


# INSIDE THE CASTLE

Law and the Family in 20th Century America



JOANNA L. GROSSMAN  
AND  
LAWRENCE M. FRIEDMAN

# Inside the Castle

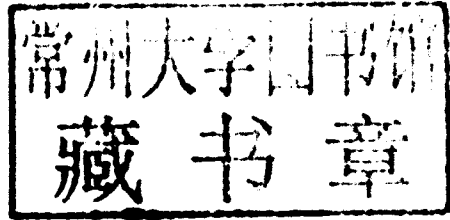
LAW AND THE FAMILY IN 20<sup>TH</sup>  
CENTURY AMERICA

✱

JOANNA L. GROSSMAN

AND

LAWRENCE M. FRIEDMAN



PRINCETON UNIVERSITY PRESS

PRINCETON AND OXFORD

Copyright © 2011 by Princeton University Press  
Published by Princeton University Press, 41 William Street,  
Princeton, New Jersey 08540

In the United Kingdom: Princeton University Press,  
6 Oxford Street, Woodstock, Oxfordshire OX20 1TW

press.princeton.edu

All Rights Reserved

Grossman, Joanna L.

Inside the castle : law and the family in 20th century America / Joanna L. Grossman  
and Lawrence M. Friedman.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-691-14982-0 (hardcover : alk. paper) 1. Domestic relations—  
United States—History—20th century. 2. Marriage law—United States—History—  
20th century. 3. Parent and child (Law)—United States—History—20th century.  
4. Children—Legal status, laws, etc.—United States—History—20th century.  
5. United States—Social conditions—20th century. I. Friedman, Lawrence Meir, 1930– II.

Title.

KF505.G77 2011

346.7301'5—dc22

2011002661

British Library Cataloging-in-Publication Data is available

This book has been composed in Palatino

Printed on acid-free paper. ∞

Printed in the United States of America

1 3 5 7 9 8 6 4 2

## Inside the Castle

✱

*FOR GRANT, LUKE, BEN, AND MILO*

—J.L.G.

*FOR LEAH, MY SISTER, IRENE,  
AND ALL MY LINEAL DESCENDANTS*

—L.M.F.

✱

## \* *Acknowledgments* \*

THIS BOOK is the culmination of a longstanding shared interest in family law and a wonderful friendship. We are grateful for this opportunity to collaborate with one another in exploring such a dynamic and important field. We are also grateful for the support from friends, colleagues, and family members, especially Maxine Eichner, Mary Grossman, and Grant Hayden, who read the entire manuscript and provided helpful comments. We appreciate the very useful critiques and suggestions of two anonymous reviewers and the enthusiastic support of our editor, Chuck Myers. At Hofstra, Dean Nora Demleitner has supported this project through generous summer grants and course relief. Joanna's friend and colleague, John DeWitt Gregory, funded the research scholarship that freed up valuable time she needed to finish this project. Patricia Kasting and other members of the Hofstra Law Library staff were cheerful, prompt, and resourceful in chasing down sources. A long line of research assistants provided superb help with research and footnotes, including Andrea Caruso, Ashley Lane, Sasha Minton, and Leah Saxtein, with special thanks due to Sarah Crabtree, Andrew Ford, and Bryn Ostrager, who devoted substantial time and effort to this project. At Stanford, thanks must go to the Dean, Larry Kramer; to Mary Tye and Stephanie Basso, who assisted in so many ways; to Andrew Shupanitz and David Oyer; and especially to the wonderful people at the Stanford Law Library, Paul Lomio, Erika Wayne, Sonia Moss, Sergio Stone, Kate Wilko, and George Wilson. Finally, we both thank our own loving families, who remind us every day that there is no place like home.

## Inside the Castle



## \* Contents \*

<i>Acknowledgments</i>	ix
INTRODUCTION	1
<i>PART ONE:</i>	
TYING THE KNOT: MARRIAGE AND PROMISES TO MARRY	
CHAPTER ONE	
Marriage and the State	27
CHAPTER TWO	
Marriage, Law, and Society: A Tangled Web	51
CHAPTER THREE	
Common-Law Marriage	78
CHAPTER FOUR	
The End of Heart Balm	90
<i>PART TWO:</i>	
ANYTHING GOES: LOVE AND ROMANCE IN A PERMISSIVE AGE	
CHAPTER FIVE	
The Rise of Sexual Freedom	109
CHAPTER SIX	
Cohabitation	121
CHAPTER SEVEN	
Same-Sex Relationships	142
<i>PART THREE:</i>	
WHEN THE MUSIC STOPS: DISSOLVING A MARRIAGE AND THE AFTERMATH	
CHAPTER EIGHT	
Untying the Knot: Divorce and Annulment	159
CHAPTER NINE	
Dollars and Sense: The Economic Consequences of Divorce	192



## CONTENTS

CHAPTER TEN	
Collateral Damage: The Children of Divorce	215
 <i>PART FOUR:</i>	
THE OLD AND THE NEW GENERATION	
CHAPTER ELEVEN	
The Extended Family: Elder Law and the Law of Inheritance	235
CHAPTER TWELVE	
Parents and Children: Rights and Duties	262
CHAPTER THIRTEEN	
Whom Do We Belong To? Parentage and the Law	286
CHAPTER FOURTEEN	
Chosen People: Adoption and the Law	305
 <i>Conclusion: Into the Void</i>	 330
<i>Notes</i>	333
<i>Index</i>	423

## \* Introduction \*

EVERYBODY, IN EVERY SOCIETY, is born into a family. Even a newborn baby, unwanted, abandoned as soon as it is born, perhaps wrapped in a filthy rag and left on a doorstep, will eventually wind up in somebody's family. A child without a family is likely to die. But there are families and there are families. They come in all shapes and sizes. There are loving families, unloving families, crazy families, saintly families, families made up of nothing but men or nothing but women, nuclear families and extended families, small families and large families. Even a person who lives alone has a family—somewhere; and can be defined as a family of one; or a fragment of a family. Human beings, like wolves or termites, are social animals, family animals. The family is the fundamental unit of society. Families are the molecules that together make up that huge compound we call a community, or a society. In this society, in this day and age, families still matter enormously—even though modern life has, in many ways, weakened the family and instead has placed enormous emphasis on the individual, the isolated, naked self. This emphasis is one of the themes of this book. This is because individualism has had such an overwhelming impact on families and family life. Nonetheless, the family remains a vital social institution. What we will try to show is how individuals and families interact, how the equations of family life shift and contort, and the role that law plays in these complex equations of family life.

Families are also *social* institutions. Family structure and family life are different from place to place, time to time, and culture to culture. In some societies, one man can have a flock of wives; in a few rare societies, a woman can have a flock of husbands. There are societies where the core of the family is a mother's brother, or a mother-in-law; where women have a lot to say or very little to say about marriage, sex, children, and family power; there are societies where blood relationship counts, no matter how far-fetched, where distant cousins have significance and assert claims on people's lives; while in other societies (like ours), even brothers and sisters often have nothing to do with each other once they leave the nest. The ways in which law and

the legal system impact the family—regulate it, affect it, mold it, challenge it, or perhaps even ignore it—are, naturally, as variable as the forms of families themselves.

This book is about family law in the United States in the twentieth century and the first decade of the twenty-first century. Or rather, it is about law and the family. “Family law” is the name lawyers give to a particular branch of the law—mostly about marriage, divorce, child custody, family property, adoption, and some related matters. This book deals with all these subjects; but it tries to consider other parts of the law that touch on the family in an important way: inheritance, for example; or the intersection between criminal law and family affairs—domestic violence and marital rape.<sup>1</sup>

We do not, however, claim to exhaust the subject. In some ways, it would be more accurate to say that this is a book about middle-class family law. There is another, vast field, which deals with poor families. This too is not usually classified as “family law” and is not covered in the usual treatises and articles. But it is a significant factor in American law, and has a huge literature of its own. Its history, among other things, is the tortured and depressing story of the way in which the state, in exchange for welfare payments, has claimed and exercised rights to meddle with the family lives—even the sex lives—of poor mothers and other women, in ways that would be legally and socially intolerable with regard to middle-class families. We will refer to this alternate system of family law from time to time, but we do not deal with it in much detail.

We have already mentioned our most basic assumption. Family law follows family life. That is, what happens to families, in this society, determines what happens to the law of the family. Law is not autonomous; it does not evolve according to some mysterious inner program; it grows and decays and shifts and fidgets in line with what is happening in the larger society. The relationship between law and society is tight, but it is not always transparent. This is, in part, because family life, in a big, bustling, diverse society, is a tangle of complexities; its essence (if it has one) is also not always immediate and transparent. No single formula, no lapidary sentence, describes the American family, as it was in 1900, as it was in 1950, as it is in 2011. When family life is intense, multiplex, and conflicted, then family law is bound to be

equally intense, multiplex, and conflicted. The story we want to tell is therefore quite complicated. But the main lines of development, we think, are reasonably clear.

## CENTURIES OF CHANGE

The twentieth century was a period of constant and dramatic change in society—it was a century that began with the invention of the automobile and the airplane and ended with the computer and the Internet. It began with the world divided, pretty much, among the great European empires; and it ended with a world in which tiny islands were sovereign nations, and the mighty empires had crumbled into dust. It was a century of genocide and war, a century of human rights, and a century of incredible technological development. The world, at the end, was bursting at the seams with people, as the population grew and people lived longer and longer. All of these developments made their mark on the law, and indeed in some ways all of them took place in and through law. The sheer volume of law, in all developed countries, grew even more rapidly than the sheer volume of people.

What happened to family law (in our expanded sense)? In part, the changes were continuations of trends that started in the nineteenth century; but in part they were completely new. Perhaps the single most important trend was the decline of the traditional family, the family as it was understood in the nineteenth century, the family of the Bible and conventional morality. The traditional family, in the twentieth century, came under greater and greater pressure; and, in some ways, it came apart at the seams.

"Traditional family" evokes a certain image. It is a picture of the family in a Norman Rockwell painting. Here is the cozy home; in it, a man and a woman, married and faithful to each other, sit at the head and foot of the table; he is the breadwinner, and the head of the family, ruggedly masculine, in charge, ruler of the roost, but a benign despot, firm but understanding, an object of respect and not of dread. She, on the other hand, inhabits a "separate sphere." She is the homemaker, the soft and delicate core of the family, neat and feminine, the loyal and trustworthy wife, obedient and helpful, darning the socks and baking the bread; the primary caregiver of the children; a warm and tender

presence, who teaches the children religion and ethical values, who instructs them to honor their father, and blankets them with the unique blessing of mother love. And the children too—the apple-cheeked boy and girl—are enveloped in sweetness and affection, as they grow up in the image of their parents. And, of course, the family is middle class and white.

This was always something of an ideal type—or perhaps always something of a myth. Most families never fit the description.<sup>2</sup> Poor and non-white families, in particular, never lived this idyllic life. Moreover, death and dissolution destroyed thousands of families in the nineteenth century. It was also a century of desertion, drunkenness, and orphanages. But the law respected and supported families that conformed to the central image, insofar as it could, and coerced or ignored the families that did not conform. Law gave the father the right to command. The wife and the children were supposed to obey. He had custody of the children, if it came to that. Divorce was appropriate only if he was a vicious brute, a philanderer, or simply abandoned the family. He controlled the family's money and its business affairs; a married woman, well into the nineteenth century, had no right to buy and sell property, could not own a farm, a house, a lot in the city; or execute a will. Her position in law was little better than that of a lunatic or a slave. Husband and wife, as Blackstone put it, were "one flesh." But it was his flesh, not hers. He was the manager and owner of the flesh.

Of course, nineteenth-century law was not static. Society was changing rapidly, and so was the law. Both formally and informally, law gradually changed to conform to what was happening to men and women and to family life. From about the middle of the nineteenth century, the states began to pass married women's property laws. These laws gave the wife the right to own property, to buy and sell, to earn money in her own name. The courts were sometimes hostile to these laws, and some courts parceled out rights to married women rather stingily, but in the end the changes took hold. The changes in the law of marital property did not result from a dramatic rights movement; it was not because men had their consciousnesses raised, but because of concrete economic and social needs and demands.

New developments in inheritance law, for the most part, improved the position of women—especially women who lived

longer than their husbands. In the common-law system, widows chiefly had to make do with the ancient right of dower. This gave her a lifetime share in some of her husband's land, but nothing much else. New laws gave the widow a fixed portion of the whole estate, and it was hers to do with as she pleased. Again, this was only in part (if at all) an act of generosity or social equity; but it helped ensure a more orderly disposition of land, by freeing estates from the threat of possible dower, which might act (in the law's apt metaphor) as a "cloud" on the title to land.

In the early nineteenth century, divorce was rare and cumbersome. In some states, mostly in the south, only the legislature could grant a divorce. The northern states instituted a system of judicial divorce: divorce as a regular courtroom procedure. The formal rules of divorce, in many states, danced back and forth between toughness and leniency; for most states, in the end, toughness won out. Divorce was not to be encouraged. That was the posture of the law. It was the view of most ethical elites. But the reality of divorce law soon made a mockery of the toughness. In the last third of the century, all sorts of ways to get around stringent divorce laws developed. Some states turned themselves into "divorce mills," where divorce was quicker and easier to get. Above all, there was collusive divorce: divorce as a lie, as a charade.

In theory, there was no such thing as an agreement to get a divorce. Husband and wife had no right to make any such agreement—no right to decide to call it quits. Divorce was a privilege granted to an innocent spouse—a woman, say, whose husband beat her, or deserted her, or committed adultery (in New York, only adultery would do). But in practice, most divorces in the late nineteenth century were in fact products of some sort of agreement—in other words, collusive. They were (legally speaking) frauds. They depended on lies told in court. Yet the legal system accepted them. The judges saw through the charade, but played dumb.

In custody disputes, the father lost ground between 1800 and 1900. Children no longer belonged, almost automatically, to the father, which was the original rule: as head of the family, he was also the natural guardian of children in case of separation or divorce. By the end of the century, a new rule prevailed: the child's

"best interests" were paramount. In practice, this usually meant (for young children at least) a mother's loving care.

So, at the dawn of the twentieth century, family law had already undergone tremendous changes. What did the twentieth century bring? A great deal more. A massive evolution. Dramatic change—more dramatic, perhaps, than anything in the nineteenth century. It is not easy to sum up these changes in a few crisp sentences. Many of them, however, like much of the development in the nineteenth century, led even further away from legal arrangements that mirrored, more or less, the Norman Rockwell picture of marriage and family life, toward more fluid, more complex, legal arrangements. One major development has already been mentioned: expansion and redefinition of the legal concept of the "family." Marriage lost its monopoly over legitimate sexual behavior. By the end of the century, there was no such thing, legally speaking, as a bastard; children born out of wedlock had more or less the same rights as children of married parents. This development was linked to another one, which would have startled the good citizens of Victorian America: cohabitation was not only legal, it was as common as dirt. Sexual freedom had gained both social and legal acceptance. Moreover, in some places, gay couples could be recognized as a kind of family.

A second development was the transfer of responsibility for family welfare, in many situations, from individuals or families, to the government: Social Security and Medicare are outstanding examples, and so are the laws concerning pensions and pension funds. The federal government also made its first forays into child welfare law in the twentieth century, with deep involvement in the law of child support, as well as issues of child abuse and neglect. Government programs have aimed at strengthening family life; but whether they did—or further weakened the family—is an interesting question. In any event, tax laws on the whole tended to favor families: homeowners, for example, got to deduct their mortgage payments from their income tax, and there was no estate tax on money left to a dead man's wife, or a dead woman's husband. In the twentieth century, the state took responsibility for educating children, at state expense. Children had to go to school, and parents had no right to say no. To be sure, there were disputes and arguments over home schooling, private schools, and the rights of small, discrete groups (like the Amish)

to control how their children were brought up and taught. But these were marginal. There were such programs as Head Start for good children; and juvenile courts for delinquents. The laws with regard to children became, in many regards, denser, more complex, and in a sense tighter than before; but at the same time, restraints on the family's grown-ups became looser and looser. No-fault divorce, cohabitation rights, and protection for non-marital children are clear examples of this second trend.

This book will describe some of these dramatic changes in family law. The question is, what brought them about? There is no point looking at the law itself for answers. The key lies in larger movements of the larger society: dramatic changes in relations between men and women, the particular mass culture of the late twentieth century, and the influence of the media, among other factors. The precise way in which these factors played themselves out in connection with the law is the subject of the book. Thus, the dependent variable (to use social science jargon) is the law that affected the family. Changes in family life itself act as the independent variable—the motor cause. Many of these changes in family life are obvious. For example, changes in sexual mores led very notably to changes in legal rules, on such subjects as cohabitation, unwed parenting, use of new reproductive technology, and same-sex marriages or civil unions. There evolved more ways of constituting a family, more ways of constituting “relationships,” than had been true in the past. And family law reflected all of these things going on in society.

A few of the obvious factors that had an impact on family life in the twentieth century are worth mentioning. There were, to begin with, technological changes—methods of contraception, the pill, in vitro fertilization. These made possible a wide variety of family forms that never existed before. Other technologies had more subtle, indirect effects on family life. The automobile made families more mobile, and helped the trend to leave the crowded streets of the city. The automobile has a lot of responsibility for that great innovation, the suburb; the suburb in turn encouraged families to live in the single-family house, the house that sits by itself in a puddle of flowers and grass, fenced off from its neighbors, and relatively private. Suburbia, and the general restlessness of Americans, also helped accelerate the flight away from the so-called extended family. In many or most families,



grandma and grandpa no longer tended to live with the kids, or even anywhere near them.

There were also demographic changes of a pretty fundamental nature. People lived longer—because of antibiotics, better nutrition and sanitation, and modern medicine in general. Longevity changed the dynamics of inheritance enormously. As John Langbein has pointed out, it is one thing to inherit money in your twenties or thirties; quite another to have to wait until your last parent dies at age ninety-five. Lifetime gifts—down payments on a house, college tuition—became critical forms of transfer of wealth within the family, more critical on the whole than the money that came from estates of the dead.<sup>3</sup> Longer life spans have also changed the dynamics of divorce. As Lawrence Stone observed, most marriages endure about as long today as they did one hundred years ago; divorce has become a “functional substitute for death.”<sup>4</sup>

Above all, there was the influence of money on families and family law. This was already a rich country, relatively speaking, in the nineteenth century. In the twentieth century, and especially in the last half of the century, it became an immensely rich country. The Great Depression was, as things turned out, an interruption in a long-term cycle of growth (at least we hope so); this book, however, was written during one of the deepest recessions (2008–2010) in memory. Still, over time, a bigger and bigger proportion of the public left the ranks of the poor and entered the house of the great middle class. Middle-class people, everywhere in the world, have fewer babies than poor people. They organize their families differently from poor people (or the very rich). They have some leisure (that is, extra time) in which to spend their money. They have separate rooms for each of the kids, and bathrooms with stall showers. Attitudes toward privacy—and toward nudity—change. These attitudes, in subtle ways, affect sexual behavior; and whatever affects sexual behavior impacts the family as well. They also accelerate the trend toward “expressive individualism”<sup>5</sup>—the radical individualism of our times—and this too has had a crucial impact on family life and family law.

All of these developments in society are linked to each other in chains of cause and effect. Technology produced wealth, wealth produced leisure, leisure encouraged consumption and