From Silver to Gold: The Next 25 Years of Law and Religion

The Decalogue Lecture: Law, Religion, and the Future of the African-American Family
“The ‘Marriage Gap:’ A Case for Strengthening Marriage in the 21st Century”
Leah Ward Sears, Chief Justice
Supreme Court of Georgia

Well, it’s good to be back at my old law school again, I guess, you know, after all these many years. Emory has really changed and grown and it’s wonderful to see. Although this auditorium was here when I was a student here, at least half of the rest of the building was not. So I have to snake my way through to find myself here, but it’s good to be here.

I don’t want to get started without acknowledging just a few people. I see my dean and my constitutional law professor here, Woody Hunter. He is the man who actually taught me everything I know about constitutional law, so I want to thank you and it’s good to see you back at least for a short time, I understand from Singapore. It’s good to see you back and thank you.

And, of course, I have to acknowledge my mother who I wouldn’t be here without her as well. And I have to thank her for all of her support, as well as my daughter, who’s a young Spellman student who wouldn’t be here without my support. Thank you.

Given the widespread rate of family fragmentation in this country, it is the rare person now who has not been directly affected by divorce or knows someone who has. As one who was one divorced, I am very sensitive to concerns about judging people without an understanding of how they wound up in that particular situation.

Moreover, as a woman who came of age at the height of the feminist movement, I do not really hold naïve notions about the so-called good old days, Ozzie and Harriet and that kind of thing. So I would never stand here for one minute and press for a return to an era in which stigmas about divorce prevented people from leaving abusive or oppressive marriages, nor have I ever thought even for one minute that everyone should eventually marry.

However, I believe that it is critically important that at this point and time we base American public policy and law on the best empirical data available. And that data shows that current trends in family formation and fragmentation have potentially long lasting and harmful effects on our children and on our communities.
That’s why I believe that we must explore ways how the law can preserve the protections and benefits of what has become that dirty word, marriage, the word that marriage, marriages. Marriage promises hope for our children.

Now, before I go further, I think I need to comment briefly on same-sex marriage, a deeply polarizing topic for large numbers of Americans regardless of their sexual orientation. And I want to be very, very clear about this. I am not here this evening to stake out a legal position on this subject, nor would it be appropriate for me as a sitting jurist to do so. Rather I’m here to address the more basic question of whether the law should support marriage as an institution at all.

The national debate over same-sex marriage raises a host of important issues, and I think that these issues will be resolved over time. But in the meantime, we must not put off the job of reflecting on the institution of marriage as we know it now.

The late Supreme Court Justice William Joseph Brennan, Jr., who I named my daughter Brennan after, once wrote – I have to say that for, “That the genius of the Constitution rests not in any static meaning it may have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and present needs.”

It is this idea that the law’s strength lies in its adaptability to change that makes me want to advocate, although I’m not a judicial activist, for a body of law that is responsive to the changing needs of our time.

And in my view, such a body of law cannot ignore now the wealth of evidence which now seems to demonstrate that the health of our society and our children is directly related to the health of our families. And the reality is that today alarming numbers of children are growing up in families without a mother and a father in the home and a great many of these families are failing and a great many of these families are African-American families.

Now last year you may recall The New York Times published a controversial article suggesting that for the first time in history only about half of this nation’s households are now headed by married couples. Almost a third of the nation’s children are born to unmarried mothers, the highest percentage ever recorded in our nation’s history. For Hispanics, the figure is 46 percent. For African Americans, 70 percent of children are now born out of wedlock. Over the past 50 years, divorce has also increased dramatically before it has begun to level off a bit, declining slightly in recent years. Co-habitation has made a transition from a fringe phenomenon to an increasingly common arrangement between men and women, including many with children.

Fatherhood is being pushed even further into the margins of society. Now when I was a child in the ‘50s and the ‘60s, I’m 52 now, I memorized a nursery rhyme that went something like this. A few of you may remember it:

Ginny and Timmy
Sitting in a tree
K-i-s-s-i-n-g
First comes love
Then comes marriage
*Then* comes a baby in a baby carriage.

Now, for me, that rhyme outlined a presumed order that I considered life’s normal pattern, a commitment that would be difficult at times. I knew that. But I was brought up understanding that if I stuck with it, it would be one that would assure security, health, and some measure of wealth for my husband, for my children to come, for my community, and for my country.

And again, I knew that the sequence was not always guaranteed. Spouses sometimes die leaving you alone to rear your children alone. And I also knew that babies sometimes come outside of marriage. And I also knew that some marriage could not, indeed should not, last six months, let alone a lifetime.

But never in my wildest dreams did I foresee a time when marriage, an historically child-centered relationship, would become almost completely adult-centered, promoting and protecting the freedom of adults sometimes to the detriment of their children, but the staggering numbers indicate that we are at that point.

Today more and more children will pass through single parent homes in route to ever more complex family structures as adults couple and uncouple in both formal and informal ways. From a child’s point of view, the concept of family is becoming increasingly fluid and confusing as family relationships become less reliable.

Parents, step-parents, quasi parents are moving in and out of children’s lives in unprecedented numbers. Certainly some reconstructed families offer new, rich, viable relationships, and that’s good, but they can also bring new conflicts and emotional loss.

The net result of these family transformations is a dramatic increase in the proportion of children being raised by only one parent. And unfortunately, we are seeing large segments of the American population now being severely disadvantaged by this fact.

Many scholars are also reporting that this marriage gap, as they’re calling it, not only creates inequality among children, it’s also creating inequality among whole communities. There is a marked gap in opportunity between communities in which marriage is the normal, reliable framework for raising children and communities in which it is not.

In family law, there is an intensifying debate about how we should respond to these changes. Should law in society seek new ways to support marriage as the optimal institution for child-rearing, or should family law abandon that attempt altogether and instead favor more rights for its alternatives, such as cohabitation and single parenthood?

Some legal scholars argue that the law should seek to reinvigorate marriage. They contend the law should remove barriers that discourage marriage, such as the marriage penalty and tax and welfare codes. They also argue for laws that would encourage marriage by, say, subsidizing
marriage education programs, divorce counseling programs, and media campaigns that promote all of the benefits of raising children within a functional marriage.

They tend to support measures that would discourage divorce, such as the extension of divorce waiting periods and a return to fault-based divorce schemes. Do you know that the waiting period for a divorce in Georgia, the shortest waiting period in the country, is 30 days?

At the other end of the spectrum are those who argue that the traditional marriage and family model may be the ideal, but it is an ideal that does not reflect the experience of some racial minorities, women, single parents, divorced persons, gays and lesbians, or others.

They argue that families have not been weakened by divorce or unwed childbearing at all. They have merely changed in form, and that these changes have not had all the negative effects that I’ve outlined.

Now these “pro-family diversity” proponents had some powerful supporters. Some of the eminent scholars of the American Law Institute, a prestigious private association of judges and lawyers of which I am a member, embraced this view in a report in 2002. The report was called “The Principles of the Law of Family Dissolution.” The report moves away from the idea that there can be public standards which guide marriage and parenthood. Instead, the report says, the central purpose of family law should be to protect and to promote family diversity. The report views “traditional marriage” as merely one of many possible and equally valid family forms.

The point I’d like to highlight this evening is this: Regardless of where you fall on this spectrum, our response to this new debate on marriage has important implications for cherished American ideals concerning family, equality of opportunity, and the health and well-being of our children.

What we need therefore is more public attention on the nature and the purpose of marriage. Marriage. And marriage must be added to the national legal discourse. Now, marriage in the United States has always been a legal institution, however, marriage is not just a legal construct as the lawyers and everybody knows. It’s also a deeply spiritual and sacred bond. It is an undeniable fact that many of our shared ideas about marriage, such as monogamy and sexual fidelity, have roots in our various spiritual heritages, thus marriage is a hybrid institution, an intimate, intensely private and personal decision to enter into a public legal status that has special meaning in our broader civil society. The law can never be the creator of family. It can only be one of its many custodians. The law may declare, for example, that children have the same right to a father’s care whether they are being raised outside or inside of marriage. However, while the law may insist that a father financially support his children, it cannot mandate his love. A child support check is important, but it cannot replace a loving father or a committed, responsible, and present husband. As a result, the equality of treatment assured by the law to all children has proved elusive to millions of children who suffer daily from the economic and social inequalities often produced by the fragmented family.

The social science evidence is strong that marriage is an important generation of human, social, and financial capital. Families and communities in which marriage is common have powerful
advantages for children over those in which children is no longer the norm. To ignore the decline of marriage therefore not only puts individual children at risk, it also sets in motion a self-perpetual cycle of disadvantage for all of our children.

How costly is this retreat from marriage? Let me give you few, just three quick examples, from my vantage point as a justice on the Supreme Court: the Courts, child well-being measures, and community health.

I’ve been a judge now in Georgia’s court system over 25 years. I started when I was 27, so I know firsthand the cost of family breakdown. In Georgia, 65 percent of all civil cases now heard at the trial level last year involving families and children. More than 25,000 children in Georgia were admitted to youth jails last year and another 13,000 children are in the care of the Georgia Division of Family and Children Services. In 2005, the Georgia Office of Child Support Enforcement had a file for one of every four children under the age of 18, with a total caseload surpassing the half million mark. Of these child support enforcement cases, 72 percent more involved were in the superior court.

And, of course, Georgia’s not unique. And it’s also exacted a tremendous cost on child well-being. Advocates who embrace family diversity as the goal of family law say they’re only responding to reality, the facts on the ground. But one of the facts is this: a growing body of scientific evidence now demonstrates that children suffer when families fall apart.

If all family forms equally protected children, then protecting the rights of adults to form families of their children would be a noble goal. Instead now 40 years of social science now tends to confirm that the structure that helps children the most is a family headed by their own biological or adopted parents in a low conflict marriage, as un-PC as that may sound. Children in single family parents, children born to unwed mothers, and children in step-families or living with cohabitating couples simply don’t fare as well.

The spread of single mother-families has also played a major role in the persistence of poverty. In 1964 when President Johnson declared war on poverty, only 30 percent of poor families were headed by single mothers. Today it’s twice that amount. In the year 2000, only 8 percent of children living with both parents were poor compared to 40 percent of children living in female-headed households.

Community crime rates are also linked to family structure. In fact, Harvard sociologist Robert Sampson argues that family structure is one of the strongest, if not the strongest predictor of variations in urban violence across the United States. His study found that nearly 90 percent of the change in violent crime rates between 1973 and 1995 can be accounted for by the change in percentages of unwed births, out-of-wedlock births.

Of course, “marriage is not the panacea for all of our social ills.” Violent or abusive marriages and marriages in which alcohol and drug abuse are worse, much worse, than no marriage at all. But on average, marriage brings together the emotional, psychological, spiritual, financial, and educational resource of two parents and their respective kin networks. And just like partners in a
business, partners in marriage actually produce more working together than either can produce apart.

There is little or no question that our legal and social policy should continue to direct social energies toward providing protection and support for our children regardless of what family form they’re born into. Compassion for the needs of others regardless of their marital status is a deeply held American value. But I believe that building a viable marriage culture is also a legitimate concern of family law. And to that end and because I’m running out of time, I just want to say that my Supreme Court last year established a Commission on Children, Marriage, and Family Law with the important goals of finding ways to reduce unnecessary divorce and unwed childbearing.

We can do better. We must do better. What we do not yet know how to accomplish, we can learn. Our nation’s commitment to principles of equality and our concern for all of our children require that we undertake the task of renewing marriage in this country. Thank you all very, very much for your time and attention.