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DIALOGUING WITH PAGANISM

HELEN M. ALVARÉ[†]

Professor Smith’s comparison of ancient and contemporary beliefs in the “immanent sacred” works well.¹ By this I mean that it’s quite plausible, and accounts for quite a few contemporary claims, disputes, and movements in both law and culture.

The book’s implications for law are likely too complicated to allow for anything like its straightforward application in today’s religion clause contests. Still, it might indirectly assist traditional believers to lower the temperature of, or even avoid, such contests. I develop each of these points below.

Regarding Smith’s claims about the presence of notions of the pagan or “immanent sacred” within current secular arguments and claims, it seems true that several of the elements of paganism Smith identifies—especially its intellectual propositions and symbols—are visible within current phenomena. The rhetoric and logic of environmentalism, for example, frequently invokes the immanent sacrality of nature.² There are also the sacred symbols of the cause of women’s freedom: contraception and abortion. Even to ask questions about the outcomes, safety, efficacy, or morality of contraception or abortion provokes heated replies, which regularly ignore empirical evidence, and instead exhibit the quality of blind faith.³ Finally there is the Supreme Court’s recent use of “sacred” language to describe governmental practices like prayers to open legislative sessions—even when these include denomination-

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¹ See generally STEVEN D. SMITH, *PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC* (2018) [hereinafter *PAGANS AND CHRISTIANS*].

² See, e.g., Alex Martin, *Jobs battle environment on sacred but scarred Mount Buko*, *JAPAN TIMES* (Nov. 21, 2017), <https://www.japantimes.co.jp/news/2017/11/21/national/social-issues/jobs-battle-environment-sacred-scarred-mount-buko/#.XHxvaZNKgWo>; D.J Pangburn, *Australia’s Sacred Sites Get Recreated for an Immersive Musical Performance*, *VICE* (July 23, 2017), https://www.vice.com/en_us/article/43d8bp/australia-sacred-sites-immersive-musical-performance.

³ I develop this at length in my article deconstructing the claimed empirical basis for “the contraception mandate” of the Affordable Care Act. See Helen M. Alvaré, *No Compelling Interest: The “Birth Control” Mandate and Religious Freedom*, 58 *VILL. L. REV.* 379 (2013).

specific references to God—as simply an acknowledgement of the “gravity,” and “higher purpose” of the legislative undertaking.⁴ If one was to apply Smith’s conclusions about paganism’s sacred claims to current religion clauses litigation, however, things would get very complicated very fast. The state-sponsored teaching or celebration of various “isms” (e.g. feminism, gender identity, environmentalism) now flying under the banner of “good citizenship” could become establishments of religion. Courts and legislatures would have to inquire about the degree to which these positions relied on sacred claims. Accusations of denominational non-neutrality could be leveled at schools that refuse to expose children to a denomination’s religious sex-ed, while promoting “secular” sex-ed programs possibly grounded on ideas about the sacredness of sex would be promoted. Beliefs and practices concerning important “secular” matters *not* previously eligible for free exercise exemptions, would become eligible, but possibly without the benefit of the usual “sacred texts” or “religious law” usually grounding courts’ necessary inquiries about the existence of a “burden” on free exercise and about claimants’ “sincerity.”

For these and other reasons, even if they are accepted as true, Smith’s insights about the “religion” of paganism are unlikely to be adopted by lawmakers anytime soon. They could, however, influence the way in which believers in transcendent religion advance their arguments for free exercise exemptions not only in order to win, but also in order to suggest common ground with pagan tenets in which they see sufficient truth. In particular, I can imagine Christians altering the way in which they frame their conscientious objections regarding sexual expression protections and mandates, on the reasoning I articulate below.

First, I believe Smith is correct when he observes that proponents of immanent sacrality are indignant about what they consider to be Christianity’s stripping the joy and communal spirit out of worldly things—sex in particular.⁵ Pope Benedict XVI also observed this in his first encyclical *Deus Caritas Est* (God is Love) when he said:

⁴ *Town of Greece v. Galloway*, 572 U.S. 565, 566 (2014).

⁵ See SMITH, PAGANS AND CHRISTIANS, *supra* note 1.

According to Friedrich Nietzsche, Christianity had poisoned *eros*, which for its part, while not completely succumbing, gradually degenerated into vice. Here the German philosopher was expressing a widely-held perception: doesn't the Church, with all her commandments and prohibitions, turn to bitterness the most precious thing in life? Doesn't she blow the whistle just when the joy which is the Creator's gift offers us a happiness which is itself a certain foretaste of the Divine?⁶

Today, celebrations of sex for its personal benefits—unrelated to children, marriage or even any future contact with the partner—are common. Margaret Sanger was fairly unique when she wrote in 1940 that sex liberated from the possibility of conception would allow mankind to “attain the great spiritual illumination which will transform the world, which will light up the holy path to an earthly paradise.”⁷ Today, on the other hand, language about sexual intimacy as a form of worldly transcendence has found its way into Supreme Court opinions. *Planned Parenthood v. Casey*, for example, famously linked “unplanned” sexual activity with defining “one's own concept of the existence, of meaning, of the universe, and of the mystery of human life.”⁸ Justice Kennedy's opinion in the same-sex marriage opinion, *Obergefell v. Hodges*, argued that legal marriage recognition would allow the couple to find “expression, intimacy, and spirituality.”⁹

Second, in the face of such impressions about Christianity's dour view of sex, it is no surprise that when an order of nuns refuses to insure its employees for contraception, or when a religious landlord refuses to house sexually-intimate cohabitants,¹⁰ opponents express their bitterness at this “blow[ing] the whistle” on sex. Is it any wonder that they see the sisters and the landlords as setting themselves apart from a tolerant, pluralistic community—a community embracing modern totems like equality, diversity, freedom, and happiness—

⁶ POPE BENEDICT XVI, ENCYCLICAL *GOD IS LOVE: DEUS CARITAS EST* ¶ 3 (2005).

⁷ MARGARET SANGER, *HAPPINESS IN MARRIAGE* 121, 126, 271 (Garden City: Blue Ribbon Books, 1940).

⁸ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851, 856 (1992).

⁹ 135 S. Ct. 2584, 2599 (2015).

¹⁰ See Helen M. Alvaré, *Is This Any Way to Make Civil Rights Law? Judicial Extension of “Marital Status” Nondiscrimination to Protect Cohabitants*, GEO. J.L. & PUB. POL'Y (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3271277 (discussing disputes between religious landlords and sexually-intimate cohabiting couples).

that is willing to allow other people to enjoy sexual intimacy without the cloud of another's judgment? In this way this "tolerant community" is like the ancient Romans, who couldn't understand why Christians wouldn't simply pay homage to a plurality of gods upon whom the city's success was in some sense dependent, or take part in other ceremonies symbolizing unity amidst the diversity of the Roman empire.

Third, it is possible that some of the discord arising in these and similar clashes stems not only from Christians' failure to understand pagan sexual sensibilities, but also from the way that Christian conscientious objectors frame their objections to various legal protections and mandates concerning sexual expression: i.e. "I can't." "My religion says no." "It's immoral." A recent, and even infamous, article by professors Reva Siegel and Douglas NeJaime¹¹—proposing fewer rights for those objecting to facilitating claimed immoral behavior—suggests that I am onto something here. This regularly repeated type of Christian objection suggests that the Christian approach to sex involves denying that sex possesses any intrinsic goodness, and refusing to "play nice" with members of the community who simply wish to enjoy their private, consensual sexual choices free of judgment.

If my observations thus far are true, then perhaps the Christians—the nuns, employers, bakers, landlords, and others—could instead, and more fruitfully, speak to the wider, and sometimes pagan world using different language. They might say, for example:

The Christian faith requires us to be a living witness to Christ in all things, including matters pertaining to sex, marriage and parenting. From its beginning, Christianity required sex, marriage and parenting to exhibit Christian ideals of love, including faithfulness, permanence and respect for procreativity. This was deemed necessary to provide a living witness to, even a way of glimpsing, the identity of God, and the meaning of our lives as love. Even as we know that not all agree, we want to witness to the world the possibility for this type of love. Also, a great deal of evidence shows that our way of life fosters stability for children and happiness and health to

¹¹ Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2202 (2015).

women and men. It also helps to promote social cohesion and prosperity, and to avoid rigid gaps between the 'haves' and the 'have-nots' who are separated importantly today by their access to marriage, marital stability, and marital parenting.¹²

In short, what if Christians tried to speak to the pagans with language and concepts reflecting positively on things of this world, and promoting care for our common community? If my reading of the last dozen "hookup books"¹³ published in the United States is any indication—and my reading of the most authoritative reflections about Americans' desires for sex within loving commitment¹⁴—such a positive formulation of the meaning of sexual expression in particular might just strike a chord. Of course, I would never anticipate that it would surely "win the day," but at least it "reaches across the aisle" to pagan interests in affirming the good things of this world and the particular good of community harmony.

¹² HELEN ALVARÉ, PUTTING CHILDREN'S INTERESTS FIRST IN US FAMILY LAW AND POLICY: WITH POWER COMES RESPONSIBILITY 58-65 (2017) (providing data on the confluence between Christian teachings on sex, marriage and parenting, and the empirical evidence about what behaviors lead to more stable families, child-flourishing, and reduced income, as well as educational and family structure disparities between the highest and lowest socioeconomic groups and between racial groups).

¹³ "Hookup books" refers to books interviewing usually college-aged men and women to discover their sexual practices, and their thoughts and feelings about them. See, e.g., PEGGY ORENSTEIN, GIRLS AND SEX (2016); LAURA SESSIONS STEPP, UNHOOKED: HOW YOUNG WOMEN PURSUE SEX, DELAY LOVE AND LOSE AT BOTH (2007); and KATHLEEN A. BOGLE, HOOKING UP: SEX, DATING AND RELATIONSHIPS ON CAMPUS (2008).

¹⁴ See Linda J. Waite & Kara Joyner, *Emotional and Physical Satisfaction with Sex in Married, Cohabiting, and Dating Sexual Unions: Do Men and Women Differ?*, in SEX, LOVE, AND HEALTH IN AMERICA: PRIVATE CHOICES AND PUBLIC POLICIES 256 (Edward O. Laumann & Robert T. Michael eds., 2001).