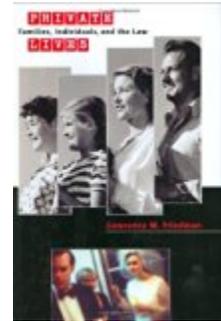


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Lawrence M. Friedman. *Private Lives: Families, Individuals, and the Law*. Cambridge: Harvard University Press, 2004. 230 pp. \$27.95 (cloth), ISBN 978-0-674-01562-3.

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Family Ties

The law school lecture is usually narrow and self-referential. Though the essays in Lawrence M. Friedman's wise and persuasive *Private Lives* began as lectures, they bear the marks of another kind of public speaking, Ralph Waldo Emerson's lectures, perhaps, or Charles Dickens's readings. They are more than a review of the past century of domestic relations law. They are a learned and cautionary tour through the history of the family in our society. They teach more than law. They remind us of our humanity and our dignity as well as the rights we have as children, spouses, and parents in courts of law.

It is a cliché of western meta-narrative that the family is declining (along with the rising middle class). Before there was the state, with its arbitrary classifications of family, there was the family itself as kin and clan. Society organized itself around family, and culture grew out of family ways and understandings. In the middle of the nineteenth century, the law and its interpreters recognized what politics and commercial life had already achieved: the rights of the individual rivaled the claims of the family. The state did not yet recognize all individuals as legal equals, but that would come in time, a becoming that is still in progress. No one can now doubt that in modern western nations the demands and the desires of the individual trump the obligations of family.

The impact of this shift from the traditional and common to the individual, sometimes comprehended by the term from art, "modernization," has profound consequences for family law. The right to choose whom

and when to marry, to reproduce or not to reproduce, and how to rear one's offspring—indeed, in sometimes contrary fashion, the rights of offspring against their caretakers—are staples of family law. Even violations of normative domestic relations, such as gay and lesbian unions, are now protected by law in some states under the rubric of "privacy." But such legally protected freedom of choice leads to new kinds of conflicts, which the law must resolve.

Whence cometh all this? Friedman's essays comprise a history of changes in American family law with some references to other nations, but Friedman is one of the founders and living legends of the law and society approach, and not surprisingly finds that changes in the law mirrored changes in the way people wanted to live. Smaller families, families with more emotional and monetary resources invested in the next generation, families that more than half the time break open and reform, families in which either partner may be the primary breadwinner, and families of same sex partners will want changes in the law. But such changes do not come automatically. Choice has limitations, conventions imposed on individuals by others in authority. Moreover, the law lags far behind social revolutions, for law is made by older men and women. And the debate over such change in the law often takes on an abrasive, intolerant moral tone. Friedman assures his readers that he is not taking sides in these debates. He asks rather than tells us whether and who has benefited from no-fault, "just say no" and "palimony" suits, or whether the right to end a pregnancy should be legal, but the lessons of his narra-

tive and his selection of stories, tells its own story.

In America, distinct theories of marriage and childrearing did not just succeed one another; they competed. The older English idea merged the identity of the wife into that of her husband. But on the frontier, informal customs of marriage had a more egalitarian cast. When these two sets of arrangements overlapped, the law fussed over the rights of the marital partners and the obligations they had to their children. For the law regarded marriage as a civil union, not a holy sacrament, and such civil unions were subject to all sorts of disputes.

As adoption law evolved and miscegenation bans vanished, the identity and rights of children emerged as a new category of law. A multicultural society included a multitude of childrearing practices that the law had to accommodate. The law strove to determine what was best for children and now, perhaps, what was best for fetuses. Was a pregnant woman a mother from conception? What about a woman who contracted to have a child as a surrogate?

As disputes over these questions came to court, judges tried to safeguard the rights of the individuals. That is why, for example, over time divorce became so much easier in the United States than it was in countries that regarded marriage as a holy union, hence permanent. Retracing the path of equal rights for women, divorce shifted from a mark of male supremacy to an equal opportunity event. Most divorces were either collusive or at least consensual. And the numbers of divorces grew, in punctuated fashion, from a relative handful, to about 50 percent of all marriages, as divorce became “no fault” in some states.

If marriage and divorce law reflected the fulfillment of individual needs, the state continued to impose its will upon family members. In laws providing for sterilization of the unfit, criminal penalties for practice of birth control, and laws forbidding mixed race marriages, the state

dictated the nature and size of the family. The state could remove children from a family when evidence pointed to abuse. And the state could restrict the right to end a pregnancy.

Indeed, the shadow flitting across these pages is the right to choose to end a pregnancy. Abortion takes family law in America into politics. Abortion rates did not change much as domestic law evolved, but the legalization of abortion raised all manner of questions about the family. Could a father compel a pregnant woman to bear his child and birth it? When did the embryo become a human member of the birth family? Did parents have the right to control their underage children’s reproductive lives even if the child and the parents were estranged?

Where does Friedman stand on abortion rights is what most reviewers of this book will ask—an unfair question, given his remarkable fairness throughout the book, his willingness to give a hearing to all sides and to ask question rather than press his opinions. As he admits, “the future of *Roe v. Wade* is still somewhat cloudy” (p. 171). But he tips his hand just a bit. In what appears to be mere description, telling the story, one can find a judgment: “Despite intense controversy, backsliding, and legal firewalls against what some see as too much protection of private choices, the zone of legal options of lifestyle has increased enormously” (p. 177). There are still limits, and the course from state imposed moral codes to individual liberties has not been linear, but its direction is clear: “the struggle to ... preserve our sacred, individual space” (p. 189). And let us say, “Amen.”

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