

University of Michigan Law School

University of Michigan Law School Scholarship Repository

Articles

Faculty Scholarship

1999

Family Law in the Age of Distrust

Carl E. Scheider

University of Michigan Law School, carlschn@umich.edu

Available at: <https://repository.law.umich.edu/articles/2296>

Follow this and additional works at: <https://repository.law.umich.edu/articles>



Part of the [Family Law Commons](#), [Law and Philosophy Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Schneider, Carl E. "Family Law in the Age of Distrust (Millenium Issue: Family Law at the End of the Twentieth Century)." *Fam. L. Q.* 33, no. 3 (1999): 447-60.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

Family Law in the Age of Distrust

CARL E. SCHNEIDER*

I. Introduction

I have been invited to examine the relationship between American culture and American family law at the end of the century. No doubt I was foolish to accept the invitation, since the topic can hardly be sketched, much less discussed, within the compass of even a lengthy article. On the other hand, that happy fault forces me to accept the luxury of writing a speculative essay and of eschewing the footnotes that are the misery (and majesty) of the academic lawyer.¹

But even thus set free I am still enchained. Family law is shaped by more cultural forces than I am allowed pages. I might consider, for example, how the triumph of American individualism continues to mold family law. I might try to remedy the unaccountable failure to analyze the way feminism has transformed family law. I might re-examine the argument I made elsewhere that family law has decreasingly deployed overtly moral language in its work.

I have, however, chosen a road less traveled. I propose a hypothesis: We live in an age of distrust, an age in which we feel less able than before to anticipate how people will behave and to be confident they will not injure us. We trust social institutions, and particularly government, less than we ever have. We seem less certain that we can count

*Chauncey Stillman Professor of Law and Professor of Internal Medicine, University of Michigan. For the reasons given in Richard A. Posner, *Goodbye to the Bluebook*, 53 U. Chicago L. Rev. 1343 (1986), I follow the University of Chicago Manual of Legal Citation (Lawyers Co-operative, 1989). I am enthusiastically grateful to the Family Law Quarterly for its indulgence for and help in my campaign to free us all from the petty tyrannies and burdensome impositions of the Bluebook. In addition I thank Carol Weisbrod for thoughtful comments on an earlier draft.

1. Perhaps I should assure the distrustful that I plan to publish a more detailed and fully annotated version of this article as part of a book on family law and moral discourse.

on our neighbors, friends, and families. This distrust is less pervasive and less intense than in many other countries. And distrust is hardly the only factor shaping *fin de siècle* family law, nor even the most powerful. Nevertheless, it is potent enough that numerous changes in family law over the last few decades can be understood as accommodating it.

II. The Evidence of Distrust

It is now well known that trust in social institutions of many kinds has declined during the last few decades. In particular, trust in government has plummeted. For example, since 1966, the proportion of the population with “a great deal of confidence” in the presidency has declined from 41 percent to 13 percent. The parallel figures for Congress are 42 percent and 5 percent.

In family life trust has always been a commodity too incommodously supplied. But I hypothesize that, while family life may always have created occasions for distrust, those occasions occur today with mounting frequency. To explain this hypothesis, I must define “trust.” I take my definition from Fukuyama: “Trust is the expectation that arises within a community of regular, honest, and cooperative behavior, based on commonly shared norms, on the part of other members of that community.”² Distrust arises, then, when you cannot rely on the behavior of other people. Behavior may be unreliable for two reasons. First, you may not be able to predict what other people are going to do. Second, you may not be able to trust them to act in your interests. In other words, I define “distrust” broadly to include apprehension about both unpredictable behavior and malign behavior.

I hypothesize that contemporary Americans tend to find people too little reliable in both ways. More precisely, I hypothesize: first, that behavior in family life is less predictable and thus less reliable than before because the rules and roles that structure family life have eroded; second, that the focus of moral duty has shifted from “other” to “self” in ways that make it harder for us to count on others to make our interests theirs.

I have repeatedly said “hypothesize” instead of “assert.” I know of no direct proof of my hypothesis. If you ask people flatly whether they “trust” their family members, almost all of them will say yes. But I doubt that they have in mind the kind of “distrust” I am discussing—an inability to predict the behavior, particularly the long-term behavior,

2. Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* 26 (Free Press, 1995).

of people in intimate life and their willingness to put familial interests ahead of their own. Indirect evidence of familial distrust, however, abounds.

First, social trust has plainly diminished in the United States. For example, the number of us who feel “most people” can be trusted has fallen in thirty years from 58 to 37 percent. Second, because familial life has become so unstable it would be strange if we had the same confidence in its predictability. Much of this essay will be devoted to specifying elements of culture that should make people less trusting in their family life.

Third, considerable irregular but suggestive evidence hints that people regard intimate life less trustfully. For instance, Glenn’s survey of college texts on family life reveals that warnings to be wary now abound in these semi-official versions of the conventional wisdom. Thus one book’s main goal seemed to be “to persuade students not to be too committed, not to love too much, and to be careful not to give more than they get in marriage and other family relationships. . . .”³ High school textbooks too portray intimacy bleakly: “[T]he world view that these textbooks convey to teenagers is a depressing one: You are alone. You must take responsibility for yourself because, in the final analysis, the only person you can rely on is you. Many families are dysfunctional, even abusive. Everyone’s motives are ultimately self-regarding.”⁴ This distrust is also exemplified by complaints that have become a cliché about the unwillingness of people (especially men) to “commit.” As one memoirist writes, “We lived in an age in which commitment had been bled out of the culture and which was, instead, saturated with temptation. . . . Our times encouraged faithlessness.”⁵

But why commit yourself? Confidence in married life seems to have dimmed quite perceptibly. Consider, for example, the collection of essays on marriage entitled *Here Lies My Heart*.⁶ Almost none of them expresses anything like enthusiasm for marriage. “*For Better and Worse*” pretty well captures the warmest view of it. The collection is rife with lamentations on the dolors of marriage. Marriage “is a long patience,” “a job of work,” a “savage business,” “an institution that hasn’t served women well” and that can even be “a barbarous institution.” Knowing what they know, marriage counselors should not be

3. Norval D. Glenn, *A Critique of Twenty Family and Marriage and the Family Textbooks*, 46 *Family Relations* 197, 199 (1997).

4. Council on Families, *The Course of True Love: Marriage in High School Textbooks* 17 (Institute for American Values, 1998).

5. John Taylor, *Falling: The Story of One Marriage* 139–40 (Random House, 1999).

6. Deborah Chasman & Catherine Jhee, eds, *Here Lies My Heart: Essay on Why We Marry, Why We Don't, and What We Find There* (Beacon Press, 1999).

able to sleep at night, but “should stand on their rooftops in their pajamas with megaphones, shouting, ‘Citizens! Heed my words! Never marry! Marriage is bad! Marriage is a bloodbath!’ ”

III. The Causes of Distrust: The Erosion of Rules

One must begin any discussion of the swelling of distrust in family life by citing the extraordinary ascent of the divorce rate, which, although it has moderated somewhat, remains imposingly high. The rate is well known. And it has now been high long enough that many of us are divorced or grew up in families with divorced parents. This knowledge and experience must make spouses warier of each other and children warier of their parents. But our distrust also arises from broad and deep movements in American culture, movements that seem likely to persist and prosper. I suggested a moment ago that we regard others as less reliable than before partly because their behavior is less predictable. It is less predictable because it is less guided by rules, rules of custom, etiquette, and morality. Rules make behavior predictable, and as rules weaken, people become less predictable.

Intimate life today teems with rules whose clarity and force have declined. The customs governing courtship are less certain and forceful than before. The rules governing marriage are less settled than before. Not only have the old sex roles (man as provider, woman as housewife) been gutted, they have not been replaced with broadly accepted understandings of how to behave in a marriage. The norms governing parents and children have also weakened. Parents today must ask a broader range of questions about their relationship with their children than ever before, particularly where the parents are unmarried, divorced, or remarried. I do not wish to overstate the case. Certainly some broad understandings about marriage and parenthood are still healthy. Nevertheless, as Alan Wolfe concludes, “the postmodern family form is ruled by an absence of rules: both spouses go in and out of the labor market; children are not necessarily the biological offspring of the adults with whom they live; sexual preference is polymorphous; and extended kin are not necessarily related by blood.”⁷

Weakened norms have their advantages. Some of the weakened norms were bad norms. And weak norms allow people more freedom

7. Alan Wolfe, *One Nation, After All: What Middle-Class Americans Really Think About God, Country, Family, Racism, Welfare, Immigration, Homosexuality, Work, The Right, The Left, and Each Other* 100–01 (Viking, 1998).

to arrange their lives as they choose. But my point here is that the weakening of norms makes people's behavior less predictable and thus makes trust more perilous.

To gain a fuller sense of how far the rules governing family life have eroded and how likely they are to erode further, we need to ask why they have eroded. Of course, as I just said, some rules are failing because they seem to have failed, because they now seem unwise or even vicious. But the erosion of rules is also promoted by a bewildering array of cultural forces and actors. Some of these forces and actors, left to their own devices, might well substitute new rules and roles for old, leaving us with a restored clarity of expectations. Feminism in many of its incarnations perhaps falls into this category. However, others of them seem inimical to the very idea of rules and roles. American ideas about individualism, freedom, and autonomy exemplify this category. Those ideas have been given new life in this century by the rise of what we may call the therapeutic imperative. This imperative asks us to think about ourselves and our relationships in the language and terms of psychology (or rather, of various popularized versions of psychology). The therapeutic imperative has contributed as largely as any social force to transforming the culture and morality of American private life. It therefore deserves our special attention, and I will use it as a vehicle for organizing my description of general changes in our moral and social culture.

At the core of much of the therapeutic imperative lies the principle that the first human obligation is to identify, develop, and express one's true self. This obligation can be fulfilled only by freeing oneself from the impositions of social rules and roles. Such versions of the therapeutic imperative, then, erode rules not just by criticizing some or proposing others, but by directly attacking the very idea of them.

The effectiveness of this attack on rules has been sharpened by the weakening of social institutions that used to promote them but that are ever more loath to do so. These institutions have increasingly adopted a therapeutic approach—foreswearing the directive, the “moralistic,” and the “judgmental.” The tendency in contemporary schools, for example, is to “clarify” values, not to teach them. Even churches have moved impressively toward a therapeutic and remissive ethos. Less formal institutions are similar. Perhaps the most notable example is support groups, which have achieved rapid and remarkable social prominence. These groups are designed to permit people to discuss their intimate lives with those who share their problems. But their rules of engagement normally prohibit any tinge of the normative. Finally, the

norm against norms has migrated from the precincts of institutions to the privacies of daily life—being “supportive” is the goal; being “judgmental” the vice.

The reluctance to prescribe and to judge seems particularly acute when the basis for prescription and judgment is moral. Alan Wolfe’s fascinating investigation of middle-class Americans describes an emphatic skepticism of moral thought.⁸ And since so many Americans see morality as a virtually adventitious personal choice, their skepticism swells to the bursting point when moral ideas are used to comment on the behavior of other people. But Americans are coming to seem as reluctant to impose standards on themselves as on others. Wolfe, for example, found that “middle-class Americans no longer believe that right and wrong provide unerring guidelines for informing them about how to lead their lives.”⁹ My law and medical students now resemble the young people Tipton describes who believe that a “sense of principled obligation . . . applies forcefully to political issues” but who feel that, “applied to the realm of personal behavior and relationships, . . . such an ethic of obligation is . . . , first, . . . uncomfortably constraining and unrealistic in relation to the actual operation of self-interest” and, second, likely “to suffocate expressive ideals of personal behavior.”¹⁰ As one memoirist says, “Marriage demands virtue, but virtue is an amputation, and what is lost is one of the things that make one feel most alive.”¹¹

I have been arguing that people’s behavior is made less predictable and thus less reliable by the widespread erosion of rules in American culture and that much of this erosion is due to the therapeutic imperative. But at least one rule has not eroded in the new dispensation; indeed, it has triumphed. Its effect, however, is to make behavior less reliable. This new rule represents one of the central shifts in contemporary moral culture. It is that we should all judge for ourselves how to behave and that we should maximize our own welfare, leaving others to look after themselves (as it is their duty to do). Thus Rice quotes Melody Beattie, an avatar of the therapeutic gospel, who considered it “a sign of her own recovery that ‘I’m starting to think about and consider what *I* want and need’ first before considering others’ wants and

8. *Id.*

9. *Id.* at 300.

10. Steven M. Tipton, *Getting Saved from the Sixties* 107 (U. California Press, 1982).

11. Lynn Darling, *For Better and Worse*, in Deborah Chasman & Catherine Jhee, eds., *Here Lies My Heart. Essay on Why We Marry, Why We Don’t, and What We Find There* 197 (Beacon Press, 1999).

needs. By placing her own wishes ahead of others, she has begun to master the necessary arts of what she calls 'self-care. . . .' ¹²

Making the duty to oneself life's central moral obligation works a volcanic change in our moral landscape. One of its central effects is to increase distrust in intimate life by making our intimates less predictable. It does so because it obliges people to leave relationships they think are serving them inadequately. Furthermore, it motivates people to act on unexpected grounds. For example, many interpretations of the therapeutic ethos require people not only to follow their own true natures, but to "grow." Since, however, the direction of "growth" is not, and presumably cannot be, specified, who can say where it might lead? Indeed, a conventional route to growth is to leave oneself open to experience and spontaneity. To limit oneself in advance to any single relationship or activity or life is to curtail the possibilities of growth intolerably.

This aversion to stability and predictability demands that "commitment" be redefined. Thus one memoirist writes,

When I commit to a person, I commit to the experience we will have together; I commit to the process of growth that comes from building the trust underlying our intimacy, to working through differences and issues. I accept that the person I may have needed and adored five years or even five months ago, the person with whom I created an environment of stability and constancy, may not be the person I need and adore now, when I want a companion with whom I can experience myself in a way that feels vast and fluid.¹³

And thus some couples promise to stay married "as long as our love shall last."¹⁴

But the significance for us here of the new primacy of the duty to oneself lies not just in the ways it makes intimate behavior unpredictable. It also undercuts a sense of duty to other people and thus corrodes our conviction that we can depend on others to act in our interest even when it conflicts with theirs. Many feminists are skeptical and even scornful of altruism in marriage because they believe it is likelier to be expected of women than men, and they seem more inclined to cure that

12. John Steadman Rice, *A Disease of One's Own: Psychotherapy, Addiction, and the Emergence of Co-Dependency* 162 (Transaction Publishers, 1998) (emphasis in Beattie).

13. Rebecca Walker, *Serial Lover*, in Deborah Chasman & Catherine Jhee, eds., *Here Lies My Heart: Essay on Why We Marry, Why We Don't, and What We Find There* 48-49 (Beacon Press, 1999).

14. Marjorie Ingall, *Going to the Temple*, in Deborah Chasman & Catherine Jhee, eds., *Here Lies My Heart: Essay on Why We Marry, Why We Don't, and What We Find There* 29 (Beacon Press, 1999).

disparity by deprecating sacrifice than by demanding it impartially. But that skepticism and scorn are widely shared. As one memoirist comments, "We have no modern affinity for the Edwardian sense of sacrifice as an endorphin high."¹⁵

Not only is sacrifice for other people scouted, but it is more acceptable to say that we need not concern ourselves when we make other people unhappy. In his illuminating study of relationships in Holland that rings uncannily true of America, Brinkgreve quotes a young woman who says, " 'If I have to choose between something which is good for the relationship or for myself I choose for myself. . . . If I meet somebody I feel like going to bed with and this gives my boy-friend sleepless nights that's his problem. . . . ' " ¹⁶

The new primacy of the duty to oneself creates distrust in another way—by making us fearful of threats to our autonomy and development. Much in the therapeutic ethos warns us that our ability to shape our lives is constantly imperilled by the demands other people make on us. We are, most vulnerable to this threat among our intimates, and thus it is against their impositions that we must be alert. This source of distrust is institutionalized in, for example, an association for "co-dependents" which encourages its members to review the wrongs done to them and to assess blame for it.¹⁷ They typically "conclude that extrication and autonomy from all externally imposed requirements (save those involved in being co-dependent) are their principal tasks."¹⁸ These members "convene in the safety and sanctity of their weekly meetings in much the same way the people once returned home after a hard day in the often-cold world of work. . . . [K]in and close relationships have become part of that larger, colder world."¹⁹

IV. Distrust and Vulnerability

I have been arguing that distrust in American family life has been heightened in recent years because behavior has become less predictable and because people feel less constrained to accommodate their behavior to other people's wants and wills. I now wish to argue that

15. Lynn Darling, *For Better and Worse* (cited in note 11).

16. Christien Brinkgreve, *On Modern Relationships: The Commandments of the New Freedom*, 18 *The Netherlands' J. of Sociology* 47, 51 (1982).

17. John Steadman Rice, *A Disease of One's Own: Psychotherapy, Addiction, and the Emergence of Co-Dependency* 61 (Transaction Publishers, 1998).

18. *Id.* at 165.

19. *Id.* at 173. I discuss many of these developments at greater length in *The Practice of Autonomy: Patients, Doctors, and Medical Decisions* 153–76 (Oxford U Press, 1998).

that sense of distrust has been intensified by a congeries of attitudes that make people feel more vulnerable. These attitudes are surprisingly numerous and influential, and they thus command our attention.

To begin with, we are more vulnerable to disappointment in family life because our aspirations for life generally are higher than before. Let me count the ways. First, we value "control" more. We now expect control over many aspects of our lives, and we believe its absence has malign effects. Second, we value independence more, and we see it as constantly endangered. Third, the therapeutic imperative promises health and happiness. Medical science has made conspicuous progress toward the first of these, and hope for the second is probably livelier than ever. Finally, we expect more gratifications than earlier generations from our intimate relationships. We expect unexampled kinds of equality. We expect unexampled degrees of sexual fulfillment. We expect unexampled breadth of psychological compatibility. We expect unexampled depths of communication.

The second way we feel more vulnerable in family life is that we are more aware of misbehavior. This feeling too has many sources. Not least is the therapeutic ethos. At a general level, some of its versions suggest that people are racked and rent by motives so dismaying they cannot even be acknowledged. The therapeutic ethos has also sharpened our sense that people act abominably in private life. We are, for example, much more aware of domestic violence, and we regularly hear alarming and even exaggerated estimates of the extent of the physical and sexual abuse of children, of spousal abuse, of brutalization of elderly parents, of date rape, and of rape.

The third reason we feel more vulnerable in our intimate lives is that we increasingly doubt that people can control their behavior. We suspect that people are motivated by social and psychological forces that are powerful and dangerous and that they themselves do not fully understand or even notice. The tendency to describe bad habits, vices, and even virtues as addictions exemplifies this source of vulnerability. So does his wife's explanation that the President of the United States can hardly prevent himself from molesting young women because of the way his mother and grandmother treated him.

Yet another cause of our increased vulnerability is this: not only are we likelier to believe that misdeeds within families are more common and less controllable, we are also more inclined to believe that the evil done there cuts deeper and lasts longer than we had thought. We are, for example, more apt to believe that child abuse of many kinds injures children indescribably and irreparably.

Our sense of vulnerability is honed by yet another cultural development. We Americans increasingly believe that we cannot fully understand people whose exact experiences we have not shared. We suspect that individuals differ so greatly that they must be opaque to each other, that people who have not shared an experience cannot comprehend it (this is one reason support groups have flourished), that members of different cultural groups cannot truly understand each other (it is dogma in some circles, for example, that white parents should not be permitted to adopt black children because they cannot understand black culture well enough to raise those children properly), and that men and women can barely comprehend each other (as Martians presumably cannot understand Venusians).

We feel more vulnerable for still another reason. We are increasingly thrown back on our own resources in dealing with people and problems. One of the many reasons is that the cultural shifts I have been describing deprive people of the guidance of the familiar and assign them exclusive responsibility for discovering and developing themselves. The price of autonomy is responsibility—nondelegable responsibility. Thus Wuthnow discovered in his study of support groups that “[t]he social norm tells [people] that they should not get involved in their friends’ and neighbors’ business. It says that people should figure out their own lives, make their own choices, and suffer their own mistakes.”²⁰ Perhaps it is this sense of being cast back on our own resources that makes us so hungry for expert assistance.

In sum, Americans today seem less trusting than before. They vehemently distrust their government’s competence and even motives. Less vociferously, they seem to trust their intimates less. They can have less confidence in the predictability of their behavior. They have less reason to think that they will behave solicitously and will remain loyal. So how has family law accommodated this cultural development?

V. Law and Distrust

Cultural developments do not change law the way rudders steer boats. They have no direct, mechanical effect. No legislator sits down and says, “Distrust is rising, so how should we revise family law?” Nevertheless, law eventually accommodates cultural changes of sufficient moment. This family law has begun to do. In what follows, I want to chart some of those accommodations.

20. Robert Wuthnow, *Sharing the Journey: Support Groups and America’s New Quest for Community* 176–177 (Free Press, 1994).

The law of entry into marriage changes little and slowly. But today one major development is the effort to find ways to address a salient cause and effect of distrust in marriage—one spouse's fear that the other will leave. This development seeks to encourage people to agree before they marry to make their marriage hard to leave. The most prominent example has been the "covenant marriage" that has been proposed in a number of states but so far adopted only in Louisiana and Arizona.

This leads us to the question of divorce and to a lesson in the complexity of the law's accommodation of distrust. The overwhelming trend in divorce law has been to make marriage easier to leave. First the grounds for "fault" divorce were expanded, particularly by an ever-broadening interpretation of "cruelty." Then no-fault divorce made divorce essentially available on demand to anyone willing to take the time and endure the (sometimes considerable) trouble. Some jurisdictions have also tried to make smooth the path to uncontested divorces through various procedural reforms.

But what does this have to do with distrust, and how can making divorce easier be a response to distrust when making divorce harder is also a response to it? The answer is that we approach marriage with two kinds of fears—fears that we may be abandoned by our spouse and fears that we may find our spouse unbearable. Covenant marriage is a way of relieving the first anxiety, easier divorce a way of relieving the second.

The move to no-fault divorce illustrates the law's accommodation of another kind of distrust—distrust of governmental agents. Traditionally, judges could decide case by case whether a divorce was justified. When no-fault divorce began to proliferate, the new laws might have been read as obliging judges to make similar decisions about whether a marriage had in fact succumbed to "irreconcilable differences." However, skepticism about the ability of judges to make either kind of decision has helped lead us to the present flat rule of divorce on demand.

Distrust of quite an active kind has led to substantial changes in the law regulating domestic violence. Here the law's response to the cultural sense that people—especially men—are likely to behave savagely in families has been quite direct. The definition of both spouse abuse and child abuse has been expanded. Any kind of assault on a spouse is likelier to be treated as a crime, and new forms of child abuse (including even prenatal abuse) have been recognized. Parental kidnapping has won a remarkably vigorous statutory response. The law is also likelier to prohibit as domestic abuse assaults against intimates to whom one is not married or related by blood.

Not only has the scope of abuse law expanded; it has also been enforced more aggressively. Some jurisdictions have instituted policies of automatic arrest in cases of spousal violence. What once would have been regarded as minor batteries are more likely to be prosecuted. Some jurisdictions make it a policy to prosecute even against the wishes of the assaulted spouse. Finally, the vogue some years ago for making the reunification of children and their abusive parents a first consideration has begun to recede in the face of a growing conviction that children "at risk" need more determined protection.

In one sense, the law regulating the distribution of marital wealth on divorce is an exception to the pattern I have been describing. The rise of equitable distribution confides considerable power to the discretion of judges. However, we may now be witnessing the beginning of attempts—like the ALI's—to devise new rules that will reduce that discretion. What is more, the movement away from the fixed rules of the common law and community property regimes has been driven by distrust of the rules government had been applying and by the sense that the old rules provided too little protection against the untrustworthy behavior of spouses (especially of husbands). Those rules were seen as too likely to trap wives economically in marriages that had become intolerable and too likely to permit husbands to reap the benefit of their wives' uncompensated labor.

In response, the law has moved toward reducing the vulnerability of people who cannot depend on remaining married. This has been done by devising theories that give wives broader and surer claims to a part of the marital wealth, particularly theories that take into account the economic value of the wife's contributions (like housework) to the family's well-being. It has also been done by expanding the category of "property" and by inventing devices like "reimbursement alimony" so that professional degrees, the goodwill of businesses, and pensions can be divided on divorce.

In recent years, the law has become markedly more tolerant of attempts to organize spouses' relationships through legally binding contracts. Contracts regulating the distribution of property on the death of a spouse had long been enforceable, but now courts are more willing to recognize contracts regulating the distribution of property on divorce as well. Commentators would have the law go much further, and the Uniform Premarital Agreement Act would allow the spouses to regulate any aspect of their relationship as long as the agreement did not violate "public policy."

This development fits my hypothesis with special precision. People enter into legally binding contracts when they do not believe that those

with whom they plan to deal will reliably act in their interests. It has conventionally been thought that, as Ellickson says, “When parties are intimately close-knit, . . . contracting may not be in their interest. The arm’s length negotiation of a contract can pollute the atmosphere of a close relationship by implying that the parties don’t trust each other enough to rely on informal exchange.”²¹ These doubts about the role of contracts in intimate life, however, are increasingly overwhelmed by the sense of the unpredictability of one’s marriage, the unreliability of one’s spouse, and the capriciousness of the law’s judges.

As marriage is increasingly seen as perilous, alternatives to it look more attractive. This has helped lead to the substantial rise in the number of cohabiting couples. Many states have acknowledged this by according cohabitation legal status. On the other hand, cohabitation itself is risky. It is in some ways riskier than marriage, since people usually enter it less deliberately than marriage, with less commitment to each other, and with less sense of what they expect of each other. To reduce those risks, some jurisdictions—most famously California—have proffered the law’s services in resolving the separating couple’s disputes over their economic relations.

In the law of child custody, recent decades have seen repeated attempts to reduce the range of discretion judges may exercise. In particular, jurisdictions have experimented with various rules and presumptions, prominently including preferences for joint custody and for the primary caretaker. These experiments are driven by several motives, but not the least of them is an acid distrust of the ability of judges to make wise decisions and a bitter apprehension that, left to their own devices, judges will be animated by improper and deplorable motives.

Reforms in the law of child support have been driven by similar concerns. Judges’ child support orders have long been thought too capricious, and the response has been the adoption (at the behest of the federal government) of guidelines intended to cabin judicial discretion. However, the primary motive for these guidelines was less distrust of judicial discretion and more distrust of parental decency. Particularly, there has been considerable agreement that too many parents—particularly fathers—have betrayed the most elemental of their financial duties to their children. The child-support guidelines, then, attempt to ensure that judges will make those duties legally binding obligations. In addition, and again spurred by the federal government, elaborate efforts have been made to enforce those obligations once they have

21. Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* 247 (Harvard U Press, 1991).

been established. These efforts have included provisions for enforcing them against noncustodial parents in foreign states, for having them enforced by the government, for collecting payments from the noncustodial parent's debtors, and so on. In addition, the scope of the duty of support has been increased in some jurisdictions by expanding somewhat the parents' obligation to support their adult children and by tentative steps toward making people who are not legally parents but who are acting as parents enforceably responsible for their children's support.

Finally, a number of areas of family law have been constitutionalized, most notably the law of abortion. This is the prototypical area in which distrust of governmental regulation is expressed. However, in these areas too distrust of the government is mixed with distrust of individuals. For example, the once undoubted and statutorily confirmed power of parents to counsel and make decisions for their minor children has been overthrown where a young girl seeks to have an abortion. This has been done precisely because of distrust of parents' kindness and justness in dealing with their children.

I have argued that Americans distrust their government and their social institutions more, that they trust each other less than they used to, and that they find even their intimates less reliable. I have argued that the law has accommodated these developments. The result of that accommodation, however, is curiously irregular. It forms no neat patterns. But this should not be surprising. When you distrust everyone, there is no one to whom you can confide authority. Rather, you seek (often unsystematically, area by area, case by case) to scatter authority broadly enough that no one can do very great harm. And this is, after all, the old American tradition, the tradition of dispersed power, of checks and balances. That is family law at the end of the century—at, if you insist, the end of the millennium. But what family law will be at the end of the next century—no, at the end of the next decade—who can be trusted to say?