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## COMMENTS ON STEVEN SMITH, *PAGANS AND CHRISTIANS IN THE CITY*

MICHAEL P. MORELAND<sup>†</sup>

One of the most interesting aspects of this generally very interesting book was the discussion of sexual morality in paganism and Christianity. I have thought for a while that much of the contemporary debate about religious freedom is not about religious freedom in a generic sense but instead about religious freedom in a very particular context—sex. But that is a descriptive point—much more challenging is trying to give an account of *why* sex should have come to be (or as Smith’s argument implies, has long been) the battlefield on which much of the fight over religious freedom takes place. My offhand thought in these remarks is that our debates about religious freedom would benefit from a more sustained engagement with this seemingly odd feature of our late modern age—that the fragile consensus around religious toleration in modernity has started to come undone over sexuality—and the deeper reasons for it.

It is worth noting that this concern with sexuality (and the progressive opposition between religious freedom and sexual liberation) is a relatively recent turn in the debate over religious freedom, a familiar story to law and religion scholars. Religious freedom during the era of the Warren and Burger Courts was seen as mostly a progressive cause, as witnessed by cases involving those seeking exemption from the draft or from incidental impositions on religious practice by members of small, minority religious groups (such as Jehovah’s Witnesses, Seventh-Day Adventists, and the Amish). The proponent of this constitutional approach to religious freedom was Justice Brennan, a liberal hero who combined enthusiasm for the Court’s decisions in *Griswold* and *Roe* amid the sexual revolution with a commitment to heightened protection for religious believers under the Free Exercise Clause. It was often conservatives (or at least legal conservatives) who were most skeptical of this regime on religious freedom, as shown, for example, by the views of

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Walter Berns, Justice Harlan (who dissented in *Sherbert v. Verner*), then-Justice Rehnquist, and Philip Kurland. This was also a period, however, in which the debate over religious freedom was, broadly speaking, less contested than it is now. The most vocal critics of the Warren and Burger Courts focused their energy for the most part on abortion, criminal procedure, and race. That period of mild contestation over religious freedom culminated in *Employment Division v. Smith*, where Justice Scalia drew an end to the era of liberal constitutional religious freedom in a case involving a claimed religious exemption for drug use (more precisely a religious exemption from the denial of unemployment benefits for employees dismissed for drug use), seen at the time as a victory for legal conservatism.

So what changed and *why* did things change? Smith's answer to this normative question proceeds mostly historically, and I am wondering how the argument might be pressed more philosophically or theologically. In *The Triumph of the Therapeutic*, Phillip Rieff called attention to a link between sexual morality and Christian identity:

Historically, the rejection of sexual individualism (which divorces pleasure and procreation) was the consensual matrix of Christian culture. It was never the last line drawn. On the contrary, beyond that first restriction there were drawn others, establishing the Christian corporate identity within which the individual was to organize the range of his experience. Individuality was hedged round by the discipline of sexuality, challenging those rapidly fluctuating imperatives established in Rome's remissive culture, from which a new order of deprivations was intended to release the faithful Christian believer.<sup>1</sup>

This account—that pagan Rome celebrated sexual gratification and gave license to all manner of sexual expression (and oppression)—is echoed in Smith's book as well. I think there is also a set of arguments Christians might make as to why this is so, and why Christian morality includes a great deal of teaching on sexuality (arguments that Smith sometimes gestures toward but does not, understandably, fully develop in what is already a long book).

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<sup>1</sup> PHILIP RIEFF, *THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD* 17 (1966) (citations omitted).

Christian sexual morality includes claims about divine authority and sanction, a view that runs contrary to a view placing autonomy and self-expression at the center. Sexual morality is tied up with *theological* claims about the authority of the Bible, creation, and the significance of reproduction. Sexual sin in Christianity is viewed as disordered desire and an inordinate love of self generated by pride. In the *Confessions* (and I am focusing most especially here on Book II), Augustine tries to give an account of his own disintegration, his own (perverted) love for incoherence as he reflects on his sexual concupiscence. In the Augustinian view, sexual desire itself is mediated by culture—what kinds of sexual desire are permissible to entertain, and what forms of sexuality are encouraged or prohibited.

Traditional Christian views on sexuality pose challenges to the modern pagan (to use Smith's parlance) on at least two fronts. First, traditional Christian accounts hold to a view affirming a natural differentiation of the sexes and the biological significance of gender, with profound implications for gender equality and sex. As argued at length by Alexander Pruss in his book on Christian sexual ethics, the theological commitments (particularly the doctrine of creation) of Christianity entail the significance of nature and natural desire: "A *natural* biological striving in a human being is always valuable in itself (though it may be contextually inappropriate), since it is the normal functioning of a creature made in the image and likeness of God."<sup>2</sup> But is it only in a theologically informed view that affirms the significance of creation in the first place that these views can get a hearing?

Second, churches are among the most well-organized and persistent opponents of permissive views on a range of matters related to sex and reproduction, with abortion, contraception, access to artificial reproduction, and same-sex marriage being the most obvious examples. In such a climate, the secular debate over sexual morality inevitably has come to shape our understanding of religion itself. In the self-understanding of most orthodox Christian churches, the central doctrines are revelation and redemption and the primary activity is worship. In the secular (or Smithian "pagan") perspective, though, moral

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<sup>2</sup> ALEXANDER PRUSS, ONE BODY: AN ESSAY IN CHRISTIAN SEXUAL ETHICS 141 (2012) (emphasis in original).

teaching—with all of its taboos and purportedly bigoted restrictions—is at the center of religion, with worship merely an activity engaged in by those who choose to do so. The contemporary debate over religious freedom, then, distorts Christianity itself because this debate over these moral questions is already such a prominent feature of public life, and the church becomes another site of such debate. The debate frequently becomes a distraction of a kind and churches come to be understood—both by those inside and outside of them—as little more than advocacy organizations in the culture wars.

Because both sides in the discussion are sometimes at pains not to address the substantive questions of sexual morality (in part because it has become increasingly difficult even to imagine, let alone garner public acceptance for, arguments that are restrictive of sexual liberty), the discussion of religious freedom (and legal doctrinal twists about compelling state interests, narrow tailoring, third-party harms, and the like) comes to be a substitute for those questions. Participants in these debates *really* disagree about questions of sexual morality, but they flee to a safer (in a sense) and legalistic debate over the First Amendment and RFRA (with echoes here of Smith's more general point about law that he made in *Law's Quandary*). One of the many virtues of Smith's provocative book is that it asks us to wonder what those legal debates are really about, including the odd but enduring centrality of sexuality to them.