THOU SHALT NOT COMMIT ADULTERY

FAITH & LAW INTERN READING GROUP - MARCH

BACKGROUND: The following excerpts will be the basis for our discussion on the commandment to not commit adultery. The Martin Luther reading will serve as a sort of starting place to then consider two contemporary proposals from Rusty Reno and David French: penalizing divorce and banning (or zoning) pornography.

> Martin Luther (1483-1546) was originally a German monk and professor of theology, ordained as a priest in the Roman Catholic Church. For his rejection of indulgences, he was excommunicated. Luther was an essential figure of the Protestant Reformation and his legacy is still palpable in Protestant theology today through doctrines such as salvation by grace alone, the clarity of Scripture, and the freedom of the Christian.
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> Rusty Reno (1959-) is the editor of *First Things*, a prominent conservative journal aimed at "advanc[ing] a religiously informed public philosophy for the ordering of society." Reno was a member of the 136-person group "Scholars & Writers for America" that endorsed Donald Trump's candidacy in 2016. He received his Ph.D. in religious ethics from Yale University in 1990.
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> David French (1969-) is an American attorney and writer, serving as senior editor at *The Dispatch*. In 2016, he was briefly floated as a potential independent conservative candidate to oppose Trump but decided not to run. Besides his prominence in the "Anti-Trump" movement, French is also known for his part in the "French-Ahmari" debate over classical liberalism and democratic proceduralism (French being favorable to both). The initial attack against these positions, "Against David French-ism," was published in *First Things*. French has his J.D. from Harvard Law School.

I. MARTIN LUTHER — *The Large Catechism (1529)*

- "[The commandment] aims at adultery because among the Jews it was ordained and commanded that everyone must be married. Therefore, also the young were early provided for [i.e., married], so that celibacy was held in small esteem, neither were public prostitution and lewdness tolerated (as now). Therefore, adultery was the most common form of unchastity among them.

  But because among us there is such a shameful mess and the very dregs of all vice and lewdness, this commandment is directed also against all manner of unchastity, whatever it may be called; and not only is the external act forbidden, but also every kind of cause, incitement, and means, so that the heart, the lips, and the whole body may be chaste and afford no opportunity, help, or persuasion to inchastity. And not only this, but that we also make resistance, afford protection and rescue wherever there is danger and need; and again, that we give help and counsel, so as to maintain our neighbor's honor. For whenever you omit this when you could make resistance, or connive at it as if it did not concern you, you are as truly guilty as the one perpetrating the deed.

  Thus, to state it in the briefest manner, there is required this much: that every one both live chastely himself and help his neighbor do the same, so that God by this commandment wishes to hedge round about and protect [as with a rampart] every spouse that no one trespass against them"

II. R.R. RENO — *Resurrecting the Idea of A Christian Society (2016)*

- "The preferential option for the poor today means a renewed public commitment to traditional norms about sex, marriage, family, thrift, hard work, and religious faith—in a word, social conservatism…

  We can start with policies that punish divorce. I see no reason why we shouldn't have a divorce tax. It could be progressive, applying only to couples who have a net worth of $250,000 (excluding their home). Let's start with a tax of 1 or 2 percent of net worth and increase it to 5 percent for the wealthiest couples. An honest look at working-class America shows that the no-fault divorce revolution has devastated the culture of marriage in poorer communities. The well-to-do who get divorced weaken the institution of marriage, while the social costs of this weakening are largely paid by the poor, who are more vulnerable. Simple justice tells us that the rich should pay to mitigate the damage they inflict on the poor. The tax, which will deter some from getting divorced, can finance programs to remediate, if not reverse, the decline of marriage among the poor.

  Those committed to a social gospel should support pro-marriage policies, including educational programs in public schools as well as tax advantages for married couples and other benefits. If we're to counter the destructive trends of family instability, we need to restore a public culture that encourages people to marry and stay married.

  There's more to the cultural disintegration devastating the poor than the decline and fragility of marriage. We need to get serious about limiting pornography, a cancer on our society that degrades attitudes toward sex and relationships. Perversely enough, pornographers are treated with great solicitude by judges, while university campuses have become quasi-totalitarian environments with elaborate speech codes."

III. DAVID FRENCH

"It's Constitutionally Impossible and Legally Imprudent to Ban Porn" (2020)

- "The Great Conservative Porn War rages on. If you're unfamiliar with this new front in the ongoing civil strife between nationalist/populist conservatives and libertarian conservatives, let me bring you up to speed on the latest developments. In December, four Republican congressmen—Jim Banks of Indiana, Mark Meadows of North Carolina, Vicky Hartzler of Missouri, and Brian Babin of Texas—wrote a letter to Attorney General William Barr requesting that the Department of Justice take action against 'obscene pornography'…

  As a Christian conservative, a civil libertarian, and a person with a legal and political memory longer than the life-cycle of Twitter, I find myself consistently frustrated with the debate. It often ignores the lessons of history, it's conducted as though relevant legal precedent doesn't exist, and it seeks to sharpen areas of disagreement rather than find common ground…

  [First,] the truth is that decades of legal battles have defined where governing is possible and where government goes too far. Populists/nationalists often scorn Reaganism as the "dead consensus," but do they remember Reagan's famous Meese Commission and the resulting Meese Report? Or how about the Newt Gingrich Congress passing (and Bill Clinton signing) the Communications Decency Act in 1996? Are they aware of the many Supreme Court rulings in response to local and federal efforts to regulate porn?

  Second, give up the pipe dream of banning porn. It's been tried. It failed. Miserably. Few people now remember the story of *American Booksellers Association v. Hudnut*. In 1984, the city of Indianapolis (then led by Republican Mayor William Hudnut) enacted an ordinance that defined "pornography" as a practice that discriminates against women. It then defined pornography as "the graphic sexually explicit subordination of women, whether in pictures or in words"…

This definition of pornography went well beyond the Supreme Court's recognized definition of "obscenity." Under controlling case law, obscenity did not receive First Amendment protection, but its definition was extremely narrow. To be "obscene," a publication "must, taken as a whole, appeal to the prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value." Offensiveness was to be "assessed under the standards of the community." In other words, Indianapolis pushed the envelope—much like current anti-porn activists want to push the envelope today…

The consequences of decades of Supreme Court jurisprudence are clear—any attempt to ban pornography is a legal fool's errand. It will not succeed.

But I also question something else—should it succeed? We have learned through bitter experience that American efforts to ban various adult activities, including alcohol, marijuana, and illicit sex, have resulted in their own human costs. Bans on alcohol and illicit sex (like adultery and sodomy) collapsed and failed. Bans on marijuana contributed to mass incarceration and have wreaked havoc on civil liberties.

Even those who aren't libertarian should think long and hard before granting the government the power to imprison adults for voluntarily engaging in conduct that the government deems bad for them, or destructive of family values. I can believe something is wrong—even terribly wrong—without also believing that the government should use its power to try to ban the practice. Government regulation is ultimately enforced at the point of a gun, and more regulation doesn't always equate with better outcomes. Sometimes, it harms more people than it helps.

But that does not mean there is nothing we legally can or should do. In fact, the Supreme Court has shown us the way. As technology develops we can and should "zone" online porn—away from children, making it (at the very least) more difficult for their young eyes to see things they most definitely should not see.

The genesis of the zoning approach comes from the physical world, where the Supreme Court has allowed municipalities to require porn establishments (like adult book stores or strip clubs) to move to specific, designated areas in the community. This development has liberated downtowns from porn, for example, and allowed places like Times Square or even downtown Nashville to thrive free from the nasty secondary effects of adult establishments.

In 1997, the Supreme Court struck down portions of the Communications Decency Act (CDA) that were designed to protect minors from "indecent" or "patently offensive" online communications, punting the protection of children back to parents, to tech companies to design better blocking software, and to the government to design better legislation.

But what would that better legislation look like? In the very decision that struck down the CDA, two Supreme Court justices gave us a hint. It would look a lot like the zoning we see in the physical world. Justice Sandra Day O'Connor and Chief Justice William Rehnquist wrote that cyberzoning legislation could pass muster if "(i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material."

The technology (and legislation) to accomplish cyberzoning was inadequate in 1997. Is technology inadequate today? That's a question worth answering. And if the answer is yes, expect to find a wide range of public support—from conservatives and progressives—for cyberzoning measures that could help clean up the internet in much the same way that city councils helped reshape urban environments to not assault a child's eyes every single trip to town.

Ban porn? No, you cannot. Nor should you try to create an entire new class of criminals out of consenting adults. Zone porn? Yes, you can. Technology permitting, it's a moral imperative to help keep shocking images out of reach of America's children."