 1900, every state had a general adoption law on its books. Almost all of these statutes gave an adopted child the right to inherit.

72. *Id.*

73. STEPHEN CRETNEY, *FAMILY LAW IN THE TWENTIETH CENTURY: A HISTORY* 596 (2003) (on English law).

74. 1846 Ala. Laws 202 (Act No. 274).

75. 1846 Miss. Laws 231.

76. 1851 Mass. Acts 815–16.

In the nineteenth century, some adopted children were orphans and some were no-name children. Later, patterns of supply and demand began to change. Fewer women died in childbirth; fewer fathers were carried off by plague. The supply of orphans decreased. Some children were adopted by step-parents. More and more, adopted children were no-name children, born out of wedlock, given up by their parents, and eagerly taken up by childless couples.⁷⁷ Although the scarlet letter was a historic relic, there were still unwanted babies—children of young, single, unmarried mothers. To some of these mothers, no-name children could be a burden. Norms and morals were changing, but no-name babies could still be a misfortune, a drain on resources, and a well-spring of scandal, shame, or embarrassment. The scandal and shame, however, meant little or nothing for the most part to adoptive parents: what they wanted were children to raise and love and treat as their own. The formal decree of adoption wiped out any sense of scandal and shame.

But, often enough, this scandal and shame still clouded the birth parents and the birth of their no-name children. For this reason, adoption law and practice shrouded the whole process in the darkest secrecy. Indeed, some children grew up never knowing the story of their birth. Most children probably knew the *fact* of their adoption, but nothing at all about their birth parents: who they were, where they lived, why they gave away their child. Under an Illinois law of the 1930s, the adoptive mother and father had the right to a “clean” birth certificate, listing them and only them as parents.⁷⁸ The certificate would say nothing about adoption, or illegitimacy. This too proved to be a passing phase. Today, to a great extent, the facts of adoption are no longer hidden behind a curtain of secrecy. Adopted children have gained in many ways the right to know where they came from. And the stigma of no-name birth is clearly in terminal decline.

IV. A CONCLUDING WORD

When we look back at Victorian England, it seems almost like a foreign country, so different from the England of today, and indeed, so different from modern society in general. This is blindingly true in matters of sexual mores and attitudes, and in the economic and social structure of society. This essay has tried to show how these factors interacted in the Victorian period and how they related to each other on the eve of their radical transformation with regard to no-name children.

Poor Ruth, in Mrs. Gaskell’s novel, was a social pariah, or became one, once the world learned about her secret. Her son, too, shared in her shame and isolation. The Bensons, kind and loving people, sheltered the two of them, but they could not, in the end, protect Ruth and her son from the devastating consequences of their “sin.” Nothing, it seemed,

77. Chris Guthrie & Joanna L. Grossman, *Adoption in the Progressive Era: Preserving, Creating, and Re-Creating Families*, 43 AM. J. LEGAL HIST. 235, 236, 245 (1999).

78. See 1931 Ill. Laws 734; 1937 Ill. Laws 1006.

could wipe out the scandal of birth. Today, both in England and the United States, all this seems grossly unfair—cruel and pointless: attitudes almost as obsolete as the belief in a flat earth. Why should innocent children suffer, even if the parents did something wrong?

The suffering—the stigma, the shame, the degradation—makes sense only if we treat no-name children as collateral damage in the struggle to maintain and strengthen the English class structure. Boundaries between the classes were meant to be rigid and impenetrable. English law created and reinforced what amounted to something like a gated community, socially and economically, in which the upper class, especially the landed gentry, lived their lives. Lower-class women, and no-name children, were not allowed to enter this gated community.

The outer skin of the law, as usual, was smooth and glossy, but also deceptive. Formal law is almost never the whole story. The real sin of no-name children was not their birth, but their threat to the rights and privileges of elite men. These men enjoyed a kind of right to “nonmarital sexuality”; the right to live “parallel lives that never intersected with their lives as respectable family men.”⁷⁹ Middle-class women, on the other hand, had no right to “sexual behavior . . . outside courtship and marriage.”⁸⁰ This quote is from a study of Philadelphia in the eighteenth and early nineteenth centuries, but it fits Victorian England like a glove. Traffic through the gates of the elite world was one-way traffic. Men could pass through to sow their “wild oats.” Women had no such privilege. Yet stern rules and rigid norms were bent in practice, in the direction of a certain sympathy for no-name children—and even their mothers.

Below the elite world, the situation was quite different. Non-marital sex was still widely condemned as sin, though not by everybody, and stigma and shame were not necessarily imprinted on the skin of those who broke the rules. Many women did pay a high price—as did their children. The price could be a life of misery, of suffering, high infant mortality, the workhouse, grinding poverty, and the brutal streets of the cities. Fathers often got away with their sins or paid a price through the laws of bastardy. No-name children started life with two strikes against them. Their position was particularly fraught if their parents had crossed the lines of class.

Nineteenth-century society was fluid, changeable, and in a state of commotion. As time went on, economic change and two revolutions—technological and sexual—undermined the moral and structural pillars of Victorian society. In contemporary time, all this has ended the age of no-name children. These children now have a proper name.

79. CLARE A. LYONS, *SEX AMONG THE RABBLE: AN INTIMATE HISTORY OF GENDER & POWER IN THE AGE OF REVOLUTION, 1730–1830*, at 391 (2006).

80. *Id.* at 244.