



Letter of Counsel

With regard to the Supreme Court decision of June 26, 2015,
in which in a 5-4 decision it held that:

The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State.

Regardless of whether we agree with the decision that finds a right to same-sex marriage in the Constitution, the fact is that now it is the law of the land. This presents great challenges to the free exercise of religion of the church, its related institutions, private Christian enterprises, and Christian individuals. We now have a legal, public definition of marriage that diverges dramatically from Christian teaching. Though same-sex marriage would have been unthinkable even in the civil sphere for everyone until very recent times, the divergence between church and civil marriage was anticipated early on. Already in Luther's time he taught that civil marriage and Christian marriage are two different things, though the civil definition was powerfully conditioned by Christian teaching. He argued that civil marriage ought to be available to couples (everyone assumed they would be heterosexual) who committed themselves to a life-long pledge of faithfulness, not just to Christians in good standing with the church, which had been the Roman Catholic requirement. For Luther, marriages blessed in the church involved higher standards than those performed in the public sphere. Thus, from Reformation times until now in Germany, Christians have two ceremonies—one by the magistrate and one in the church. C.S. Lewis, already in the 1940s, perceived that the idea of marriage promulgated by the state was sharply divergent from that of the Christian church. He, too, supported two different rites.

This dual approach to marriage is something the NALC corporately ought seriously to consider, now that the public definition contrasts so sharply with Christian teaching on marriage. Such a withdrawal from being an agent of the state is perhaps the best way to protect the free exercise of the church's teaching on and practice of marriage.

It is quite likely that the First Amendment will be interpreted by the courts to allow for the religious freedom to teach and practice Christian marriage within the church. But it is possible that churches will be punished for doing so by various public sanctions, e.g., the loss of tax exemptions for its property, as well as those for its institutions. Or the church and its institutions might lose the right for its contributors to receive tax deductions for their gifts. The church will

also be subject to contempt by sectors of the society who have embraced the world's new definition of marriage.

At any rate, it is clear that no court, Supreme or otherwise, or secular establishment can define marriage for the church. The biblical definition of the First Institution founded by God before the Fall (Gen. 1:26-28, 2:21-25), and the reiteration of that definition by Jesus (Matthew: 19: 4-7, Mark 10: 6-9) as well as the consistent teaching of the church throughout the millennia, offer a course of action that is plain: "We must obey God rather than any human authority." (Acts 5: 29) If penalties come its way, the church must be faithful to God's Word in spite of negative legal or cultural repercussions. It may live and flourish even with these sanctions against it; for example, many churches in Australia thrive even though contributors receive minimal tax relief for their gifts.

Though it is doubtful that such curtailments of the church's exercise of religious freedom will be applied to the church itself, the same cannot be said for institutions related to the church. We have already seen how Catholic adoption agencies have decided to close down rather than buckle to the state's requirement that they offer adoption services for same-sex couples. Those church-related institutions that take any sort of federal or state money will likely be subject to the new federal and state requirements. This will be true of charitable institutions of all kinds, as well as schools and colleges. Sadly, this will be the case even if the public support is indirect, through grants to individuals, such as loans to students. However, it seems that the government (both federal and state) is more likely to exempt religious associations from federal and state non-discrimination laws if those associations are "pervasively religious," i.e., if they hire only members of their religious tradition.

It is important that such "pervasively religious" institutions be allowed to exercise their religious commitments in their own institutions. In such institutions it makes clear sense to claim that they should "obey God rather than any human authority." The NALC should publicly witness for such free exercise even though it has no vulnerable church-related institutions of its own. (Its seminary and house of studies are "pervasively religious" and presumably take little or no public money. It behooves them, for obvious reasons, to continue to preserve that status.)

Such institutions should be under no illusion that they will necessarily escape retaliatory public sanctions—loss of property tax exemptions or tax relief for contributions—or public opprobrium.

Business enterprises run by Christians or individual Christians in their work are even more vulnerable to public legal sanctions than the churches or their pervasively religious institutions. They are certainly vulnerable to vicious attacks through the social and public media. Even so, the Supreme Court did exempt a business run by committed Christians, Hobby Lobby, from including contraceptives it considered to be abortifacients from the medical insurance it offered its employees. But the Court's ruling was very narrowly drawn.

Such free exercise may be more strictly limited when it comes to issues surrounding same-sex marriage, but certain distinctions may be helpful in preserving the right to conduct one's enterprise and work according to one's religious convictions. First, a Christian enterprise or individual Christian should never discriminate against a person based upon who they are. Race, ethnic group, religion, sex, or sexual orientation cannot be grounds for refusing service or

ministry. Such discrimination would be wrong morally as well as legally. So a Christian baker should not refuse to sell any of her regular products to anyone based upon who they are.

A crisis of conscience emerges when a customer wants the Christian to provide custom-made products for use in specific practices which violate Christian convictions regarding those practices. So, for example, a customer wants a Christian photographer to take photos at a same-sex wedding. Such a request ought to be able to be denied if the exercise of religious freedom means anything at all. Forcing people to participate in practices that violate their consciences is certainly a violation of the freedom to exercise one's religion, including its prohibitions. Indeed, one would hope that such a request would not be forthcoming from gay couples. Respect for the other's religious convictions would lead them to seek out photographers who had no such scruples, of whom there would likely be many.

A more extreme example might be offered to make our point: a group of Christians demand that an Orthodox Jewish butcher prepare and serve pork sandwiches for their picnic. Legally requiring such action on the part of the butcher would be a thorough destruction of free exercise. On the other hand, that same Orthodox butcher would be morally and legally wrong to refuse to sell his regular kosher products to a Christian who came into his shop.

The NALC should publicly witness for the religious freedom not to be forced to participate in practices that violate religious convictions, while at the same time supporting laws against discrimination based on the identity of the customer.

A complication arises when a Christian is in a public government role, as was a Kentucky county clerk when she refused to grant marriage licenses to same-sex couples. In such cases there are a number of options available. She might press for an accommodation for her religious beliefs by releasing her from her duty to offer marriage licenses because others in the office would do so in her stead. Or, since she has taken an oath to uphold the law but believes the law is wrong and following it would compromise her Christian convictions, she might quietly resign. (This seems to be the route suggested by the Lutheran two-kingdoms teaching. The law goes against God's will and therefore she cannot participate in it. Yet, she agrees that the law must be obeyed by those in a public role.) Or, she can simply accommodate herself to what she believes is a bad law.

At first it seems that the second alternative is the best one. Anarchy would ensue if governmental officials pick and choose what laws they wish to follow or enforce. Yet, that might be too passive a stance. Perhaps the request for accommodation would bring public attention to the need to accommodate those many citizens for whom what is legally demanded is not morally acceptable. Such instances will arise more frequently as secular interpretations of the law replace those based on religiously-based moral convictions. It will make for social peace if such accommodations can be reached.

If such accommodation is not forthcoming, it may well behoove Christians to disobey the law but take the consequences, which might include dismissal, fines, or even imprisonment. This strategy was followed frequently in the civil rights struggle of the late 1950s. Or, short of that more dramatic path, to make a very public statement about the reason for their forced resignation

or dismissal. In either case “the world” is being shown that it is departing from God’s law, which will have grave consequences for our common life.

Christians might well be called to such sorts of actions, or to support such actions if they are done without malice or threat. The NALC should be attentive to members who sense the call to such actions.*

While there are many more instances where the First Amendment’s guarantee of the free exercise of religion will be challenged, right now they seem focused on sexuality issues. Therefore, this letter of counsel has naturally been concerned about those areas. The church must pay close attention to these issues. The free exercise of religion, which this country has so prized, is at stake.

*In the NALC Braaten-Benne Theological Lectures of 2015 on the subject of martyrdom, an interesting set of distinctions was made. “Witnessing” means publicly proclaiming Christian truth when there will likely be no negative repercussions for that action. “Confessing” means public proclamation in a context in which serious deprivations are likely, such as the loss of one’s job. “Martyrdom” means proclamation in the face of possible death. Christians in America are not threatened by death for their beliefs and practices, but they may soon be called upon not only to witness but to confess. The church should have the courage to both witness and confess, while it should offer support to those who also choose to do both.