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# Does Christianity Teach Male Headship?
# The Emerging Protestant Legal Traditions

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Both the legal and the Protestant traditions of the West have offered multiple answers to the question whether Christianity teaches male headship. The answers change as one moves from medieval Catholic canon law, to early modern civil law, to twentieth-century Anglo-American common law. The answers change further as one moves across mainline Lutheran, Calvinist, Anglican, and Anabaptist traditions, and moves forward within each denomination from the sixteenth century until today. And the answers change again as one moves through institutions of the household, the church, the state, and voluntary associations. In broad historical outline, the theological presumption of male headship is stronger among Calvinists and Anglicans than among Lutherans and Anabaptists, and stronger among sixteenth and seventeenth century Protestants than among their modern successors. Also in broad historical outline, the legal presumption of male headship has been more fully maintained within the household and the church, where group identity and rights are more heavily emphasized, than within the state and voluntary associations, where individual rights and equality have higher priority.

Both the theology and the law of the Protestant traditions have had to steer a course between patriarchal monism and gender-blind egalitarianism. Even the most rigid patriarchal models of headship have had to yield to the perennial realities of queenships, matriarchal associations, and single mother households. Even the most rigorous expositions of gender equality have had to acknowledge the distinct callings and capacities of males and females in the processes of procreation, nurture, and education of children. An emerging theme of the Western Protestant tradition has thus been to emphasize the ontological equality of males and females before God, even while differentiating, and sometimes chauvinistically prioritizing, their respective callings and offices. An emerging theme of the Western legal tradition, has been to emphasize the constitutional equality of men and women, even while allowing churches, households, and other non-state associations to strike their own internal balances between headship and equality, authority and liberty.

## James Fitzjames Stephen v. John Stuart Mill

Rather than tracking this moving picture of male headship with anecdotes, permit me to summarize a vigorous literary debate about male headship within marriage in mid-nineteenth century England. The antagonists in the debate were James Fitzjames Stephen, a prominent Anglican jurist and moralist, and John Stuart Mill, a leading libertarian and utilitarian.

Both were distinguished men of letters and occasional legislators. Both spoke for broad constituencies--Stephen for an old Protestant order featuring marital headship, Mill for a new libertarian order featuring gender equality.

The setting for much of their debate was the ferment in Parliament for the reform of the traditional English law of marriage--ferment that found equal force in American state legislatures at the same time. The Stephen-Mill debate was focussed by several bills that sought to liberalize marriage and divorce rules, to liberate children from abusive households, and to enhance the rights of wives to their property and minor children. For Stephen, the heart of the debate was over the essential character of marriage and the family: Is this institution "a divine, indissoluble union governed by the paterfamilias [at its head], or is it a contractual unit governed and dissolved by the wills of the parties?"

Stephen, speaking for the old order, defended the first position. "[T]he political and social changes which have taken place in the world since the sixteenth century [Protestant Reformation] have ... been eminently beneficial to mankind," Stephen wrote. "The terms of the marriage relation as settled by the law and religion of Europe" since the Protestant Reformation must be maintained.
The "settled" theological view of Stephen's day was that marriage is a "state of existence ordained by the Creator," "a consummation of the Divine command to multiply and replenish the earth," "the only stable substructure of social, civil, and religious institutions." Marriage was almost universally taken to be a permanent monogamous union between a fit man and woman designed at once for mutual love and affection, mutual procreation and nurture of children, mutual protection from spiritual and civil harms.

The "settled" legal view of Stephen's day was that marriage depended for its legitimacy on the absolute and unequivocal consent of both the woman and the man. Marriage formation required formal betrothals, publication of banns, parental consent, peer witnesses, church consecration, state consecration. Marriages would be annulled, on petition of either party, if couples were related by various blood or family ties identified in the Mosaic law, or where one party proved impotent, frigid, sterile, or had a contagious disease that precluded procreation or endangered the other spouse. Marriages could also be annulled if one of the parties had been coerced, tricked, or misled into marriage.

The "settled" natural view of Stephen's day was that men are created with superior power, ability, and opportunity in life, which they must discharge with due restraint and accountability to God. Women have a special calling to be wives and mothers, teachers and nurturers of children, which calling they must discharge in the household. Our law and religion reflect these natural sentiments, said Stephen, "by prescribing monogamy, indissoluble marriage on the footing of the obedience of the wife to the husband, and a division of labour among men and women with corresponding differences in the matters of conduct, manners, and dress."

Nature is defied if marriage is treated as a simple contract, Stephen argued. This notion assumes falsely that men and women are equal. To allow marriage to become "a simple bargained-for contract," without oversight by parents and peers and by church and state, "will inevitably expose women to great abuse." They will have no protection in forming the bargain with naturally superior men, nor protection from men who dismiss them when barren, old, unattractive, troubled, or destitute. "The truth is," Stephen thundered, "that the change of marriage ... from status to contract" "is not favorable to equality." "Men [and women] are fundamentally unequal, and this inequality will show itself, arrange society [and its law] as you like." "If marriage is to be permanent," and justice and liberty properly guarded, "the government of the family must be put by law and by morals in the hands of the husband."

Nature is also defied if the family is treated as an open contractual society, subject to multiple claims of right by its members. The family, once formed, is an independent institution that "lies at the foundation of both church and state." The husband and father is the head of the family, just as the monarch is the head of church and state. As paterfamilias, he must rule the household as God's vice-regent with all benevolence, grace, and Christian devotion. A wife is the husband's co-helper in the family, a child his ward and agenda, both of whom must obey his every reasonable command.

Stephen was well aware of the potential abuses in this traditional law. "No one," he writes, "contends that a man ought to have power to order his wife and children about like slaves and beat them if they disobey him." Such abusive conduct must be punished severely, but on a case-by-case basis.

John Stuart Mill attacked Stephen's sentiments with arguments well known in England's liberal circles. Mill's attack was, in part, directed against the abuses allowed by this traditional system of marriage and family law. But Mill's deeper attack theological -- "laying bare the real root of much that is bowed down to as the intention of Nature and the ordinance of God." The prevailing theology and law of marriage and the family supports a "three-fold patriarchy," Mill charged. The church dictates to the state its peculiar understanding of nature. The state dictates to the couple the terms of their marital relation, and abandons them once the terms are accepted. The man lords over his wife and children, divesting them of all liberty and license in their person and property, thought and belief.

Nature does not teach the headship of man or the subjection of women, said Mill, but "a perfect equality" of spouses. "If marriage were an equal contract ... and if [a woman] would find all honourable employments as freely open to her as to men," marriages could be true institutions of liberty and affection, shaped by the preferences of wife and husband, not the prescriptions of church and state.

Nature also does not teach tyranny and commodification of children by the paterfamilias. Children are not items of property, to be sold on the market of marriage, or conduits through which to pass the family name and property. Nor are children slaves to be worked and whipped into

submission and performance by the paterfamilias. If the family were an open unit, where children could seek redress from neglect, abuse and arbitrary rule, a real family could be realized and true happiness for all parties involved could be attained. If the paterfamilias does not "fulfill his obligation to feed, nurture, and educate his child with love and patience," said Mill, the paterpoliticus, the state as the child's protector under the social contract, "ought to see it fulfilled, at the charge, as far as possible, of the parent."

## Legal Reforms

Mill's critique anticipated many of the reforms of Anglo-American marriage law enacted over the past 150 years. The reforms came in two waves. The first wave, which broke slowly over England and America from the mid-nineteenth to the mid-twentieth centuries, was designed to bring greater equality and equity to the traditional household, without necessarily denying the traditional Christian ideals of marriage that had helped to form this institution. The second wave of reform, which has been breaking in America since the early 1960s, seems calculated to break the preeminence of the traditional family law, and the basic Christian values which once sustained it.

The first wave of legal reforms brought greater protection to women and children. New legislation released married women from the legal bonds of "coverture," which traditionally had subsumed a married woman's person and property into that of her husband. A married woman could now hold independent title and control, and exercise independent contractual and testimonial rights, over the property she brought into the marriage or acquired thereafter. She also gained the capacity to litigate in respect of her property, without intermeddling by her husband. As their rights to property were enhanced, (married) women slowly gained broader rights to higher education, learned societies, trade and commercial guilds and unions, and various professions, occupations, and societies, and the franchise -- all of which had been largely closed to them.

Other new legislation provided that, in cases of annulment or divorce, courts had discretion to place minor children in the custody of that parent who was best suited to care for them. This reversed the traditional presumption that child custody belonged to the father. The wife could now claim custody, particularly where children were of tender years or where the husband was found to be cruel, abusive, or unfit as a caretaker. Courts retained the traditional power to order guilty husbands to pay alimony to innocent wives, and were newly empowered to make other "reasonable" allocations of marital property to the innocent wife for child support.

These and other early reforms sought to improve traditional marriage lore and law more than to abandon it. Most of these reformers, Mill among them, accepted the Christian ideal of marriage as a permanent union of a fit man and woman of the age of consent. Most accepted the classic Augustinian definition of the marital goods of fides, proles, et sacramentum--sacrifical love, supportive procreation, and symbolic stability. The primary goal of these early reformers was to purge the

household of the paternalism and patriarchy inherent in some traditional views of headship, and thus to render the ideals of marriage a greater reality for all.

The legal reforms introduced during this first phase were designed to render marriages easier to contract, maintain, and dissolve. Courts were more deferential to the wishes of both marital parties, before, during, and after their wedding. Wives received greater protections from their husbands and greater independence in their relationships outside the household. Children received greater protection from parental abuse and greater access to benefit rights. Young women, in particular, received greater freedom to forgo or postpone marriage, and greater social, political, and economic opportunities, regardless of their marital status. While traditionally, a woman's consent was considered essential only for purposes of marital formation, now it was becoming essential to all phases of the marital process. While traditionally, male headship was considered the natural condition of a voluntarily formed marriage, it was increasingly viewed as a negotiable term, particularly if the woman or her family had ample political or economic power.

It should be noted that this transformation of marital headship was as much as reformation as a rejection of basic Protestant lore. One goal of the sixteenth century Protestant reformers had been to remove the cleric as a mediator between God and the laity--following St. Peter's teaching on the priesthood of all believers. One consequence of embracing the principle of headship was to interpose the paterfamilias as a mediator between God and his wife--following St. Paul's teaching on household codes. Later Protestants slowly parsed this tension by reemphasizing classic Protestant themes of the equality of men and women in Christ, and of their respective vocations before God.

Since the early 1960s, American reformers have taken the lead in pressing the Enlightenment contractarian model of marriage to the more radical conclusions that Mill and others had intimated. The same Enlightenment ideals of liberty and equality, which had earlier driven reforms of traditional marriage laws, have come to be used to reject these laws altogether. The traditional Christian ideal of marriage as a permanent spiritual union designed for the sake of mutual love, procreation, and protection is slowly giving way to a new reality of marriage as a terminal sexual contract designed for the gratification of the individual parties.

Today, John Stuart Mill's contractual ideal of marriage as "a private, bargained-for exchange between husband and wife about all their rights, goods, and interests" has become a legal reality in America. The strong presumption today is that adult parties have free entrance into marital contracts, free exercise of marital relationships, and free exit from marriages once their contractual obligations are discharged. Antenuptial, marital, and separation contracts that allow parties to define their own rights and duties within the marital estate and thereafter have gained increasing acceptance. Implied marital contracts are imputed to longstanding lovers. Surrogacy contracts are executed for the rental of wombs. Medical contracts are executed for the abortion of fetuses. Traditional requirements of parental consent, peer witness,

church consecration, or civil registration for all these contracts have largely disappeared. No-fault divorce statutes have reduced the divorce proceeding to an expensive formality. Lump sum property exchanges now often substitute for alimony. Parties are still bound to continue to support their minor children, within and without marriage. But this merely expresses another contractual principle--that parties respect the reliance and expectation interests of their children, who are third party beneficiaries of their marital or sexual contracts.

But today, James Fitzjames Stephen's warning that undue contractualization of marriage will bring ruin to many women and children has also become a social reality in America. Premarital, marital, separation, and divorce contracts too often are not arms-length transactions, and too often are not driven by rational calculus alone. In the heady romance of budding nuptials, parties are often blind to the full consequences of their bargain. In the emotional anguish of separation and divorce, parties can be driven more by the desire for short-term relief from the other spouse than by the concern for their long-term welfare or that of their children. The economically stronger and more calculating spouse triumphs in these contexts. And in the majority of cases today, that party is still the man--despite the loud egalitarian rhetoric to the contrary.

"Underneath the mantle of equality that has been draped over the ongoing family, the state of nature flourishes," Mary Ann Glendon writes. In this state of nature, freedom and privacy reign supreme. But married life is becoming increasingly "brutish, nasty, and short"--with women and children bearing the primary costs. Recall the familiar statistics: In the 1990s, a quarter of all pregnancies are aborted. A third of all children are born to single mothers. One half of all marriages end in divorce. Two thirds of all black children are without regular fathers. The number of "no parent" households doubles each year. The number of "lost children" in America is more than fifteen million. The greater the repeal of regulation of marriage for the sake of marital freedom and sexual privacy, the greater the threat to real freedom for women and children. The very contractarian gospel that first promised salvation from the abuses of earlier Christian models of marriage and headship now threatens with even graver abuse.

## Lessons from the Tradition

What is the way out of this dilemma? There have been, and must be, many responses. Mine is the expected response of an historian: "Back to the sources!"--but now newly enlightened. The achievements of the Enlightenment in reforming the theology and law of marriage cannot be lost on us. It took the contractual radicalism of Mill and his contemporaries to force the Western tradition to reform itself--to grant greater respect to the rights of women and children, to break the monopoly and monotony of outmoded moral and religious forms and forums respecting sexuality, marriage, and the family, to purge the excesses born of traditional understandings of male headship. Some religious traditions may have retrieved or conceived their own resources to achieve these reforms, but it was the Enlightenment critique that forced these

traditions to reform themselves and the state to reform its laws. This was no small achievement.

Just as the Enlightenment tradition still has much to teach us today, so do the earlier Protestant traditions. Protestants have seen that marriages are at once natural, spiritual, social, and contractual units; that in order to survive and flourish, this institution must be governed both externally by legal authorities and internally by moral authorities. Protestants have seen that the household is an inherently communal enterprise, in which marital couples, magistrates, and ministers must all inevitably cooperate to achieve the marital goods of mutual love, mutual procreation, and mutual protection of a person from sexual sin. One modern lesson in this is that we must resist the temptation to reduce marriage to a single perspective or to single authority. A single perspective on marriage--whether religious, social, or contractual--does not capture the full nuance of marriage. A single authority over marriage--whether the church, state, or paterfamilias--is not fully competent to govern all marital questions. Marriage demands multiple perspectives and multiple authorities to be understood and governed adequately.

A second lesson is that we must resist looking to the state alone for the sources of our marriage law. American religious communities need to think much more seriously about restoring and reforming their own bodies of religious law on marriage, divorce, and sexuality, instead of simply acquiescing in state laws. American states, in turn, must think more seriously about granting greater deference to the marital laws and customs of legitimate religious and cultural groups, with the state setting only minimum conditions to facilitate such unions and criminal law limits against abuses of wives and children. The introduction of such legal pluralism might well lead some Christian, Jewish, Muslim, and other religious groups to reinstitute traditional forms of headship within the household. American Baptist churches have made headlines of late by announcing such a position. But if a religious community mandates responsible male -- or female -- headship as a condition for voluntary membership in the religious community, or of holding distinctive offices or powers within it, a state that respects religious freedom ultimately has little constitutional ground to object. So long as membership in such religious communities, and their constituent household units, remains voluntary, and parties commit no threats or violence to life and limb to their members, the rights of the religious group to define its idea marital forms must trump.

A promising recent development, which builds on the lessons of both the Protestant and Enlightenment traditions, is the rise of covenant marriage laws. Such laws were first enacted in Louisiana in 1997, and are now under consideration in several other states. At the time of their marital formation, couples may choose either a traditional contract marriage with attendant rights to no-fault divorce, or a covenant marriage, with more stringent formation and dissolution rules. In forming a covenant marriage, the parties must receive detailed counseling from a licensed therapist or religious official, read the entire covenant marriage statute, and then swear an oath, pledging "full knowledge of the nature, purposes, and responsibilities of marriage" and promising "to

love, honor, and care for one another as husband and wife for the rest of [their] lives." Divorce is allowed such covenanted couples only on proof of adultery, capital felony, malicious desertion or separation for more than a year, and/or physical or sexual abuse of the spouse or one of the children. Formal separation is allowed on any of these grounds, as well as on proof of habitual intemperance, cruel treatment, or outrages of the other spouse.

This is a cleverly drawn statute that seeks to respect both the inherent virtues of contractual calculus, emphasized by the Enlightenment tradition, and the inherent goods of marital union, emphasized by the Protestant tradition. The statute has been attacked, predictably, as an encroachment on sexual freedom and the rights of women and children, as a "Trojan horse" to smuggle biblical principles into American law, and as a throwback to the days of staged and spurious charges of marital infidelity which "no fault" statutes sought to overcome. But, given the neutral language of the statute and its explicit protections of both voluntary entrance and involuntary exit from the covenant union, such objections are largely inapt. The statute should help to inject both a greater level of realism into the heady romance of prospective couples and a greater level of rigor into the state's law of marriage formation and dissolution.

The stronger objection to the Louisiana statute is not that it jeopardizes liberty but that it trivializes covenant. The statute effectively reduces "covenant" to a super marriage contract between the husband and wife alone. Historically, however, marriage covenants involved parents, peers, ministers, and magistrates as well, who served at least as checks on each other and the prospective couple, if not as representatives of God in the covenant formation. Indeed, according to classic Protestant theology, the couple's parents, as God's bishops for children, gave their consent to the union. Two parties, as God's priests to their peers, served as witnesses to the marriage. The minister, holding God's spiritual power of the Word, blessed the couple and admonished them in their spiritual duties. The magistrate, holding God's temporal power of the sword, registered the parties and their properties and ensured the legality of their union. These four parties represented different dimensions of God's involvement in the marriage covenant, and were thus essential to the legitimacy of the marriage covenant itself. The Louisiana law replaces all four of these parties with a licensed marriage counsellor. Moreover, the Louisiana law leaves it to the state to decide the terms of the marital covenant, the credentials of the marriage counsellor, the contents of the marriage oath. Historically, however, churches and synagogues defined these matters for themselves, without much state interference. Perhaps this covenant statute will be the first step toward a more embracive legal pluralism -- that respects the rights of individuals and religious groups to devise their own institutions of liberty and authority, equality and headship.

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and Law in the Western Tradition (Louisville: Westminster/John Knox Press, 1997), 10-15, 194-215, 268-273.
. See James Fitzjames Stephen, Liberty, Equality and Fraternity, ed. Stuart D. Warner (Indianapolis: Liberty Fund, 1993), 15, 138-153; id., "Marriage Settlements," Cornhill Review (Dec. 1863): 1-6; and id., "English Jurisprudence," Edinburgh Review (Oct. 1861): 456-486.
. See Collected Works of John Stuart Mill, ed. John M. Robson, repr. ed. (Toronto: University of Toronto Press, 1984), 3:952-953; 16:1470; 17:1624, 1668-1669, 1692-1694; 19:401; 21:37, 46, 261-263, 287-289, 299-322; 23:677-680; 25:1172-1176; Ann P. Robson and John M. Robson, eds., Sexual Equality: Writings by John Stuart Mill, Harriet Taylor Mill, and Helen Taylor (Toronto: University of Toronto Press, 1994), 23, 28-34, 53-102.
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. Mary Ann Glendon, The Transformation of Family Law: State, Law, and Family in the United States and Western Europe (Chicago: University of Chicago Press, 1989), 146.
. See the monumental efforts in Don S. Browning et al., From Culture Wars to Common Ground: Religion and the American Family Debate (Louisville: Westminster/John Knox Press, 1997).
. See sources and discussion in Joel A. Nichols, "Louisiana's Covenant Marriage Law: A First Step Towards a More Robust Pluralism in Marriage and Divorce Law?" Emory Law Journal 47 (Summer, 1998): __.
. See Max L. Stackhouse, Covenant and Commitments: Faith, Family, and Economic Life (Louisville: Westminster/John Knox Press, 1997) and Witte, From Sacrament to Contract, chap. 3.