

## POPE FRANCIS AND CIVIL UNIONS

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In the 2020 documentary “Francesco,” Pope Francis is heard saying:

Homosexual people have a right to be in the family. They are children of God. They have a right to a family. Nobody should be thrown out of the family or made miserable over this. What we have to make is a law of civil coexistence, for they have the right to be legally covered. I stood up for that.<sup>1</sup>

The Pontiff made these remarks in a 2019 interview, which were excluded by the Vatican in the final version but were spliced into the documentary. In that interview, the Pope had added a sentence omitted from the documentary: “That does not mean approving of homosexual acts, not in the least.”<sup>2</sup>

In these statements, Pope Francis is not rejecting the Church’s traditional characterization of homosexual practices as “sins gravely contrary to chastity.”<sup>3</sup> Furthermore, the Pontiff is not questioning the Church’s position that “[t]here are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God’s plan for marriage and family.”<sup>4</sup> And though some ambiguity exists about whether he meant that homosexual persons have a right to *have* rather than *be in* a family, it is difficult to conclude that the Pope was endorsing adoption by same-sex couples given the Church’s concern that “[a]llowing children to be adopted

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1. Paul Eli, *Pope Francis Supports Same-Sex Civil Unions, but the Church Must Do More*, THE NEW YORKER (Oct. 25, 2020), <https://www.newyorker.com/news/daily-comment/pope-francis-supports-same-sex-civil-unions-but-the-church-must-do-more>.

2. *Id.*

3. Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* ¶ 4 (2003) [hereinafter *Unions Between Homosexual Persons*] (quoting CATECHISM OF THE CATHOLIC CHURCH ¶ 2396).

4. *Id.*

by persons living in such unions would mean doing violence to these children.”<sup>5</sup>

It is fair, however, to read Pope Francis as agreeing that same-sex couples have a right to some form of legal recognition for their unions and such recognition does not necessarily imply approval of their sexual activity. That reading places his remarks at odds with a 2003 statement from the Congregation for the Doctrine of the Faith (“CDF”), which concluded “that all Catholics are obliged to oppose the legal recognition of homosexual unions.”<sup>6</sup>

The CDF offered several reasons for this conclusion. First, such laws would amount to formal cooperation in sin:

In those situations where homosexual unions have been legally recognized or have been given the legal status and rights belonging to marriage, clear and emphatic opposition is a duty. One must refrain from any kind of formal cooperation in the enactment or application of such gravely unjust laws and, as far as possible, from material cooperation on the level of their application.<sup>7</sup>

Second, the CDF reasoned that such laws would violate the State’s obligation to protect the common good: “[T]he State could not grant legal standing to such unions without failing in its duty to promote and defend marriage as an institution essential to the common good.”<sup>8</sup> As the CDF explained:

The inevitable consequence of legal recognition of homosexual unions would be the redefinition of marriage, which would become, in its legal status, an institution devoid of essential reference to factors linked to heterosexuality; for example, procreation and raising children. If, from the legal standpoint, marriage between a man and a woman were to be considered just one possible form of marriage, the concept of marriage would undergo a radical transformation, with grave detriment to the common good. By putting homosexual unions on a legal plane analogous

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5. *Id.* ¶ 7.

6. *Id.* ¶ 10.

7. *Id.* ¶ 5.

8. *Id.* ¶ 6.

to that of marriage and the family, the State acts arbitrarily and in contradiction with its duties.<sup>9</sup>

Further, the CDF reasoned that withholding legal recognition to homosexual unions was not unjust discrimination:

Not even in a remote analogous sense do homosexual unions fulfil the purpose for which marriage and family deserve specific categorical recognition. On the contrary, there are good reasons for holding that such unions are harmful to the proper development of human society, especially if their impact on society were to increase.<sup>10</sup>

Notably, the “radical transformation” of marriage that the CDF predicted began, at least in the United States, not with the legalization of civil unions but rather with the broad recognition of contraceptive rights. Beginning with the narrow holding that married couples had a privacy right to freedom from governmental regulation of their marital intimacy,<sup>11</sup> the Supreme Court quickly moved to a right of use beyond that relationship:

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals, each with a separate intellectual and emotional makeup. If the right of privacy means anything it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>12</sup>

If there was a right to use contraceptives, then a right to abort would easily follow as a backup if contraceptives failed.<sup>13</sup>

The separation of the procreative from the unitive function of sexual relations that contraceptives produced also began the transformation of marriage. Thus, in its attempt to rehabilitate the constitutional flaws in *Roe*

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9. *Id.* ¶ 8.

10. *Id.* (citing Pope John Paul II, *Evangelium Vitae* [Encyclical Letter on the Value and Inviolability of Human Life] ¶ 73 (1995)); the CDF allowed for some latitude “[w]hen legislation in favor of the recognition of homosexual unions is already in force” and “[i]f it is not possible to repeal such a law completely.” *Unions Between Homosexual Persons*, *supra* note 3, ¶ 10. Pope Francis, however, did not limit his suggestion to such circumstances. *Id.*

11. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

12. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (citation and footnote omitted).

13. *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

v. *Wade*, the Court recognized a right to freedom in making intimate and personal choices:

[M]atters [surrounding family and sexual activity], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.<sup>14</sup>

If choices about intimate and personal acts were constitutionally protected, it easily followed that the relationships in which such acts were performed were protected as well: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."<sup>15</sup> Since the conduct need not be procreative, the sexual relationship in which it is performed need not be complementary. Thus, "[t]he liberty protected by the Constitution allows homosexual persons the right to make this choice."<sup>16</sup> And, if the choice was constitutionally protected, it followed for the Court that the State could not disparage it by withholding from homosexual unions the recognition of marriage while affording it to heterosexual unions.<sup>17</sup>

These developments aside, the basic question presented by Pope Francis' remarks is whether civil unions inevitably constitute an endorsement of homosexual acts. The answer requires some review of existing Church teaching.

St. Thomas observes that "the interior act of the will, and the external action, considered morally, are one act."<sup>18</sup> It follows for him that, "for a thing to be evil, one single defect suffices, whereas, for it to be good simply, it is not enough for it to be good in one point only, it must be good in every respect."<sup>19</sup>

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14. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion).

15. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

16. *Id.*

17. *Obergefell v. Hodges*, 576 U.S. 644, 680–81 (2015).

18. ST. THOMAS AQUINAS, *THE SUMMA THEOLOGICA* Pt. I–II, Q. 20, Art. 3 (Fathers of the English Dominican Province trans., Benziger Bros. ed. 1947) [hereinafter *SUMMA THEOLOGICA*], [http://www.documenta-catholica.eu/d\\_1225-1274-%20Thomas%20Aquinas%20Summa%20Theologiae%20-%20Prima%20Pars%20-%20EN.pdf](http://www.documenta-catholica.eu/d_1225-1274-%20Thomas%20Aquinas%20Summa%20Theologiae%20-%20Prima%20Pars%20-%20EN.pdf).

19. *Id.* Art. 2.

Thus, for St. Thomas, a good end cannot justify a bad means: “[I]f the will be good from its intention of the end, this is not enough to make the external action good: and if they will be evil either because it intends the end or because of the act willed, it follows that the external action is evil.”<sup>20</sup>

Notably, a similar analysis compelled Pope Paul VI to reject the “principle of totality” as applied to contraception, “that is, that the finality of procreation pertains to the ensemble of conjugal life, rather than to its single acts[.]”<sup>21</sup> As the Pontiff explained:

To justify conjugal acts made intentionally infecund, one cannot invoke as valid reasons the lesser evil, or the fact that such acts would constitute a whole together with the fecund acts already performed or to follow later, and hence would share in one and the same moral goodness. In truth, if it is sometimes licit to tolerate a lesser evil to avoid a greater evil to promote a greater good, it is not licit, even for the gravest reasons, to do evil so that good may follow therefrom; that is, to make into the object of a positive act of the will something which is intrinsically disorder, and hence unworthy of the human person, even when the intention is to safeguard or promote individual, family or social well-being. Consequently it is an error to think that a conjugal act which is deliberately made infecund and so is intrinsically dishonest could be made honest and right by the ensemble of a fecund conjugal life.<sup>22</sup>

St. John Paul II made the same point in a more general way:

[H]uman activity cannot be judged as morally good merely because it is a means for attaining one or another of its goals, or simply because the subject’s intention is good. Activity is morally good when it attests to and expresses the voluntary ordering of the person to his ultimate end and the conformity of a concrete action with the human good as it is acknowledged in its truth by reason. If the object of the concrete action is not in harmony with the true good of the person, the choice of that action makes our will and ourselves morally evil, thus putting us in conflict with our ultimate end, the supreme good, God himself.<sup>23</sup>

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20. *Id.*

21. Pope Paul VI, *Humanae Vitae* [Encyclical Letter on the Regulation of Births] ¶ 3 (1968).

22. *Id.* ¶ 14 (footnotes omitted).

23. Pope John Paul II, *Veritatis Splendor* [Encyclical Letter Regarding Certain Fundamental Questions of the Church’s Moral Teaching] ¶ 72 (1993).

He concluded that:

The reason why a good intention is not itself sufficient, but a correct choice of actions is also needed, is that the human act depends on its object, whether that object is *capable or not of being ordered* to God, to the One who “alone is good,” and thus brings about the perfection of the person. An act is therefore good if its object is in conformity with the good of the person with respect for the goods morally relevant for him.<sup>24</sup>

The CDF recently reaffirmed this teaching, with Pope Francis’ approval, in a negative response to whether homosexual couples could receive a blessing for their unions.<sup>25</sup> In part, the response rested on the relation between sacramentals and the sacraments they prefigured: “[such blessings] would constitute a certain imitation or analog of the nuptial blessing”<sup>26</sup> while “there are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God’s plan for marriage and family.”<sup>27</sup> But the CDF also rejected the argument that constructive aspects of the relationship could render the whole licit: “The presence in such relationships of positive elements, which are in themselves to be valued and appreciated, cannot justify these relationships and render them legitimate objects of an ecclesial blessing, since the positive elements exist within the context of a union not ordered to the Creator’s plan.”<sup>28</sup> The CDF declared that, though blessings on homosexual individuals were permissible, “any form of blessing that tends to acknowledge their unions as such [was illicit].”<sup>29</sup>

Thus, under this traditional teaching, the fact that a homosexual couple intends to cohabit for their mutual physical and psychological support does not justify sodomy as a means of promoting that support. Pope Francis does not question this; his point is that legal protections for such unions do

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24. *Id.* ¶ 78; CATECHISM OF THE CATHOLIC CHURCH ¶ 1761 (“There are concrete acts that it is always wrong to choose, because their choice entails a disorder of the will, i.e., a moral evil. One may not do evil so that good may result from it.”).

25. Luis F. Ladaria, *Responsum of the Congregation for the Doctrine of the Faith to a Dubium Regarding the Blessing of Unions of Persons of the Same Sex*, HOLY SEE PRESS OFFICE (Feb. 22, 2021), <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2021/03/15/210315b.html>. Pope Francis assented, not only to the responsum, but also to the explanation the CDF had annexed to it.

26. *Id.* (footnote omitted).

27. *Id.* (footnote & internal quotations omitted).

28. *Id.*

29. *Id.*

not necessarily endorse their immoral aspect. To answer this point, we must turn first to a brief discussion of formal and material cooperation and finally to the relationship between natural and civil law.

An instructive discussion of formal and material cooperation is set out in the Appendix to the Ethical and Religious Directives for Catholic Health Services adopted by the National Conference of Catholic Bishops in 1994 and worth quoting at length:<sup>30</sup>

The principles governing cooperation differentiate the action of the wrongdoer from the action of the cooperator through two major distinctions. The first is between formal and material cooperation. If the cooperator intends the object of the wrongdoer's activity, then the cooperation is formal and, therefore, morally wrong. Since intention is not simply an explicit act of the will, formal cooperation can also be implicit. Implicit formal cooperation is attributed when, even though the cooperator denies intending the wrongdoer's object, no other explanation can distinguish the cooperator's object from the wrongdoer's object. If the cooperator does not intend the object of the wrongdoer's activity, the cooperation is material and can be morally licit.

The second distinction deals with the object of the action and is expressed by immediate and mediate material cooperation. Material cooperation is immediate when the object of the cooperator is the same as the object of the wrongdoer. Immediate material cooperation is wrong, except in some instances of duress. The matter of duress distinguishes immediate material cooperation from implicit formal cooperation. But immediate material cooperation—without duress—is equivalent to implicit formal cooperation and, therefore, is morally wrong. When the object of the cooperator's action remains distinguishable from that of the wrongdoer's, material cooperation is mediate and can be morally licit.<sup>31</sup>

Pope Francis disavowed any intent to further homosexual conduct, and thus his suggestion would not constitute formal cooperation. Whether it would constitute implicit formal or immediate material cooperation,

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30. Although these directives apply to health providers, their general discussion of cooperation can help with the ethical analysis of laws recognizing civil unions.

31. James F. Keenan & Thomas R. Kopfensteiner, *The Principle of Cooperation*, HEALTH PROGRESS, April 1995, at 23, 23, <https://www.chausa.org/docs/default-source/health-progress/the-principle-of-cooperation-pdf> (quoting the appendix to the revised Ethical and Religious Directives for Catholic Health Services).

however, depends on whether the object he and the same-sex couple intend is the same. In both instances, the object is the relationship as a whole: the couple intends a relationship based on illicit conduct, and civil unions would provide legal protection for that relationship.<sup>32</sup>

The Sixth Edition of the Directives provided a revised discussion of “formal cooperation”:

[C]ooperation is formal not only when the cooperator shares the intention of the wrongdoer, but also when the cooperator directly participates in the immoral act, even if the cooperator does not share the intention of the wrongdoer, but participates as a means to some other end. Formal cooperation may take various forms, such as authorizing wrongdoing, approving it, prescribing it, actively defending it, or giving specific direction about carrying it out. Formal cooperation, in whatever form, is always morally wrong.<sup>33</sup>

Again, if the object both Pope Francis and the same-sex couple intend is viewed as the relationship as a whole, having as its core component illicit conduct, his suggestion for legal recognition of that union constitutes authorization of such conduct, albeit as a means to further the aim of providing the couple with some degree of social security. In other words, when identifying the object of laws legalizing homosexual unions, sexual conduct is inseparable from the relationship. Thus, to authorize one is to authorize the other.

Perhaps a more focused approach on specific aspects of the relationship, not the relationship as a whole, could constitute only mediate material cooperation. Thus, for example, if employees were provided a health care savings plan covering licit services for any economically dependent member of their households—say an elderly parent, disabled adult child, or a same-sex partner—any assistance to the homosexual union would constitute an incidental effect of an object to finance the health care of needy persons.

Perhaps Pope Francis simply meant that, though the Church could not recognize homosexual unions as a sacrament, the State was free to grant such unions legal status in society. This would view the Church’s opposition as a

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32. Pope Francis did not mention duress.

33. U.S. CONF. OF CATH. BISHOPS, *ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES* 24 (6th ed. 2018), [https://www.usccb.org/resources/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06\\_1.pdf](https://www.usccb.org/resources/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06_1.pdf).



matter of faith and not also a matter of natural law. In contrast, the CDC had observed that, though “the marital union of man and woman has been elevated by Christ to the dignity of a sacrament,”<sup>34</sup> it was also true that, “in the Creator’s plan, sexual complementarity and fruitfulness belong to the very nature of marriage,”<sup>35</sup> and thus are requirements of the natural law as it concerns marriage.

Admittedly, St. Thomas concludes the Natural Law and Civil Law are not co-extensive, so that conduct which the former considered vicious the latter was not necessarily required to prohibit.<sup>36</sup> Civil law, however, cannot sanction what the Eternal Law (and thus the Natural Law) condemned since it would be unjust and thus no longer a law.<sup>37</sup> If “sanctioning” vice is the same as formally cooperating with it, it would appear again that laws recognizing civil unions simply are not legitimate.

Of course, an offhand statement during an interview does not constitute official Church teaching, even if made by the Pope himself and especially if not intended to be made public. Yet, the Pontiff’s words are an invitation to rethink the Church’s position on civil unions. Even if the same conclusion is ultimately reached, the process enables us better to understand the grounds for that teaching and better to distinguish just from unjust discrimination. In words Pope Francis did assent to have published, “[t]he Christian community and its Pastors are called to welcome with respect and sensitivity persons with homosexual inclinations, and will know how to find the most appropriate ways, consistent with Church teaching, to proclaim to them the Gospel in its fullness.”<sup>38</sup>

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34. *Unions Between Homosexual Persons*, *supra* note 3, ¶ 3.

35. *Id.*

36. SUMMA THEOLOGICA, *supra* note 18, Pt. I-II, Q. 96, Art. 2.

37. *Id.* Pt. I-II, Q. 96, Art. 4; *id.* Pt. I-II, Q. 93, Art. 3.

38. Ladaría, *supra* note 25.