



ST. MARY'S
UNIVERSITY

Digital Commons at St. Mary's University

Faculty Articles

School of Law Faculty Scholarship

2013

Inside the Castle: Law and Family in 20th Century America, by Joanna L. Grossman and Lawrence M. Friedman (book review)

Michael S. Ariens

St. Mary's University School of Law, mariens@stmarytx.edu

Follow this and additional works at: <https://commons.stmarytx.edu/facarticles>



Part of the [Law Commons](#)

Recommended Citation

Michael S. Ariens, *Inside the Castle: Law and Family in 20th Century America*, by Joanna L. Grossman and Lawrence M. Friedman (book review), 60 *Fed. Law.* 83 (2013).

This Book Review is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons at St. Mary's University. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.



INSIDE THE CASTLE: LAW AND FAMILY IN 20TH CENTURY AMERICA

BY JOANNA L. GROSSMAN AND
LAWRENCE M. FRIEDMAN

Princeton University Press, Princeton, NJ, 2011. 443 pages, \$35.00.

Reviewed by Michael Ariens

Inside the Castle: Law and Family in 20th Century America, by Joanna L. Grossman and Lawrence M. Friedman, is an entertaining and occasionally frustrating history. In the book's introduction, the authors offer two big ideas. Their first idea promotes the instrumental explanation of law: "Family law follows family life. ... 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 authors adopt as well as ignore this idea as they survey what they accurately and insightfully call their study of "middle-class family law." They distinguish middle-class family law from the law dealing with poor families, the history of which studies "the way in which the state, in exchange for welfare payments, has claimed and exercised rights to meddle with the family lives—even sex lives—of poor mothers and other women. ..."

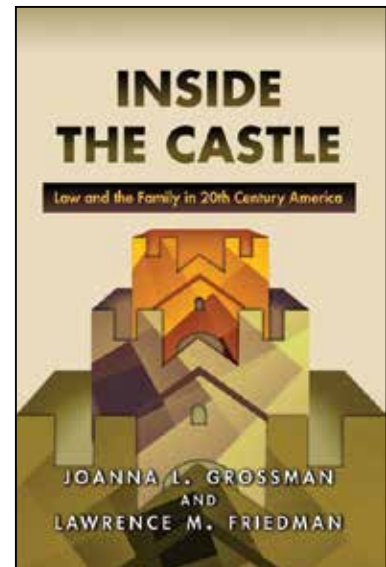
The authors' second big idea is the rise in the last part of the 20th century of what the authors call "individualized marriage," the successor to "companionate marriage." Companionate marriage was marriage between two equals, replacing a more patriarchal form of marriage. Individualized (or expressive) marriage—terms they take from the sociologist Andrew Cherlin's *The Marriage Go-Round* (2009)—is "an intensely individual matter, a road to self-realization, to personal fulfillment."

Both these ideas have been long promoted by Lawrence M. Friedman, one of the nation's foremost legal historians. Friedman's *The Republic of Choice: Law, Authority, and Culture* (1990) and *The Horizontal Society* (1999) both emphasized the rise of the expressive self in

American history and law. In the earlier book, he stated that an understanding of individualism has developed that focuses on the right "to choose oneself," one "in which *expression* is favored over *self-control*." His well-known general histories of American law, *A History of American Law* (3d ed. 2005) and *American Law in the Twentieth Century* (2002), reject any claim of the autonomy of law from society. Friedman instead argues in the latter book that "changes in the world bring about, inevitably, corresponding changes in the law."

These ideas course throughout *Inside the Castle*. In many respects, the evidence adduced by the authors confirms both big ideas. Grossman and Friedman are persuasive that law has followed culture in the many varieties of marriage-like relationships. And they persuasively demonstrate the shift to individualized marriage from companionate marriage through the 20th century. By comparison, the authors' case that their two big ideas are proven by the historical events they record is occasionally weak, but, even so, they take the reader on an enlightening journey.

Inside the Castle is divided into four parts: marriage; sex outside of marriage (which part they title "Anything Goes: Love and Romance in a Permissive Age"); divorce and its consequences, including issues of child custody and support; and relational duties and rights of family members, from inheritance and adoption to the rights and duties of parenthood. This division is largely successful, though some sections of chapters seem shoe-horned (particularly the chapter on the rise and fall of "heart balm" tort claims, a subject given much more coverage than needed, and that seems largely disconnected from other chapters), and other sections are summarized too quickly (particularly the authors' study of the end of intra-spousal tort and criminal immunity for marital rape). *Inside the Castle* alights on issues large and small, discussing cases, statutes, and other material from a large number of states (though the authors rely too heavily on the *New York Times* for historical exemplars). It provides a wide-ranging synthesis of the dramatic changes in family law during the past century.



Two areas in which further development would have bolstered their overarching claims are the legal changes to both marital rape and intra-spousal tort immunity. The authors spend three pages discussing the abolition of the "notorious doctrine that a man could not be guilty of raping his own wife." They briefly speak of the well-publicized 1978 Oregon case in which John Rideout was accused of raping his wife, as well as the case of John and Lorena Bobbitt. They conclude that marital violence may be a symptom of "modern marriage—companionate or expressive marriage." This seems right to me, but I wish that the authors had pursued more thoroughly any evidence supporting this conclusion. They cite a clipping service study of prosecutions for marital rape from 1978 and 1985, and tell us that there exist "no decent records of marital rape." I accept that statement, but wonder why the authors decided not to attempt to update the clipping service study, as relying on a study that ended a quarter-century before publication of this book is insufficient. In regard to the end of intra-spousal tort immunity, the authors provide only the barest outline, concluding that "[m]ost states have gone this route; but a surprising number still cling to the original doctrine." In a society in which individualized marriage is becoming the norm, the fact that a "surprising number" of states still bar tort claims by one spouse against the other

seems astonishing. Indeed, that brute fact might suggest that individualized marriage is not always the touchstone for courts and legislatures. And if family law follows family life, why hasn't intra-spousal tort immunity been abolished by all (or nearly all) states?

The small section on marital rape also offers an example of a constant if minor irritation in the book. The authors provide plenty of anecdotes, but it is unclear whether these are telling anecdotes or are merely entertaining. The lurid details of the case of John and Lorena Bobbitt generated weeks of jokes for late night talk show hosts, but such events fail to provide a platform for understanding the transformation of family law in the 20th century. A similar anecdote is found in the chapter on the demise of "heart balm" claims, such as breach of promise to marry and alienation of affection. The authors tell the story of the "filthy rich" John Bernard Manning, then 84, defendant in a suit brought by 29-year-old Honora O'Brien in 1917. The jury found that Manning had breached his promise to marry O'Brien, and awarded her the munificent sum of \$200,000. The New York appeals court reduced the award to \$125,000, and determined that she could recover damages even if her decision to marry was based on "mercenary motives." Although interesting, the story of Manning and O'Brien seems to tell us little, for the paragraph following that story recites other instances in which such suits were dismissed.

Another constant though minor irritation is the recurrent discussion of how "traditional gender roles" required that "[w]ives were supposed to be chaste, loyal homemakers." The authors join this trope with occasional references to Victorian morals, but they do not cite court decisions or other authorities reflecting these views, and it appears that they insert such statements in order to make changes in family law appear more transformative than one might otherwise believe they are.

Grossman and Friedman thoroughly and convincingly trace the history of divorce law, including the rise of collusive divorces and the reason that many made trips to Nevada. (Here, the anecdote involving Eddie Fisher's divorce of his wife Debbie Reynolds in order to marry Elizabeth Taylor is both entertaining and telling.) They also note that, by the middle of the 20th century, "a kind of creeping no-fault system began to emerge," and they give New Mexico

credit for first adding "incompatibility" as a ground for divorce in 1933. But did divorce law change for reasons having to do with either the emergent expressive marriage or because law follows culture? I'm not sure that the authors have made either case. In Texas, the only place whose divorce law reform I have studied, lawyers were at the forefront in urging the legislature to change the law, for law reformers believed that the integrity of the legal system was at stake, given the prevalence of perjury and artificial technicalities in the law of divorce. One mid-century study indicated that 85 percent of divorces in Texas were given on grounds of cruelty, well above the national average of 55 percent. This interest by lawyers in the integrity of the legal system was one driving factor in the 1969 statute allowing Texans to divorce for the no-fault reason that the marriage was insupportable, as well as to divorce for reasons based on fault. The other reason driving the reform of Texas divorce law was instrumental: Women were gaining new legal powers in Texas community property law in the mid-1960s, and divorce law reformers framed marriage more starkly as a partnership requiring equitable distribution of assets in cases of dissolution. The story of divorce reform in Texas suggests that the law may, on some occasions, be autonomous from society.

A section titled "Education and Religion" discusses the rise of compulsory education laws, which gave states more control over children as against parents. That section briefly discusses the rise of home schooling, but this brevity short-circuits a possibly fruitful line of inquiry, namely changes to the triadic relationship of parent, child, and state over the course of the 20th century. Compulsory education laws were a favorite of early-20th century progressives. Oregon tried to take such laws to another level by prohibiting private schools, an effort rejected by the Supreme Court in *Pierce v. Society of Sisters* (1925). But many states made mandatory the education of children in either private or public schools. Compulsory education may cleave parental authority, and allow (or encourage) a child to form his or her own self, even if that self is contrary to the person whom parents wish to raise. In an age of expressive individualism, how did parents manage to transform compulsory education laws so dramatically between 1980 and the early 21st century? Around 1980, some parents who taught

their children at home were prosecuted for violating compulsory education laws, and most states either outlawed or barely tolerated home schooling, sometimes requiring parents to prove their teaching credentials to teach their children at home, or requiring children to pass standardized tests if parents wanted to continue schooling at home. But today, as the authors note, "[a]s many as 4 percent of children nationwide are home schooled." Is the triumph of home schooling consistent with expressive individualism? It seemed to arise at the same time (the 1970s) as other trends that focused on expressive individualism, but home schooling reflects less the fear of another person who may impinge on one's "self-realization" than a fear of the totalizing state. It may suggest the value of families as civic entities that provide a buffer between the individual and the state.

As a historical study of 20th-century family law, *Inside the Castle* properly abjures any predictions, noting that "there is no ending. ... The story of life goes on, into the void. And so too the story of the law." ©

Michael Ariens is a professor of law at St. Mary's University in San Antonio, Texas, where he teaches American legal history, constitutional law, evidence, and other courses. He is the author of Lone Star Law: A Legal History of Texas (2011) and other books.

MAPPING THE NATION: HISTORY AND CARTOGRAPHY IN NINETEENTH-CENTURY AMERICA

BY SUSAN SCHULTEN

University of Chicago Press, Chicago, IL, 2012. 246 pages, \$45.00.

Reviewed by Henry S. Cohn

University of Denver history professor Susan Schulten points out that, in the 21st century, the term "map" often refers to a "thematic" rather than a "directional" document. For example, we speak today of "mapping" the genome or the human brain (last April, President Obama announced a project to do the latter). Schulten's excellent book, *Mapping the Nation*, seeks the 19th-century roots of today's maps, which have moved away from mere cartography.