

Newsweek

Individual Rights and Kim Davis: It's Not Quite What It Seems

Ilya Shapiro

September 8, 2015

When the clerk of Rowan County, Kentucky, went to jail rather than have to license same-sex marriages, she wasn't committing civil disobedience—whether you think her action was courageous or bigoted. No, civil disobedience involves an intentional violation of an unjust law. Another name for it is nonviolent resistance: Think Martin Luther King or Gandhi.

Kim Davis isn't doing that; she's instead refusing to fulfill her duty as a government official, even after a judicial order confirmed that duty. That's official disobedience.

That Davis's action (or inaction) is based on her religious belief is of no moment. She isn't being ordered to give up her faith under penalty of law. Instead, as a public official, she has to enforce the law or, if she can't in good faith (literally) do that, resign—at which point she would no longer be in contempt of court or face any other public sanction.

But why is a clerk in a county and state where gay marriage is unpopular bound by a ruling of U.S. Supreme Court? It's not the Constitution's Supremacy Clause, whereby state law must yield to (properly enacted) federal law to the contrary. Instead, it's because Justice Anthony Kennedy's majority opinion in *Obergefell v. Hodges*, while not exactly the apotheosis of legal reasoning, stands for the proposition that state laws denying marriage licenses to same-sex couples violate the 14th Amendment. So it's not federal law that trumps state law but individual rights that trump state law.

The 14th Amendment worked a fundamental transformation in our constitutional order: As of its ratification in 1868, Americans can turn to federal courts to enforce infringements of their liberty against the states. And that principle stands whether a state infringes the right to keep and bear arms or the right to equality under the law.

To put a finer point on it, the 14th Amendment says “no state shall” violate rights to privileges or immunities, due process and equal protection. That's a prohibition on public actions, not private ones.

Both progressives and social conservatives miss that public-private distinction.

In other words, states must extend to same-sex couples whatever recognition they do to opposite-sex—though I don't see a need for government involvement in marriage in the first place—but it's illegitimate for them to bend the will of people who have religious differences from the prevailing viewpoint. Private citizens should be free to live their lives according to their consciences. Obergefell doesn't say that everyone now has to support same-sex marriage, just that governments have to provide for it.

That's where Barronelle Stutzman comes in. She's the florist in Washington state who was fined for declining to provide arrangements for a same-sex wedding. Or Aaron and Melissa Klein, the bakers in nearby Oregon who were put out of business under similar circumstances. Or Elaine Huguenin, the New Mexico wedding photographer. There are, of course and alas, many more examples. Unlike Davis, these people are indeed being forced to compromise their sincerely held beliefs under penalty of law.

Oh sure, they could "resign" too and stop running businesses that are typically hired as wedding vendors (which, in theory, could be nearly anyone; I once attended a wedding where an economist gave the homily). But people have a basic right to earn an honest living, as well as to associate (or not) with whomever they choose.

After all, we're all born free and equal under the law. While governments must treat everyone equally, individuals should be able to make their own decisions on whom to do business with and how—on religious grounds or otherwise. Those who disagree with those choices can take their custom elsewhere and encourage others to do the same.

On the other hand, nobody has a right to a government job, and I doubt it violates any religion to resign a government job (my colleague Walter Olson in jest called such an apocryphal religion "cool," but given my Soviet background, the mere idea causes me to shudder).

Which doesn't mean that we should applaud Davis's tenure behind bars. Frankly, the only colorable criticism I've seen of the contempt order is that it would've made more sense to fine Davis the amount of her salary—a fitting recompense for failure to do her job and also a lessening of her current martyr status—but Judge David Bunning had a point in reasoning that outside groups would've simply paid those fines.

This whole episode really shows a failure to adjust to the needs of a pluralistic society, to give the law some "play in the joints"—as Justice Ruth Bader Ginsburg has advised in other contexts.

North Carolina passed a law allowing clerks to recuse from transactions that violate their consciences, and Texas's attorney general issued a directive along similar lines. If such regimes can work without impeding the orderly processing of official documents or giving the appearance of "separate but equal" (a big if), they may do the constitutional trick.

A friend of mine suggested that all wedding bureaus institute a waiting period, so everyone waits the same amount of time while accommodating potential religious objections (including to remarriage after divorce, interfaith marriage and who knows what else).

None of this is to say that Davis was at all justified. But we shouldn't equate the legal obligations of public officials with those of private citizens.

Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review.