Future of Family Requires Changes in Laws, Attitudes
Wednesday, January 17, 2007

By: Kathy Morse

Laws that provide less favors to married couples, more options for marriage, and a coherent approach to handling children in the legal system were among the family law issues addressed (view webcast) during “The Future of Marriage and Family Life,” a panel discussion among four distinguished senior fellows of the Center for the Study of Law and Religion (CSLR) held recently at Emory University School of Law. The event was sponsored by the CSLR.

Panelists' books on these subjects are available in the Publications section of this website.

Changing American Family
“There has been extreme, biting commentary by prominent social scientists, theologians and politicians regarding the precipitous decline of the American family and the very state of marriage for more than 50 years,” said John C. Mayoue, moderator of the evening’s discussion. Mayoue is an Emory Law alumus and partner in the domestic relations litigation firm of Warner, Mayoue, Bates and Nolen, P.C.

While the concern is not new, the nation has reached a troubling milestone. “For the first time in U.S. history, traditional marriage has ceased to be the preferred living arrangement in the majority of U.S. households,” Mayoue said. “Of 55.8 million households in the new majority, 14 million are headed by single women, 5 million by single men, and 36.7 million belong to a category described as ‘non-family households.’”

The state interest in marriage and family life is changing. What is the role of institutions, churches, synagogues and civic organizations in the debate? Mayoue challenged the panelists to address this question: “How has the very purpose of marriage changed from traditional constructs – and is marriage, as historically understood, either viable or socially desirable?”
Social Change and Law Reform
Anita Bernstein, Sam Nunn Professor of Law, led off the debate by stating that the number one topic today in marriage law is same-sex marriage and its complications, such as civil unions and a constitutional amendment to prevent them.

“Half of the states now have constitutional amendments regarding same-sex marriage. Legislation has been defeated in Congress, but could be reintroduced,” she said.

The number two issue is marriage promotion by government through such vehicles as joint income tax returns, Social Security benefits based on spousal earnings, and spousal health insurance as a non-taxable transfer of income.

“Government is affirming marriage as a ‘good thing’ to order your life,” Bernstein said. “There is a belief that marriage is desirable and valuable. Same-sex marriage activists want to get it; opponents want to defend marriage from this assault.”

Bernstein then questioned the merits of marriage. “Should it really be envied, defended and promoted? My thesis is that the enthusiasm for marriage by government is misguided and is very costly. The law could change its stance and become more neutral on the role of marriage and in allocating privileges and benefits and some detriments. If being married mattered less, issues such as same-sex marriage would matter less.”

Separation of Church and State
Next, Mark D. Jordan, Asa Griggs Candler Professor of Religion, questioned the role churches should have in setting marriage policy.

Current fights over marriage – such as same-sex marriage – primarily are fights among Christians and are part of a long historical trend, he said. “I often wish that Christians might debate these issues without interference from the state and without one churchly camp or the other relying on the state’s coercive power. Christian ministers should refuse to act as agents of the state in blessing any kind of marriage union, as they should not be agents of the state when they baptize or consecrate the Eucharist.

“I believe that so long as the state distributes citizen benefits through marriage, it is obliged to strive for a religiously neutral civil marriage that is flexible as to the number and gender of the parties to it, its conditions for dissolution, its relations to reproduction or child-rearing,” Jordan said.

Jordan sees his wishes as “utopian dreams” and cites Christian arguments around the raising of children. “Christian opponents to same-sex marriage present ‘scientific’ research to show that such arrangements damage children. Much of the alleged research comes from dubious sources and is contradicted by a much larger and more reliable body of evidence that there is no damage to children.”

In conclusion Jordan said, “Churches and states have compelling reasons to keep trying to sort things out separately in this historical moment. Giving in to the theocratic impulses that regularly surge through churches will not only damage many vulnerable groups, it will harm all religious believers who are not members of the church that wins... and will harm most of all the members of the church that does win.”
Sign Posts Show Pluralization of Marriage Options

John Witte, Jr., Jonas Robitscher Professor of Law and CSLR director, explored covenant marriage law, which first surfaced 10 years ago in Louisiana. The law is designed to make it more difficult for couples to form or dissolve their union. Now 26 other states have covenant marriage options, and it is being considered in Georgia.

“Covenant marriage laws have been one of several legal responses to the mounting social and psychological costs of America’s experiment with easy-in/easy-out marriage,” said Witte. “Better to prepare well for a marriage than to rush into it. Better to cancel a wedding than to divorce shortly after it. Such is the theory of the new covenant marriage laws.”

But he argues that this marriage option is one of several that ought to be considered. “Covenant marriage laws might well be a sign post along the way to the pluralization of marriage options held out by the state. A generation or two from now, a number of states may well be offering several off-the-rack models of marriage or civil union that parties can choose – for straights, gays, lesbians, bisexuals, in committed monogamous or polygamous unions, with or without sexual intimacy, with or without mutual dependency and sometimes with non-state associations (including churches, synagogues, mosques, and temples) providing at least some of the marital rules and structures.

“Each of these off-the-rack models would have its own set of default rules set by the state concerning marital property, mutual support, custody and care for children and dependents, health and life insurance, social security and more.

“Whether this legal pluralization of marriage is healthy or harmful is worthy of serious discussion. But we are moving in this direction, and moving more rapidly in recent years because of constitutional mandates of liberty, privacy, and equality for all,” said Witte.

What Rights Should Children Have?

Karen Worthington, clinical professor of law and founding director of the Barton Child Law and Policy Clinic at Emory University, discussed the disparity of children’s treatment in the legal system.

“Children are treated differently in different contexts. Ideally, we would have a coherent approach based on universally accepted paradigms regarding children’s place in society,” she said.

Worthington cited the example that a 13-year-old in Georgia can be tried as an adult and sentenced to life without parole, but cannot drive, sign a contract, consent to medical care, vote, or enter into marriage. Should that 13-year-old bear a child, she could assume full responsibility for all decisions regarding that child.

“Historically, children were treated as the property of their parents. Large segments of the population have approached children from a religious perspective using the Bible as the ultimate authority on the handling of children,” Worthington said. “More recent approaches have used a rights-based analysis to bring about better outcomes for children, forcing adults to honor their responsibilities and commitments to children.”
Yet Worthington believes “we too rarely get the child’s perspective on situations” and instead presume that parents act in their children’s best interests. An alternative, particularly in cases of divorce custody and foster care, is the “least detrimental alternative” model based on guidelines. In this model, a parent should:

- safeguard the child’s need for continuity
- reflect the child’s sense of time
- take into account the law’s incapacity to make long-range predictions and manage family relationships

“Such a standard would maximize a child’s opportunity for being wanted and for maintaining a relationship with at least one adult who is capable of becoming her psychological parent,” she said.

***

The Center for the Study of Law and Religion is home to world-class scholars and forums on the religious foundations of law, politics, and society. It offers first-rank expertise on how the teachings and practices of Christianity, Judaism and Islam have shaped and can continue to transform the fundamental ideas and institutions of our public and private lives. The scholarship of CSLR faculty provides the latest perspectives, while its conferences and public forums foster reasoned and robust public debate.

Link to this story: