PUBLIC JUSTICE REVIEW

A PUBLICATION OF THE CENTER FOR PUBLIC JUSTICE

FAIRNESS FOR ALL: DOES SUPPORTING RELIGIOUS FREEDOM REQUIRE OPPOSITION TO LGBT CIVIL RIGHTS?
VOL. 9, ISSUE 3, 2019

Fairness for All: A Peacemaking Process

Stanley Carlson-Thies

***Summary**: Fairness for All (FFA) is an important example of peacemaking and prudential policymaking. In the midst of our society's deep and fierce polarization around LGBT rights and religious freedom, FFA is a careful and prayerful effort to find a way forward. It is a pluralistic framework that better protects rights and freedoms for all in our society, argues **Dr. Stanley Carlson-Thies**, the Founder and Senior Director of the Institutional Religious Freedom Alliance (IRFA), in this response to the 2019 Kuyper Lecture by **Shapri LoMaglio**, given on April 25, 2019. The aim of Fairness for All is to present a peacemaking approach to our society's divided views on marriage and sexuality, and to urge Christians to adopt this type of approach in going forward. Instead of battling for political power as the only way to protect the freedom to live and serve consistently with one's worldview, neighbors with different worldviews can devote themselves to setting good examples, to persuasion, arguments and research, and to prayer—seeking to convince, rather than coerce, each other about what is true and best. This is Fairness for All.*

Stanley Carlson-Thies is the Founder and Senior Director of the Institutional Religious Freedom Alliance (IRFA), a division of the Center for Public Justice. As part of this role, he convenes the Coalition to Preserve Religious Freedom, a multi-faith alliance of social-service, education, and religious freedom organizations that advocates for the religious freedom of faith-based organizations to Congress and the federal government. In addition, he is also a Senior Fellow at the Canadian think tank, Cardus.

Editor's Note: This article was originally delivered by Stanley Carlson-Thies as a response to the Kuyper Lecture given by Shapri LoMaglio on April 25, 2019. This article has been adapted from Stanley's notes and modified for this series.

Thank you to Shapri LoMaglio for her eloquent account of the "Fairness for All" (FFA) journey, the rationale for this legislative initiative, and the significance of the effort.

In commenting on the theme of Fairness for All (FFA) as an important example of peacemaking, I will bring to the forefront the pluralist inspiration for, and design of, the FFA policy proposal. I wish to acknowledge and stress that FFA is an example of prudential policymaking, not of biblical imperatives for faithfulness. In the midst of our society's deep and fierce polarization around LGBT rights and religious freedom, Fairness for All is a careful and prayerful effort to find a way forward. Even still, it is fallible. Given the weighty issues involved—biblical teachings

about sexuality, questions of human dignity and the respect we owe each other as creatures made in God's image, the scope of religious freedom, the nature of civil rights, what actions constitute wrongful discrimination and which are acceptable and even meritorious instances of differential treatment—it should be no surprise that any proposal dealing with this polarized matter sparks intense discussion. It should. We ought to pay close attention and bring to the dispute our best wisdom and analytical skills.

Shapri portrayed FFA as an essential and inspirational instance of peacemaking and building bridges to find a resolution to the polarized and destructive clash of rights and freedoms. But some are concerned that it is, instead, a capitulation to mistaken views of human sexuality and to a deeply erroneous concept of civil rights. Others are certain that the legislative proposal perpetuates a kind of religious freedom that authorizes some to treat others in harmful and discriminatory ways. Clearly, these are important alternative evaluations of Fairness for All. I will address them, but only indirectly.

My focus will be on FFA as a pluralistic framework. This type of framework better protects rights and freedoms in our divided society than the usual anti-discrimination framework or prescription. I will outline an example of this pluralistic approach, drawn from the FFA legislative discussions, and will conclude with a brief comment about how the law can be a teacher when citizens are deeply divided on important issues of religion and morality.

The public policy issue that FFA addresses has the shorthand name "LGBT rights versus religious freedom." This is a misleading label. People of faith have different views on human sexuality, sexual identity, and marriage, as well as different views about how the law should deal with these issues. Although this is an oversimplification of a complex reality, we would do well to acknowledge that our society has developed two contrasting worldviews about what is right and good in the areas of human sexuality, sexual identity, and marriage. The public policy conflict we see is about what the law ought to do in response to this division of opinion: should the law continue to maintain the traditional worldview or should it support the new, progressive view, treating the old view as wrong and bigoted? Or, third, can and should the law find a way to accommodate both sets of convictions? The latter is the FFA proposal.

A major aim of the discussion of Fairness for All is to show that it is a peacemaking approach to our society's divided views on marriage and sexuality, and to urge Christians to adopt this peacemaking approach in our polarized society. Shapri notes that FFA requires, and is a vital example of, bridge building. Morally conservative Christians and members of the LGBT community worked together seeking a collaborative approach to resolving a deeply polarizing and complex issue. This process is an example of peace-making in place of culture-warring. It is a different role and posture for Christians who see that many of their neighbors do not share their moral views. This peacemaking process has helped to build bridges between divided groups, thereby showing love of the other as Jesus commands us, regardless of whether we regard those others as neighbors or enemies.

Some may wonder, doesn't dealing with conflicts regarding LGBT rights in this way result in a wrongful compromise? Shouldn't Christians committed to the traditional view instead push hard to make the law reflect the traditional view? In response, Shapri points out that our laws have never perfectly reflected God's justice: even good laws often fall short, and too often our laws have actually enforced injustice. In any case, we should not expect human laws to implement God's kingdom; only Jesus' return will inaugurate the Kingdom of God on earth.

True, this is the case. But what the law requires and forbids in our time is surely of great importance to our lives before Jesus returns as King of Kings. So, we might ask—bringing to the foreground a subordinate theme in Shapri's comments—what kind of law, and what content in the law, is right or appropriate when citizens are deeply divided about such basic matters as human sexuality, sexual identity, and marriage? Shapri has sharply drawn attention to FFA as a peacemaking *process*. I propose we add to that a focused consideration of FFA as an instance of a peacemaking *policy proposal;* that is, a policy that aims to deal with opposing worldviews by providing simultaneously for the rights and freedoms that people and organizations on both sides desire.

I will call this the pluralism question. Sometimes, when citizens are divided, the law ought to take one side or the other: slavery is wrong and should be outlawed. But is that our circumstance with the current division between the two worldviews? Or, when it comes to our deep differences about human sexuality, sexual identity, and marriage, should the law, instead, find a way to protect both sides and both worldviews? Actually, that is what we do with religious freedom. Clearly, there are contrasting convictions in our society which cannot all be true and right, yet we insist that the law should not take the side of one of the religions nor of a secularism that would displace the other religious views. The right law when citizens are divided religiously is to protect everyone's freedom of religious exercise, including the freedom not to believe in any religion. What, then, is right for the law when we are so divided about sexual morality?

When the public concern is about civil rights and the mistreatment of people because of some personal characteristic, we adopt the discrimination framework. Our civil rights laws protect people against discrimination and unequal treatment based on characteristics such as race, ethnicity, sex, religion, age, and disability. The popular response has been to press for the addition of sexual orientation and gender identity to this set of protected characteristics. That is the approach of the Equality Act that is now being considered in Congress.

[*Editor's Note: The Equality Act (H.R.5) passed the House of Representatives on May 17, 2019*]

Within the civil rights or discrimination framework, any differential or unequal treatment is wrong, discriminatory, and must be made illegal. If this is the case, then this strategy can only be one-sided, enshrining into law the progressive worldview and rendering traditional convictions and practices illegal or suspect.

But our actual civil rights laws do not fit this model so closely. Differential treatment based on race is illegal, to be sure—but even here—uniformity is not the absolute rule. For example, while federal employment law bans racial discrimination, it only applies to companies and nonprofits with fifteen or more employees. When it comes to other protected characteristics, flexibility is the rule.

Consider religion and sex. Under federal civil rights law, it is illegal to treat people differently based on either of these characteristics. Title VII, the main federal civil rights law governing employment, makes clear that an employer may not legally refuse to hire a job applicant merely because she is a Muslim. And Title IX states that universities that receive federal funding may not legally treat male and female students differently, even in how the university funds its sports programs.

Even still, Title VII has always included a religious employer exemption. Employers, in general, must not discriminate on the basis of religion when hiring and firing workers, but religious

employers, such as Calvin College, which is hosting this Kuyper Lecture, may take specific account of religious views and faithfulness when selecting and dismissing employees. So, while differential treatment based on religion is illegal for secular employers, it is legal—and protected—for religious employers.

Likewise, Title IX does not make having separate men's and women's locker rooms, bathrooms, and dorm rooms illegal, nor does it outlaw fraternities (no women!) or sororities (no men!). It does not even prohibit single-sex undergraduate colleges. Furthermore, it specifically permits religious universities to engage in additional forms of differential treatment if such "discrimination" is required by the religious university's religion.

Civil rights laws apply to various areas of our life: they apply to hiring staff, organizing sports teams, constructing dorms, and operating clubs for kids. They also apply to individuals and organizations, both religious and secular, with respect to race, sex, ethnicity, age, and more. And these laws accordingly treat different circumstances differently. In some instances, the laws make differential treatment illegal; in others, the same laws protect differential treatment. One example of this is the protected practice of differential treatment in hiring for religious organizations.

Although we commonly think of civil rights law as a matter of absolutes—no unequal treatment because unequal treatment is discriminatory treatment—in fact, civil rights law is an area with a significant degree of pluralism. The prohibitions of differential or unequal treatment are limited in multiple ways: by how key characteristics or activities are defined (what is the "religion" that is protected?), by the scope of the laws' reach (not to small employers, for example), by the creation of specific exemptions for faith-based practices and faith-based organizations. Thus, civil rights laws do forbid some kinds of differential treatment in certain circumstances, but they also protect other kinds of differential treatment in other circumstances. In various ways and places, civil rights laws acknowledge diverse values, perspectives, and worldviews. In short, civil rights laws both prohibit and protect differential treatment. A key question is, what differential treatment is wrong and ought to be illegal and what differential treatment is acceptable or even essential and ought to be protected?

In the matter of the two worldviews concerning human sexuality, sexual identity, and marriage, the question that has animated and guided the Fairness for All initiative is, what is it that the law should protect and what should the law forbid? Instead of taking the side of one or the other worldview—given that our society is so divided—how can the law protect all of the varied rights and freedoms across the many different circumstances and complexities of our society?

Consider the Fairness for All question another way. People and organizations committed to the traditional worldview, and those committed to the progressive worldview, hold different views about human sexuality, sexual identity, and marriage. The progressive view regards same-sex marriages to be morally equitable to opposite-sex marriages. The traditional view regards the differences to be deeply important. If the progressive view is encoded comprehensively into law, persons and organizations holding the traditional view will have no freedom to act in accordance with their convictions. Yet, if holders of the traditional view can act as they wish, what happens to the right to same-sex marriage declared by the U.S. Supreme Court in its 2015 *Obergefell* decision? How then can and should civil rights law make it possible for people and organizations with these contrasting worldviews to live peacefully side-by-side? When and where should private organizations be allowed to treat people differently, given that our civil society and marketplace are very diverse?

These are complicated and controversial matters. As Shapri noted, the FFA discussions took three years before agreement was reached about how to add sexual orientation and gender identity to federal civil rights laws as new protected classes, while simultaneously adding strong new protections for religious exercise and religious organizations. Three years of detailed, intensive discussions among a core group of negotiators included wide consultation with allied organizations. In some cases, these allied organizations were skeptical about or even opposed to the FFA initiative in the beginning. One can accurately say that the FFA process has been all about details, details, and even more details. The challenge is to protect the rights and freedoms on all sides across the great diversity of circumstances within our society.

An example of a FFA policy proposal would be federally funded adoption and foster care services administered by the states. Some states like Michigan, the site of the Kuyper Lecture, have dealt with contrasting worldviews by requiring all private agencies to follow the progressive worldview. Out of conviction for equal treatment without regard to sexual orientation and gender identity, some private adoption and foster care agencies, both secular and religious, have chosen the progressive view when recruiting families and placing children. Meanwhile, a Catholic agency, seeking to adhere to Catholic teaching about the kinds of families, marriages, and sexual identities that please God and are best for children, has taken the State of Michigan to court for the legal right to maintain its traditional policies and practices. Bethany Christian Services in Michigan, facing the possibility of losing the ability to serve thousands of children, has submitted to the state's requirements while simultaneously proclaiming its continued commitment to the traditional moral view. Similar conflicts and varied responses have emerged in a number of other states and large cities.

The prohibition of discrimination based on sexual orientation and gender identity is intended to ensure equal treatment of LGBT individuals and couples in adoption and foster care services. In the past, government policies regarded LGBT people as unsuitable adoptive and foster parents and no private agencies would serve them, making the prohibition necessary. Yet this legal bar has already been eliminated in every place in the United States, and many private agencies welcome and cater to prospective LGBT adoptive and foster parents.

At the same time, it is not irrational for a private agency—Catholic, orthodox Jewish, Muslim, or evangelical Protestant—to be convinced that it is in the best interest of children to be placed with a married mother and father. Is it possible for laws to protect this perspective without interfering with LGBT people who seek to adopt or become foster parents?

Also, becoming an adoptive or foster parent is a challenging task, and, it is more likely that people will step forward and follow through when working with an agency that they trust and one that shares their values and outlook. Thus, for many years, the Human Rights Campaign has operated a program called "All Children, All Families." This program helps agencies become more welcoming to LGBT persons and couples. But an agency that follows the HRC recommendations and modifies its staff training and changes the way it communicates, the pictures on the walls, and its recruitment practices is likely to be less inviting and less trustworthy to prospective parents with the traditional worldview. At the same time, other parents should not be barred or discouraged from adopting or fostering, either.

We should note that religious exercise is specifically protected in the U.S. Constitution, and that both the Old and New Testaments call for the care of orphans as a specific charge assigned to believers by God. This exercise of religion should not be restricted by civil rights laws, even as those laws declare that LGBT people have a legal right to foster and adopt children.

Accordingly, the FFA initiative proposes a different solution than no discrimination based on sexual orientation or gender identity, adopted by Michigan and other jurisdictions. The FFA alternative adapts the model of federal funding for child care created in 1990 to assist low-income families. In that funding model, qualified families are given the authority, through "child care certificates", to receive federally funded child care and have the freedom to choose a provider they trust and find most appealing. The chosen providers are then reimbursed by the government for the services they provide.

The kind of pluralistic solution mentioned above would have this design: states would allow private agencies to serve based on their respective worldviews, other interests, and specialized competencies, and qualified parents would select the agency best suited for them. This would ensure that at least one private agency in each area of the state was willing to serve qualified persons and families and would pay private agencies in proportion to how often it provided the services.

This is the core idea: diverse agencies best serve a diverse society. In the FFA policy, all qualified persons and couples, regardless of worldview, would find an agency they can trust. Likewise, all agencies, regardless of their worldview, would be able to serve in accordance with their convictions about children, families, sexuality, and marriage. If more than one way of serving can be right, then differential treatment should be allowed, so long as the entire system of providers ensures that all will be served well.

Fairness for All is, as Shapri emphasized, a peacemaking *process* in our polarized nation. In the FFA process, Christians with a conservative sexual ethic have been proactive bridge builders, working to eliminate the polarization between adherents of contrasting worldviews. That is a gift to our nation and a testimony to the Prince of Peace.

As Shapri indicated and I stressed, Fairness for All is also a process designed to identify or create peacemaking *policies*: policies that will enable adherents of contrasting worldviews to live consistently with their respective worldviews without taking away that same freedom from the others. This is the essence of peacemaking: protecting the rights and freedoms of both sides despite the deep differences in worldview.

Can the law be a teacher? If so, what can it teach? To date, it has not effectively taught our society that the conservative sexual worldview is true and best for all. Acceptance of the LGBT worldview developed and accelerated while gay intimate relationships and same-sex marriages were socially discouraged and illegal. But modifying our civil rights laws now to require adherence to the LGBT worldview would not be using the law to teach, but rather to coerce.

In this time of such differences concerning human sexuality, sexual identity, and marriage, what is it that the law can teach? The inspiration and the intention of the Fairness for All initiative is that the law can and should teach us how to live as good neighbors despite how much we differ in our worldviews. The civil rights laws should state where differential treatment based on sexual orientation and gender identity must be forbidden, and all the places where it is acceptable, and even necessary. As with other protected demographics, federal civil rights laws should seek to protect all legitimate rights and freedoms of all people and all organizations. That means protecting the rights and freedoms of people and organizations adhering to both worldviews, not just one.

Then, rather than continually battling for political power as the only way to protect the freedom to live and serve consistently with one's worldview, neighbors with different worldviews can

devote themselves to setting a good example, to persuasion, arguments and research, and to prayer—seeking to convince rather than coerce each other about what is true and best.

Thank you.

To respond to the author of this article, please email PJR@cpjustice.org. The articles in the Public Justice Review do not represent a consensus of positions on questions of public policy. We do not expect our readers will agree with all the arguments they find here, but we believe that within the broad tradition of what we call public justice we can do more by providing a forum for the debate and exchange among Christians, within those bounds, to work out public policy faithful to God and in service of our neighbors. We do not necessarily share the views expressed, but we do accept responsibility for giving them a chance to appear.