

PASTOR'S CORNER

Plague Journal

From day to day, as the Spirit moves me, I will share with you certain theological reflections concerning the liturgy and its relation to the times we're in.

Divine Mercy Sunday; April 19: Some thoughts on the place that religious services should have in our state upon advent of the coming reopening. The following is from a New York Times Opinion piece by Michael W. McConnell and Max Raskin which appeared in the April 21 online edition.

If Liquor Stores Are Essential, Why Isn't Church?

The new conundrums created by the coronavirus can be addressed by some very old materials: the principles of the First Amendment.

Churches and synagogues were tragically empty two weekends ago, among the holiest days of the year for America's Christians and Jews. With few exceptions, the nation's faithful found solace via computer screens and in solitary prayer, acquiescing to restrictions on their constitutional liberty that would have seemed unthinkable a few months ago.

But many are asking: How long must this go on? America was founded in no small part so that people of every creed and conviction could worship without hindrance, in accordance with conscience and tradition.

Individual churches have been closed for health reasons in the past. History buffs may recall that the first Free Exercise Clause case in Supreme Court history, in 1845, involved the prohibition of open-coffin funeral services in a New Orleans church during a yellow fever outbreak. But this is the first mass closure of churches, synagogues, temples and mosques all over the country. And it has lasted for almost a month.

Other important activities — from shopping in hardware stores to voting — manage to take place with appropriate safeguards against the spread of the disease. Yet worshipers have been prevented from gathering “together” (six to 10 feet apart) in cars in the church parking lot; Catholic churches have been told to close their doors even for solitary prayer; traditional sunrise services were canceled even when they would take place in the fresh air, observing the rules of social distancing.

In the early weeks of the crisis, it made sense to enforce sweeping closure rules against all public gatherings — no exceptions. And even now, until the crisis subsides, religious communities will have to refrain from activities long central to the expression of love of God and one another. We would know: One of us had to forgo being with family who were sitting shiva, mourning his cousin. The son of the other could not be received into the church on Easter morning. Sacraments cannot be taken by Zoom.

But in the days ahead, religious leaders and public health officials will need to find new ways to deal with the novel conundrums forced on us by this novel coronavirus. Fortunately, these new arrangements can be fashioned with some very old materials: the centuries-old principles of the First Amendment.

Three time-tested principles of the First Amendment stand out as guideposts for navigating the competing demands of religious exercise and public health in a time of contagion.

First, separation of church and state does not give religious communities immunity from regulation that is necessary for the common good. As long ago as 1905, the Supreme Court rejected the religious objections of a Massachusetts pastor to compulsory vaccination against smallpox. Other legal rights, too, are affected. Less than two weeks ago, an appellate court approved restrictions on some abortion procedures during the crisis, saying, “When faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some real or substantial relation to the public health crisis and are not beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”

The second principle is that government can regulate religious activity only through what the Supreme Court calls “neutral” and “generally applicable” laws. This means that a government requirement cannot single out religious activity on the ground that it is somehow dispensable or “nonessential.” The government may regulate religious activities no more strictly than it regulates secular activities that present comparable risks. This principle was invoked by Judge Justin Walker of the Western District of Kentucky when he allowed a drive-in Easter service to take place in a church parking lot with cars six feet apart from one another. Noting that Kentucky permitted drive-through liquor stores to continue operating, the court quipped, “if beer is ‘essential,’ so is Easter.” It is not for government officials to decide whether religious worship is essential; the First Amendment already decided that. The question is whether, and how, it may be conducted without undue risk to public health.

Third, both sides must seek what the courts call “reasonable accommodations.” These are tailored arrangements that allow people to practice their faith to the maximum practicable extent while still minimizing the dangers those activities pose to the public. Sacramental wine was permitted during Prohibition; Quakers are not drafted into the Army; kosher and halal facilities are excused from some of the details of meatpacking regulations.

Reasonable accommodation is the most important principle as we emerge from the first phase of this crisis. Government officials must continue to be vigilant about realistic public health dangers from religious practice, but they must identify “less restrictive” means for achieving their purposes. For instance, Jewish ritual baths, called mikvahs, are permitted to operate in the tristate area, but are doing so with stricter rules and regulations, including enhanced disinfection and cleaning, and they are visited by appointment only. Similarly, priests in New York City hospitals designated by the Catholic Archdiocese are permitted to enter patients’ rooms to give communion, so long as they wear all necessary protective equipment. These accommodations require a bit of trust on the part of the government and will need to be verified, potentially with clergy attesting to compliance with certain rules. But such trust is also required when California and Colorado deem marijuana dispensaries essential businesses.

Religious leaders and congregations will have to remember that the First Amendment is not an exemption from law applicable to all. And government officials must not forget that religious exercise is at the apex of our national values. Mass is not a football game, a minyan not a cruise. Worship cannot shelter in place indefinitely.

Michael W. McConnell, a former federal judge, is a law professor and director of the Constitutional Law Center at the Stanford Law School. Max Raskin (@maxraskin) is an adjunct professor of law at New York University.