

CATHOLIC CANON LAW AND HOMOSEXUALITY: AN ASSESSMENT OF THE NATURAL LAW JUSTIFICATION FOR HOMOSEXUAL INTOLERANCE

*Rusi Jagose**

The Catholic Church is a global power capable of influencing the development of domestic law in multiple jurisdictions. This influence can be obvious, such as where politicians vote according to a religiously formed conscience. The influence of the Church can also be more subtle. At the heart of several social conventions is a collection of traditional societal norms that originated within the boundaries of the Catholic canon law. In many states these conventions have developed naturally due to advancements in modern philosophical and scientific thought. However, in states with strong Catholic or Christian traditions, societal development is prone to stagnation due to conflicts between the official canons, the more liberal canons and societal development. One example where this conflict is most obvious is the canon law surrounding homosexuality. The official position of the canon law is conservative. Homosexuality is treated as a disease-like condition requiring strict abstinence to achieve spiritual enlightenment. The foundation for this position derives from natural law theory. Natural law theorists repel suggestions for reform based upon the idea that the rules stemming from natural law theory are either divine in origin or are articulations of naturally existing goods. I make the appraisal that the natural law foundation to the conservative position collapses when the true historical origins and motivations for the traditional position are revealed. When the origins of the canon law are no longer regarded as "divine in nature", the law can be more receptive to societal development.

I INTRODUCTION

It is an unfortunate reality that homosexual acts are identified as officially contrary to Catholic canon law. Consequently, homosexual Catholics are placed in an uncomfortable position where they

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must pursue a chaste life or leave the Church congregation. The Church justifies this position under the jurisprudential school of natural law. Leading natural law theorists, such as John Finnis, have argued that it is permissible for states and religions to maintain laws deterring the normalisation of homosexuality in modern society.¹ Natural law, they argue, aims to preserve naturally occurring morals and duties within any established societal structure. To surrender these naturally occurring morals will endanger society, encouraging virtuous institutions to decay.² Natural law influences conservative policy in the present day. For example, laws allowing employers to discriminate against homosexuals in employment situations, laws relating to conversion therapy and laws relating to marriage are all encouraged to be implemented and maintained.³ Conservative natural law theory is derived from a multitude of historical customary sources and politically motivated adjustments that are no longer appropriate in the contemporary social climate. An entrenched legal stance obstructs the law's ability to adapt to modern society, modern philosophical developments and modern scientific thought. Where law fails to develop, the original motivations for the creation of those rules become muddled. Accordingly, the position of the current Catholic canon law must be reformed to embrace the developments of the modern world.

This article will discuss the historical and political developments that shaped the natural law position on homosexuality which has materialised into the official Catholic legal position. The natural law position on homosexuality is the result of various economic, societal and competitive triggers that were utilised for purposes such as the encouragement of procreation to defend family assets, or for the development of trade monopolies. This article is divided into seven Parts. Part II defines Catholic canon law. Part III defines the relationship between natural law and homosexuality. Part IV describes the official legal position taken towards homosexuality within Catholic canon law. It also makes reference to the various canons in support of homosexuality as well as the groups arguing for the adoption of these more liberal canons. Part V assesses the historical and political influences that shaped the natural law position. Part VI compares the position of the Catholic canon law to other jurisdictions. The courts of New Zealand and the United Kingdom have utilised a principle-based system to identify the heart of the law. This method enables the court to escape the application of a literal interpretive approach. Finally, Part VII will propose three potential avenues for reform: legalisation of homosexual marriage; legalisation of homosexual civil unions; or discontinuation of the abstinence-based approach to moral sexuality.

II CATHOLIC CANON LAW

Catholic canon law is an amalgamation of several sources. Sacred Scripture, natural law and custom form the basis for the spiritual jurisdiction. The findings of Catholic Canonical Councils, the

1 Brent Pickett "Natural Law and the Regulation of Sexuality: A Critique" (2004) 8 JOLPI 41 at 43.

2 At 43.

3 At 41.

writings of early Christian authors, responses of the Pope to social or political matters, pastoral judgments, rules of religious orders and formal agreements between the Holy See and foreign governments influence the spiritual jurisdiction but are mainly applicable in the context of the exterior jurisdiction.⁴ These sources form statutory canon law. A canon is an ecclesiastical rule that is treated in a statutory manner. The Church codified canon law within the *Corpus Juris Canonici* 1917 and again in the Code of Canon Law 1983.⁵

Canons are divided into universal, particular or special categories. Each category determines the scope of a canon's enforceability. Universal application is self-explanatory: the scope of universal canons stretches to all members of the Catholic Church. Particular canons only apply to a pre-determined area or group of people. Special canons govern process, such as the election of a Pope, and have the narrowest application clergy-wise.⁶

Canons are treated as prescriptive bodies of law and are difficult to challenge due to the corresponding belief of their divine origin. Canons are treated as divine law, drawn directly from natural law. Juridically, the rules established by canons are either invalidating or incapacitating, with no juridical effect.⁷ They are viewed as prescriptive forces of nature which Catholics are obliged to follow for purposes of salvation.⁸ However, if an individual is seen to breach the most prescriptive of canons, there is room for a more visibly serious consequence such as an excommunication.⁹

Various canons are constitutive. They define the essence of a juridical institution or act. For instance, to have binding effect, the process followed for a baptism or first holy communion cannot be departed from, as the nature of the process would no longer correspond with the prescribed procedure of that institution or action.¹⁰

The extent of an individual's observance of the various canons is dependent on the level of importance attached to a particular canon. Many canons require substantial observance rather than

4 James A Coriden *An Introduction to Canon Law* (Burns and Gates, London, 2004) at 33.

5 Pope John Paul II *Sacrae Disciplinaes Leges* (Holy See (translators), Apostolic Constitution, Vatican City, 1983).

6 Coriden, above n 4, at 36.

7 At 36.

8 Judith Hahn *Church Law in Modernity: Toward a Theory of Canon Law between Nature and Culture* (Cambridge University Press, Cambridge, 2019) at 16.

9 Coriden, above n 4, at 36.

10 RS Clark "Hans Kelsen's Pure Theory of Law" (1969) 22 JLE 170 at 198.

complete observance. This allows for occasional non-observance without violating the law;¹¹ an example is the occasional inability to participate in Mass or abstain from work on Sundays.¹²

Canonical matters pertain to either the external or internal forum. Most matters concern the external forum. The external forum is the arena of the Church's public governance.¹³ Where a matter is found to exist in the external forum the power of governance is normally exercised.¹⁴ The internal forum, also known as the forum of God, is the arena of one's relationship with God.¹⁵ Matters such as sacramental confession are under the jurisdiction of the internal forum and must be surrounded by total secrecy.¹⁶ However, the power of governance may be utilised in rare circumstances within this forum.¹⁷

III NATURAL LAW AND HOMOSEXUALITY

Natural law is a school of jurisprudential thought. It asserts that there are naturally occurring fundamental and pre-existing rights conferred on everyone by "God, nature, or reason".¹⁸ These rules of right and wrong are inherent in people and cannot be created or changed by society or the courts. There is an assumption that the fundamental and pre-existing rights, said to exist naturally within humanity, were correctly identified by the "fathers"¹⁹ of natural law thought.²⁰ This unwavering position has resulted in a reluctance by many natural law theorists to question whether the rights identified were correct or whether they were flavoured by societal moral standards of the relevant period. Consequently, natural law theory retains an unwaveringly conservative collection of morals that allow many contemporary natural law scholars to make arguments that ignore the modern social climate.

Law, in its most basic sense, must reflect the moral conscience of society to remain justified.²¹ Otherwise, it threatens to obstruct an individual's right to societally recognised freedoms. Many

11 Coriden, above n 4, at 37.

12 Code of Canon Law 1983, c 1247.

13 Coriden, above n 4, at 37.

14 Code of Canon Law, c 130.

15 Coriden, above n 4, at 37.

16 Code of Canon Law, cc 983, 984 and 1388.

17 Canons 1079, 1080 and 1357.

18 Hans Kelsen *General Theory of Law and State* (Harvard University Press, Cambridge (Mass), 1946) at 392.

19 The fathers of natural law being Aristotle, Cicero, Thomas Aquinas and Albert the Great.

20 Kelsen, above n 18, at 393.

21 Jerome Doraisamy "How Law Reflects the 'Moral Conscience' of Society: Bathurst CJ" (5 February 2020) Lawyers Weekly <www.lawyersweekly.com.au>.

Catholics are of the opinion that homosexual intolerance is an unfortunate historical relic.²² The Pew Research Center found that three quarters of Catholics in both the United States and in various Western European states are in favour of the acceptance of homosexuals within the Church. Given this, the position established by the Catechism of the Catholic Church 1992 is unjustified and should not be considered legitimate law.²³ The Catechism of the Catholic Church is a Catechism implemented by Pope John Paul II that summarised the official positions of the Church.²⁴ While Catholic canon law may not be directly enforceable within a large range of jurisdictions, it remains relevant due to its ability to influence the development of law within largely Catholic jurisdictions and to affect the behaviour of devout Catholics.²⁵

A Traditional Natural Law Theory

The traditional school of natural law theory is based on the work of St Augustine. Augustine believed that law should only be followed where it is seen as objectively reasonable. He stated that "an unjust law is no law at all". Augustine argued that "just" law existed when based on the teachings of Jesus Christ.²⁶ Subsequent natural law scholars interpreted the teachings of Jesus as premised on the idea of individual submission to a "higher righteousness".²⁷ Regarding homosexuality, medieval Christian theology emphasises the centrality of certain human institutions such as marriage.²⁸

Critical to the idea of human sexuality more generally is the Christian understanding of creation and consequently the truth of God. The truth of God is only comprehensible where one accepts that God created all matter. Therefore, human beings and sexuality have a divine purpose.²⁹ The spiritual reality of existence is to form a union with God in knowledge and love. Before experiencing the finite material pleasures associated with one's material body, the individual must embrace the spiritual

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- 22 Jeff Diamant "How Catholics around the world see same-sex marriage, homosexuality" (2 November 2020) Pew Research Center <www.pewresearch.org>.
- 23 Gary D Glenn "Are there Catholic Antecedents of the Declaration of Independence? A Conversation Between Archbishop John Ireland, Orestes Brownson and the Twentieth Century" (2006) 11 Catholic Social Science Review 115 at 127.
- 24 Mary Boys "The Catechism of the Catholic Church" *The Christian Century* (United States, 23 November 1994).
- 25 Diamant, above n 22.
- 26 Grant Morris *Law Alive: The New Zealand Legal System in Context* (4th ed, Thomson Reuters, Wellington, 2019) at 172.
- 27 Charles Lee Irons "The Object of the Law is Realised in Christ: Romans 10:4 and Paul's Justification Teaching" (2016) 6(1) *Journal for the Study of Paul and His Letters* 33 at 44.
- 28 Amos N Wilder "Equivalentents of Natural Law in the Teaching of Jesus" (1946) 26 *Journal of Religion* 125 at 130.
- 29 Larry Kutz "Human Sexuality and the Natural Law" (1998) 3 *Liberty, Life and Family* 211 at 213.

reality of existence. Intercourse is permitted for the purpose of procreation given that a love for God is tied to the idea of a love for human life. Any sexual act not for the purposes of procreation is considered a distraction from the spiritual reality of existence.³⁰

Thomas Aquinas emphasised the centrality of human goods such as the institution of marriage. His conception of marriage is reflective of the late medieval Christian ideal.³¹ At the centre of Aquinas' view of a morally acceptable marriage was the idea of monogamy. Monogamy encompasses mutual love and regard. Mutual love and regard are the foundations for Aquinas' "greatest friendship", the central factor of a marriage.³² The "greatest friendship" is best realised through procreation and the raising of children.³³ Sexual activity, within the bounds of marriage and engaged in for the purposes of procreation, was seen by Aquinas as permissible and morally good. However, all sexual acts outside marriage, or not for the purposes of procreation, were inherently immoral.³⁴ Given a homosexual couple's inability to biologically procreate, their sexual activity was inherently immoral.

Aquinas' view of homosexuality formed the foundation for subsequent natural law theory. Subsequent theorists have argued that the immorality of an action justifies its regulation by law.³⁵ The goal of law should be to cultivate virtue in citizens. A preservation and cultivation of virtue allows citizens to build on and eventually master their union with God in knowledge and love. When relinquishing the pleasures of material lust, individuals can eventually gain an appreciation for their relationship with God, as sexual desire will no longer govern their intellect; rather, their intellect will govern their sexual desire.³⁶

B New Natural Law Theory

New natural law theory is based on the work of Germain Grisez. Grisez challenged Thomas Aquinas' understanding that actions are morally permissible only if they subscribe to the foundations of human nature.³⁷ According to Grisez, natural law is not identified through a purely theoretical understanding of human nature. Instead, Grisez submits that knowledge of the natural law begins with

30 At 214.

31 Pickett, above n 1, at 40.

32 Thomas Aquinas *Summa Contra Gentiles* vol 3, c 123.

33 Gerald J Massey "Medieval Sociobiology: Thomas Aquinas's Theory of Sexual Morality" (1999) 27 *Philosophical Topics* 69 at 75.

34 Pickett, above n 1, at 41.

35 At 43.

36 Faramerz Dabhoiwala "Lust and Liberty" (2010) 207 *Past & Present* 89 at 93–95.

37 Patrick Lee "The New Natural Law Theory" in Tom Angier (ed) *The Cambridge Companion to Natural Law Ethics* (Cambridge University Press, Cambridge, 2019) 73 at 81.

its own self-evident principles.³⁸ These principles are identified through a knowledge of several human "goods". The most important of these "goods" are life, marriage, friendship and society. Law must be structured to accommodate each of these "goods".³⁹

John Finnis, a leading defender of the new natural law school, has described homosexuality as destructive to human character and relationships. For this reason, any liberalisation of the law should be repudiated by legislators.⁴⁰ According to Finnis, achieving the "good" of marriage requires intercourse for both the purpose of reproduction and for the purpose of developing mutual affection between a couple to preserve their friendship.⁴¹ Homosexual marriage does not allow for biological procreation to take place. Therefore, intercourse is unable to satisfy the requirements of marriage.⁴² Furthermore, the "good" of mutual affection is unable to be achieved by homosexual couples. Biological parenthood requires male and female genitals. This pairing of genitalia allows for true unity to be achieved, as this type of interaction could result in procreation.⁴³ Homosexual intercourse is therefore inappropriate to achieve true mutual affection and the "good" of friendship. Consequently, the institution of marriage should not be extended to homosexual couples.⁴⁴

Finnis' argument, that it is the duty of legislators to prevent the normalisation of homosexuality, focuses purely on homosexual behaviours but not on the individual. He argues that the homosexual "condition" is not an inherently immoral behaviour. He states that homosexuals must be treated with respect and should not be discriminated against. However, this respect is conditional on homosexuals practising abstinence. Public acts of homosexual affection endanger and confuse the public as to the purpose of virtuous sexual activity. Abstinence is a responsible method for homosexuals to refrain from threatening the institution of marriage and the "goods" existing alongside this institution.⁴⁵ Where abstinence is practised, it would be immoral for the law to identify and then persecute homosexuals who are behaving in a manner that exemplifies the preservation of the various self-

38 John Finnis *Natural Law and Natural Rights* (2nd ed, Oxford University Press, Oxford, 2011) at 103–105.

39 Lee, above n 37, at 87.

40 Thomas More Garrett "Something Old and Something New: The Catholic Church and Covenant Marriage Legislation" (2016) 58 JCS 710 at 714.

41 Marcus Allen "New Natural Law Theory vs Liberalism: A Response to John Finnis on Sexual Orientation & the Law" (Honours Capstone Project, American University, 2009) at 5.

42 Garrett, above n 40, at 716.

43 Allen, above n 41, at 6–7.

44 At 6.

45 Kevin E O'Reilly "Thomas Aquinas on Abstinence and Fasting: Participating in Christ's Cruciform Wisdom" (2019) 28(4) *Pro Ecclesia* 385 at 390.

evident "goods".⁴⁶ This is because it would arbitrarily encourage division in society based upon an unfounded presumption that certain individuals will eventually threaten the morality of society. Consequently, the stability of the law would crumble.

According to natural law theorists such as Finnis, Germain Grisez, Joseph Boyle, Gerard Bradley, Robert George and Patrick Lee, acts of homosexual intercourse can be tolerated provided they are committed in secret. Governments must maintain a social environment that is conducive to virtue. However, governments must refrain from punishing non-virtuous behaviour where it does not influence the morality of society.⁴⁷ Correspondingly, the law should prohibit the public promotion and facilitation of homosexual activity. This includes homosexual marriage and the adoption of children by homosexual people. Natural law realises that homosexual acts distract the morally competent from the self-evident principles of "goodness", which justifies their sanctioning at law.⁴⁸ When hidden from the public eye, homosexual activity and relationships do not cause damage to these principles, meaning that they do not need to be sanctioned at law.

IV POSITION OF HOMOSEXUALITY WITHIN CATHOLIC CANON LAW

The stance of the Catholic Church is divided. While the current canon law discourages homosexual acts, there is a large collection of more liberal canons supporting the recognition of homosexuality as a legitimate form of relationship within the Church's spiritual jurisdiction.⁴⁹ A large part of both the Church hierarchy and its congregation has argued for the replacement of the current position with the more liberal canons.⁵⁰

46 Igor J Pietkiewicz and Monika Kołodziejczyk-Skrzypek "Living in Sin? How Gay Catholics Manage their Conflicting Sexual and Religious Identities" (2016) 45 Arch Sex Behav 1573 at 1578.

47 Stephen Macedo "Against the Old Sexual Morality of the New Natural Law" in Robert George (ed) *Natural Law, Liberalism, and Morality* (Oxford University Press, Oxford, 2001) 27 at 31.

48 At 32.

49 See Pope John Paul II and Cardinal Joseph Ratzinger *Letter to the Catholic Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons* (Holy See (translators), Congregation for the Doctrine of the Faith, Vatican City, 1986); and Cardinal Franjo Seper *Persona Humana: Declaration on Certain Questions Concerning Sexual Ethics* (Holy See (translators), Congregation for the Doctrine of the Faith, Vatican City, 1975).

50 Andrew KT Yip "Dare to Differ: Gay and Lesbian Catholics' Assessment of Official Catholic Positions on Homosexuality" (1997) 58(2) *Sociology of Religion* 165 at 170–172.

A Official Position Reached in the Catechism of the Catholic Church

The official position of the Catholic canon law was clarified and recorded at the Catechism of the Catholic Church:⁵¹

Basing itself on Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that "homosexual acts are intrinsically disordered." They are contrary to the natural law. They close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved.

The number of men and women who have deep-seated homosexual tendencies is not negligible. They do not choose their homosexual condition; for most of them it is a trial. They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided. These persons are called to fulfill God's will in their lives and, if they are Christians, to unite to the sacrifice of the Lord's Cross the difficulties they may encounter from their condition.

Homosexual persons are called to chastity. By the virtues of self-mastery that teach them their inner freedom, at times by the support of disinterested friendship, by prayer and sacramental grace, they can and should gradually and resolutely approach Christian perfection.

The new natural law school heavily influences the Catechism of the Catholic Church's position on homosexuality. Although the Church states that homosexuals must be treated with "respect, compassion, and sensitivity",⁵² it continues to define homosexuality as a "condition". In 2018, Pope Francis described homosexuality as a "mental illness".⁵³ He said that it is the duty of Catholic parents to seek psychiatric help for their children if they have exhibited signs of the homosexual "condition". Pope Francis subsequently retracted and apologised for these statements.⁵⁴ Therefore, they are not necessarily authoritative.⁵⁵ Regardless, they demonstrate that the traditional narrative towards homosexuality is still deeply embedded in Catholic convention.

Given that homosexual intercourse is unable to result in conception, homosexual people must practise chastity to achieve a meaningful relationship with God. Homosexual relations are seen as sinful given their association with material lust. Homosexual activity is intolerable given it is not engaged in for the purpose of reproduction and can therefore not be described as a proper act of love.

51 Pope John Paul II *Catechism of the Catholic Church* (Holy See (translators), Catechism of the Holy See, Vatican City, 1992) at [2357]–[2359] (citations omitted).

52 At [2358].

53 Jim Russell "Why was Pope Francis' comment about homosexuality and psychiatry changed in the official transcript?" *The Catholic World Report* (online ed, United States, 6 September 2018).

54 "Vatican Removes Pope's Remarks on Psychiatric Help for Gay Children" *France24* (online ed, France, 27 August 2018).

55 Coriden, above n 4, at 33.

While there is no way for the law to actively prosecute homosexuals who engage in sexual activity through use of the external forum, the internal forum prevents any relationship or marriage from being spiritually compliant with the internal forum.⁵⁶ Consequently, the ability for homosexuals to achieve a loving and meaningful relationship with God is diminished.

B Liberal Catholic Law

The Dutch Catechism, published by the Catholic bishops of the Netherlands, is a summary of Catholic doctrine concluding that homosexuality is not a mortal sin.⁵⁷ Given that this Catechism was not the work of a sole academic or member of the congregation, but rather a document endorsed by the hierarchy of the Dutch Catholic Church, there is a certain weight attached to its conclusions. Canon law can be created by the teachings or pastoral judgments of the Church hierarchy. While the Vatican published the Catechism, it remains a controversial document which was protested by conservative Dutch Catholics who argued that the document deviated so far from traditional Church teaching that it amounted to heresy and was therefore not binding.⁵⁸

In 1986, Pope John Paul II issued the Pastoral Letter entitled "On the Pastoral Care of Homosexual Persons", which was designed to correct the misunderstandings of the *Persona Humana*.⁵⁹ These misunderstandings culminated in the narrative that homosexuals were only to be tolerated when practising complete abstinence. "On the Pastoral Care of Homosexual Persons" pronounced that these misunderstandings were the product of ignorance. The Pope articulated that many incorrectly believed that homosexuality was a choice rather than a naturally existing biological orientation. Lacking the freedom to be heterosexually oriented should not result in internal forum culpability given that homosexual relationships are just as capable of achieving the friendship and mutual affection of a heterosexual relationship.⁶⁰ Pope John Paul II pronounced that these clarifications of the canon law logically correspond to the secondary rule that Catholics choosing to treat homosexuals maliciously are in violation of natural law.⁶¹ The Doctrine of Papal Supremacy means that this Pastoral Letter remains an authoritative part of Catholic canon law.

56 At 37.

57 Mortal sin is the gravest of sins, representing a deliberate turning away from God and destroying love in the heart of the sinner: Peter M Collins "Religion and the Curriculum: John Dewey and the Dutch Catechism" (1990) 85 *Religious Education* 119 at 124.

58 At 126.

59 See Pope John Paul II and Cardinal Ratzinger, above n 49; and Cardinal Seper, above n 49.

60 Charles J Reid "Same-Sex Relations and the Catholic Church: How Law and Doctrine Have Evolved 1820–2020" (2019) 34 *JLR* 210 at 231–232.

61 At 232.

During the first week of the 2014 Synod of Bishops, it was decided that to speak of "living in sin", to refer to homosexuality as "intrinsically disordered" or to idealise complete abstinence for homosexuals was outdated and worthy of rejection.⁶² The Synod argued that both Catholics and the Church hierarchy should be encouraged to accept and value homosexuals.⁶³ The reasoning behind this is that homosexuals were purposefully created by God. Therefore, they are, like heterosexuals, created in God's image. To reject them or to cause them physical or mental pain is in violation of natural law.⁶⁴ By accepting the humanity of homosexuals, and emphasising their importance within the modern Church, the Synod is openly accepting that homosexual Catholics can have a loving relationship with God. The 2015 Synod of Bishops confirmed the findings of the 2014 Synod that every person should be treated with dignity regardless of their sexual orientation.⁶⁵

C Public Calls for Liberalisation

1 Theologians

Many Catholic theologians have suggested that the criterion of the human person needs to be reconsidered to assess the persuasiveness of the natural law position. The natural law position rests on the assumption that there are obvious naturally occurring "goods" or virtuous behaviours that must serve as the basis for the creation of law.⁶⁶ However, Catholic revisionist sexual anthropology emphasises the lack of historical consciousness within both the traditional and new natural law schools of natural law.⁶⁷ The strength of the natural law argument is that its origins are deeply embedded in the easily identifiable morals found in human nature. Therefore, to argue against the conclusions of natural law is to argue against naturally occurring human morality. The problem with this pattern of thought is that the original morals identified by Thomas Aquinas were a representation of a medieval theological interpretation of Jesus Christ's teachings.⁶⁸ The interpretation of these teachings in the contemporary era would vary hugely from the "goods" initially identified by Aquinas and would likely invalidate the position reached in the Catechism of the Catholic Church.

Another area of theological thought is that sexual activity within a heterosexual marriage is the most virtuous type of sexual activity. However, the law should tolerate homosexual activity within a

62 At 236.

63 At 238.

64 Timothy Chappell *Understanding Human Goods* (Edinburgh University Press, Edinburgh, 1995) at 43.

65 "Bishops Reintegrate Remarried Catholics into Church Life" *Crux* (United States, 25 October 2015).

66 Todd Salzman and Michael Lawler *The Sexual Person: Toward a Renewed Catholic Anthropology* (Georgetown University Press, Washington, 2008) at 95.

67 James P O'Sullivan "Josef Fuchs' Revised Natural Law: Possibilities for Social Ethics" (2014) 95 *New Blackfriars* 379 at 382.

68 At 388.

committed relationship. The thought behind this argument is based on the new natural law school and the notion that the law should not persecute homosexuals where they are engaging in sexual activity privately and outside the public eye. While this area of theological thought does not advocate any need for secrecy, homosexual activity is still seen as a lesser and more lustful practice than heterosexual activity.⁶⁹ This means that it is a less efficient path to achieving a loving relationship with God but not an impossible one.

The last body of theological thought argues that heterosexual activity and homosexual activity are equally natural and of the same moral standing. Homosexual relationships should be celebrated and not just tolerated.⁷⁰ Catholic theologians utilise the findings of other religious bodies, such as Islam and Judaism, to justify this conclusion as well as modern developments to the moral conscience of society.⁷¹ This body of thought aligns most closely with current social thinking. Therefore, this argument will most likely be accepted by modern society. As the law is meant to reflect societal standards of morality, this body of thought is the most appropriate to be incorporated into the law.

2 *Catholic public*

Catholics United, a United States Catholic political organisation, advocates the implementation of political solutions preserving "the dignity of the human person".⁷² The organisation argues that a strict conservative legal position coerces the Catholic public to adopt a cautious approach in the consideration of more liberal policy.⁷³ Faith and the ability to form a meaningful relationship with God should not be constrained by a fixed interpretation of the moral scope of sexuality. A fixed law that fails to reflect the social developments of morality damages the ability of Catholics to independently assess the morality of a relationship and encourages Catholics to pursue relationships that will deter friendship.⁷⁴ To prevent these harms the law needs revision and Papal intervention.

The New Ways Ministry argues that sexuality is a gift from God and that, as a gift, it should be seen as a good inherent in human nature that allows one to become closer to God. Sexuality should not be weaponised to divide society. In 1981, the Ministry held a national symposium on homosexuality which was contested by the Archbishop of Washington, who urged Catholics not to

69 Salzman and Lawler, above n 66, at 163.

70 At 165.

71 Patricia Beattie Jung "The Roman Catholic Tradition" in Jeffrey S Siker (ed) *Homosexuality and Religion: An Encyclopedia* (Greenwood Press, Connecticut, 2007) 191 at 200.

72 Benedictine University Library "Catholic Social Teaching Research Guide: Life and Dignity of the Human Person" (18 August 2022) <www.researchguides.ben.edu>.

73 Michael Sean Winters "Catholics United Puts a Foot Wrong" *America: The Jesuit Review* (online ed, United States, 28 May 2020).

74 O'Sullivan, above n 67, at 388.

endorse the event. Despite this, several Catholic groups and Bishops openly voiced their support for the symposium and later repeated its messages.⁷⁵ Recently, Pope Francis, in two letters, commended the Ministry.⁷⁶ The Pontiff's comments suggest that the scope of the ultimate form of friendship, articulated by Thomas Aquinas, extends to homosexual couples and that their love will bring them closer to God. This would mean that a failure to follow the position pronounced by the Catechism of the Catholic Church – that is, that homosexuality is intrinsically disordered – is neither invalidating nor incapacitating. The Pontiff stated that the Commandment of loving one's neighbour is tied necessarily to the first commandment to love God.⁷⁷ Rather, the duty of homosexuals to practise abstinence is secondary to the duty of other Catholics to respect every person. Therefore, its applicability in modern Catholic society is largely redundant.

The Wijngaards Institute for Catholic Research demands that homosexuals be able to fully participate in both Church ceremonies and social institutions without spiritual conviction within the internal forum.⁷⁸ The Institute argues that the various bodies of Catholic canon law which advocate liberalisation from the Catechism's pronouncement are purposefully ignored in order to avoid the potentially controversial process of changing the official position of the law. In particular, the Institute contrasts the disparity between the law relating to sterility and the law relating to homosexuality. Canon 1084.3 states that "sterility neither prohibits nor nullifies marriage".⁷⁹ Similarly, in *Humanae Vitae* Pope Paul VI stated that "sexual activity ... does not ... cease to be legitimate even when, for reasons independent of their will, it is seen to be infertile".⁸⁰ These parts of the law contradict the natural law position that sexual intercourse exists for one of two purposes which can only be achieved if the ultimate goal is to procreate.

3 *Clergy*

The most persuasive recent dissent from the position established by the Catechism of the Catholic Church is Pope Francis' endorsement of same-sex civil unions.⁸¹ The Pontiff stated that:⁸²

75 Brian Fraga "Pope Francis thanks New Ways Ministry in recent correspondence" *National Catholic Reporter* (online ed, United States, 8 December 2021).

76 Fraga, above n 75.

77 Fraga, above n 75.

78 Luca Badini Confalonieri *Christian Objections to Same Sex Relationships: An Academic Assessment: Interim Research Report* (Wijngaards Institute For Catholic Research) at 12.

79 Code of Canon Law, c 1084.3.

80 Pope Paul VI *Humanae Vitae* (Holy See (translators), Encyclical Letter of the Holy See, Vatican City, 1968).

81 Catholics for Choice "Pope Francis States Support for LGBTQ Civil Unions" (2020) 41(2) *Conscience* 10 at 10.

82 At 10.

Homosexuals have a right to [be] a part of the family ... They're children of God and have a right to a family. Nobody should be thrown out, or be made miserable because of it.

This overt support for civil unions suggests that the heart of the law, which is based on the ability to achieve a meaningful relationship with God, is not limited to the Catechism. While the Catechism assumes that the only way for homosexuals to achieve a meaningful relationship with God is through abstinence, the comments of the Pontiff suggest that the love and friendship arising from a same-sex relationship allows for the achievement of true Christian perfection.⁸³

Cardinal Jean-Claude Hollerich suggested that there has been a shift in societal morality due to both scientific and sociological advancements. This shift is reflected by the majority of the Catholic congregation. He stated that "the sociological-scientific foundation [of the official Church position reached in the Catechism of the Catholic Church] is no longer true".⁸⁴ This suggests that the goods or qualities that occur naturally in everyone must be revised in the contemporary era. They reflect the medieval moral code where sex was seen as a potential avenue to disease, and as something which should only be encouraged where conception was a likely consequence.⁸⁵ In the modern era, there must be a fundamental revision to the current doctrine, as there is no logical basis for the inconsistency that exists when heterosexual sex outside marriage is seen as sinful but forgivable, while homosexual sex is seen as completely unnatural.⁸⁶

Bishop Walter Sullivan argued that theological debate concerning the moral justification for homosexual discrimination was mundane given the underlying principles that run in tandem with the law.⁸⁷ These principles emphasise that the life of any human is sacred and deserves protection.⁸⁸ An individual's subjective dislike or mistrust of homosexual people does not justify an individual or a society invading the rights and protections assigned to each human by God.⁸⁹ Given that each human is created in the likeness of God, any discrimination against any group of people is a violation of the central natural law principle to respect human life.⁹⁰

83 O'Sullivan, above n 67, at 389.

84 Philip Pulella and Zuzanna Szymanska "Liberal cardinal calls for revised Catholic teaching on gays" *Reuters* (online ed, United Kingdom, 4 February 2022).

85 Massey, above n 33, at 73.

86 Pulella and Szymanska, above n 84.

87 James P Martin "The Church and Gay Liberation: The Case of John McNeill" (2016) 34 *US Catholic Historian* 125 at 125–136.

88 Code of Canon Law, c 696 § 1.

89 Francis DeBernardo "Catholic LGBT History: 'You belong here. It's about time somebody says that to you'" (28 October 2017) *New Ways Ministry* <www.newwaysministry.org>.

90 Germain Grisez "Towards a Consistent Natural-Law Ethics of Killing" (1970) 15 *Am J Juris* 64 at 68.

In 1986, the New Zealand Bishops Conference declared that "concern for the dignity of persons leads us to oppose all forms of discrimination against homosexual persons".⁹¹ They articulated that it was against natural law for a subset of society to be deprived of any right. There is danger, according to the Conference, in not accepting the inherent rights of homosexuals. The criminal law should only be utilised to protect society from any threat to the common good.⁹² If the official canon law continues to associate the rights of homosexuals with an interference in the public good, there is a real risk that Catholics will continue to perceive homosexuality as a threat.⁹³ Homosexuals are just like any other individual; they can be subject to the spiritual jurisdiction and deprived of a meaningful relationship with God. However, negative exposure within the spiritual jurisdiction, based purely on sexual orientation, cannot be the intention of God.⁹⁴ The life-giving language of love and friendship runs through all kinds of human relationships. This includes homosexual relationships.

The "OutInChurch" movement calls for an end to institutional discrimination against homosexual people. This movement represents the collective views of several priests, teachers, administrators and Church volunteers who have identified themselves as gay or queer.⁹⁵ The two core demands of the movement are: first, that sexual orientation, as well as entering into a non-heterosexual relationship or marriage, must never be considered a breach of loyalty to God; and secondly, that the Church must explicitly express in its rites and celebrations that homosexual people are blessed by God and that their love bears manifold fruits.⁹⁶ The widespread popularity of this movement, within the German Catholic hierarchy, indicates that the divine purpose of sexuality should be revisited. Otherwise, the truth of God doctrine becomes muddled by human error based on out-of-date medieval theology and scientific thought. Consequently, the true heart of the law is lost.

In 1976, the United States National Conference of Bishops held that homosexual people "should not suffer prejudice against their basic human rights. They have the right to respect, friendship and justice".⁹⁷ The importance of this statement lies in the recognition of a homosexual's right to "friendship". Natural law theory teaches that the ultimate form of "friendship", a method for improving one's relationship with God, can only be achieved where intercourse is practised by a

91 New Zealand Catholic Bishops Conference "Dignity, Love, Life" (8 May 1986) <www.catholic.org.nz>.

92 New Zealand Catholic Bishops Conference, above n 91.

93 New Zealand Catholic Bishops Conference, above n 91.

94 New Zealand Catholic Bishops Conference, above n 91.

95 OutInChurch "OutInChurch Manifesto" (24 January 2022) <www.outinchurch.de>.

96 OutInChurch, above n 95.

97 Bruce Robinson "The Roman Catholic Church and Homosexuality" Religious Tolerance <www.religioustolerance.org>.

married couple for the purpose of conception.⁹⁸ However, here the National Conference of Bishops explicitly affirms that the bounds of "friendship" are not limited to heterosexual relationships and that the morality of society is not threatened by the love of homosexual couples.

V HISTORICAL AND POLITICAL DEVELOPMENTS SHAPING THE NATURAL LAW POSITION

The most effective way to loosen natural law's influence over Catholic canon law is to assess the origins of the naturally existing goods. Natural law presumes that there are inherent goods existing naturally in all people. To breach these goods is to contradict the laws of nature and act in defiance of God.⁹⁹ The problem here is that the ability to identify the true bounds of these goods has been masked by medieval Christian theology. Historic Christian theology assumed that the most authoritative source, for purposes of identification, was the Bible.¹⁰⁰ Consequently, parts of the Old Testament remained authoritative and persuasive. While there has been substantial advancement within modern theological and scientific thought, embraced by many members of the clergy such as Father David Kennedy,¹⁰¹ medieval Christian theological thought still prevails as the most authoritative identifier of naturally existing goods.¹⁰²

A The Marriage Contract

Central to the natural law idea of sexuality's purpose is marriage. Marriage is a moral convention through which heterosexual couples can achieve the ultimate form of friendship. The ultimate friendship brings individuals closer to God within the scope of canon law's spiritual jurisdiction.¹⁰³ While this is so, the origins of the convention of marriage are ignored in the arguments of many natural law scholars such as John Finnis. Marriage was originally a form of contract, between two consenting families, that acted similarly to modern trust law.¹⁰⁴ A family member from one family was chosen to enter a sexual relationship with the chosen family member of the second family. The assets of both families were amalgamated and protected from the state provided that the couple was able to produce

98 Allen, above n 41, at 5.

99 O'Sullivan, above n 67, at 380.

100 William E Carroll "Creation and Science in the Middle Ages" (2007) 88 *New Blackfriars* 678 at 679.

101 Michael Fowler "Marist father turned comet catcher" *Hawkes Bay Today* (online ed, New Zealand, 25 November 2017).

102 O'Sullivan, above n 67, at 381.

103 At 382.

104 James A Brundage *Law, Sex, and Christian Society in Medieval Europe* (University of Chicago Press, Chicago, 1987) at 9.

a child who could inherit the wealth.¹⁰⁵ Naturally, conventions and rules emerged that prevented homosexual relationships within the context of a marriage.

The earliest example of law being used as a tool to control sexual conduct was in ancient Babylonia. The Code of Hammurabi identified and prescribed punishments for numerous sexual offences. Several of these offences related to violations of the marriage contract. For instance, where a wife refused to have sex with her husband she was drowned.¹⁰⁶ This would allow for the husband to marry again to ensure likely protection of the assets of his family. The law also condemned a husband who refused to have sexual relations with his wife. He was condemned to exile, and his property assigned to the wife and their children.¹⁰⁷ However, the law did not define the convention of marriage as an exclusive relationship. Marriage existed alongside the convention of concubinage. The law allowed for men to engage in both homosexual and heterosexual relationships outside the immediate marriage relationship.¹⁰⁸ Similarly, the later laws of Eshnunna also permitted homosexual relationships between men outside the immediate marriage convention. Marriage served the sole purpose of procreation to defend assets.¹⁰⁹

The institution of the marriage contract was developed under Ancient Egyptian law. Marriage became a solely monogamous institution, with the institution of concubinage abandoned.¹¹⁰ Abandonment of the concubinage institution resulted in widespread adultery. Adultery was considered a serious breach of the contract and would deprive the adulterer of their share of the amalgamated assets.¹¹¹ However, adultery was not viewed as a capital crime; it was merely a legal basis for divorce. The omission to acknowledge adultery as a capital crime indicates that there was a wider social acceptance that attraction outside the marriage contract was natural but non-desirable. There are numerous examples of adulterous same-sex relationships occurring that violated the marriage contract.¹¹² These relationships were able to continue after a divorce was awarded.¹¹³

105 Mohannad Al-Shamari and Muzahim Al-Jalili "Two Old Babylonian Marriage Contracts from Isin" (2020) 84 IRAQ 125 at 127.

106 Brundage, above n 104, at 10.

107 Al-Shamari and Al-Jalili, above n 105, at 134.

108 Brundage, above n 104, at 11.

109 At 11.

110 At 12.

111 Carolyn Graves-Brown *Dancing for Hathor: Women in Ancient Egypt* (Bloomsburg Publishing, London, 2010) at 41.

112 See Brundage, above n 104, at 11.

113 Graves-Brown, above n 111, at 43.

Society legislated to deter breaches of the contract. They did not legislate to assess the legitimacy of relationships formed through adultery.

Ancient Greek law was developed to further deter adultery. Adultery, as well as the seduction of widows, became a serious crime which could be punished by death or imprisonment.¹¹⁴ The reasoning behind these developments was to protect the families who had entered the contract and to promote certainty in the protection of assets.¹¹⁵ Fidelity was demanded of wives; however, husbands could engage in extra-marital relationships. Greek societal morality demanded that married men abstain from extra-marital relationships with women due to the risk of conception, which would threaten the marriage contract. However, extra-marital relationships with other men were not considered a threat to marriage and were encouraged.¹¹⁶ This again illustrates that the laws governing the institution of marriage were purely economic.

Roman law echoed the theme of patriarchal dominance in relation to sexual prescriptions. Marriage was seen as a symbolic unification of two families for political or economic purposes.¹¹⁷ The law assumed that women were at the service of men within the context of marriage. Male gratification was the main goal of the law.¹¹⁸ Sexual offences came under the category of Stuprum. Stuprum outlawed certain kinds of fornication. Fornication between a man and a slave or servant was not included within its scope, nor was intercourse with a prostitute or a woman of degraded status.¹¹⁹ Stuprum also did not apply to homosexual intercourse between two men.¹²⁰ Marriage under Roman law no longer acted as a private contract but rather as a symbolic expression of friendship where two families were brought together. Marriage would result in legitimate offspring as this would extend the period of friendship between the two families.¹²¹

Given that the purpose of marriage was to bring two families together, they were often devoid of mutual affection between the husband and the wife. To deter divorce, the institution of concubinage was legislated outside the scope of Stuprum.¹²² Like marriage, concubinage was a long-term licit

114 Brundage, above n 104, at 13.

115 Deborah Lyons *Dangerous Gifts: Gender and Exchange in Ancient Greece* (University of Texas Press, Austin, 2012) at 23–26.

116 Brundage, above n 104, at 13.

117 Beryl Rawson *Marriage, Divorce, and Children in Ancient Rome* (Clarendon Press, New York, 1991) at 52.

118 Brundage, above n 104, at 28.

119 Craig Williams *Roman Homosexuality: Ideologies of Masculinity in Classical Antiquity* (Oxford University Press, Oxford, 1999) at 119.

120 Brundage, above n 104, at 29.

121 At 33.

122 At 41.

sexual relationship. A concubine could be considered as the partner towards whom the husband was truly affectionate. Typically, concubinage was practised where a mutual loving relationship between the husband or wife and the concubine was impossible due to legal or social regulation.¹²³ Reasons of public policy or differing classes of social status could prevent a marriage.¹²⁴ The existence of concubinage as a legally recognised institution indicates that ethical standards were not echoed within the laws of marriage. Marriage was a tool for political or economic advancement rather than a naturally occurring good that was utilised to become closer to the relevant deities of that period.

Under early historic Jewish law,¹²⁵ marriage arrangements involved an agreement between the fathers of the prospective couple. The agreement would cover both the property arrangements and other conditions of the marriage.¹²⁶ A dowry was calculated based on the amount needed to ensure the well-being of the future household. Sexual attraction and affection between the future spouses were of little importance in these negotiations.¹²⁷ The convention of the Jewish marriage ritual was a public acknowledgement of the bargain between the two families. This convention placed legal obligations on both spouses. The husband was obligated to have sex with his wife while the wife had the right to demand sexual performance from him.¹²⁸ This was for the purpose of conception, which would further solidify the relationship established between the two families. These obligations are also reflected in other areas of law that existed alongside Jewish law. For instance, the purpose of marriage within the context of Roman law was as a tool for political or financial gain.

The obligations attached to marital intercourse were developed by later historic Jewish law¹²⁹ to increase the probability of conception. This would minimise the risk for both families entering a marriage agreement. Marital relations for procreative purposes were ritually pure. Sex, unless purified, threatened to defile others, and thus damage the community.¹³⁰ With these developments to the law, sex became culturally associated with impurity and immorality unless the sexual activity was

123 At 41.

124 Williams, above n 119, at 107.

125 The Halakha, derived from the Torah.

126 Brundage, above n 104, at 52.

127 At 52.

128 At 52.

129 *Tanakh* at Genesis 1:31, Ketubot 48a:2, Deuteronomy 24:5, Mishnah Ketubot 5:6 and Mishneh Torah, Sabbath 30:14.

130 Brundage, above n 104, at 53.

practised for purposes of conception. Naturally, sexual relationships that had no possibility of conception became associated with this idea of impurity and were deterred through the law.¹³¹

Early Christian law adopted much of the ancient Jewish Code. However, the teachings of Jesus were intertwined with the rules already readily established in the Jewish Code. In relation to the marriage institution, Jesus did not reject traditional beliefs concerning the marital obligations or the family.¹³² However, he differed from most ancient Jewish legislators by the emphasis that he placed on the naturally occurring virtue of love within the context of the family.¹³³ Sexual relations in the marriage were interpreted by early Christian theologians as necessary but also as a potential distraction from achieving the naturally occurring good of love.

The idea of love may appear to be separate from the immediate economic or political purposes of the historic marriage institution. However, the behaviours needed to achieve this naturally occurring good remain similar to the central motivations of the historic marriage contract. Sexuality is a part of the marriage that enables a heterosexual couple to engage in intercourse that could result in conception. Engaging in intercourse for the purposes of conception is a practice that enables individuals to become closer to God. The reasoning behind this is that a love for God is tied to the idea of a love for other humans.¹³⁴ This reasoning is deeply inspired by the moral conventions that would have developed around the institution of marriage. A marriage was an agreement between two families that demanded offspring to either bring two families together or to protect their combined assets.¹³⁵ Homosexuality was not compatible with the institution for these purposes given the inability of homosexuals to produce genetic offspring.¹³⁶ Therefore, it was deterred as a relationship, within the scope of marriage.

B Justified War Theory

The Catholic theologian Francisco de Vitoria suggested that Spanish dominion in America could be justified on the grounds that it was right to save the innocent from egregious harms. These harms

131 *The New Jerusalem Bible* (1985) at Leviticus 18:22, Leviticus 20:13, Deuteronomy 23:17, Romans 1:26, Corinthians 6:9–10, Timothy 1:10, Genesis 19:5 and Judges 19:22.

132 Brundage, above n 104, at 57.

133 At 57.

134 David G Hunter (ed) *Marriage and Sexuality in Early Christianity* (Fortress Press, Minneapolis, 2018) at 237.

135 At 238.

136 Jeffrey Wickes "Jewish Law and Early Christian Identity: Betrothal, Marriage, and Infidelity in the Writings of Ephrem the Syrian by Yifat Monnickendam (review)" (2020) 28 *Journal of Early Christian Studies* 669 at 670.

included cannibalism, human sacrifice and sodomy.¹³⁷ The theory of justified war was formulated on the basis of God's commandment to "love thy neighbour as thyself"; the Indians were neighbours of the Spanish and had to be defended from the tyranny and oppression that would distance them from achieving a spiritual relationship with God.¹³⁸ Traditional social practices that distanced a population from God were seen as a grave injustice.

Under canon law, war is a great evil that can only be justified if an innocent population is being harmed and cannot defend itself. There is a general prohibition on killing those who have not inflicted injury. Vitoria viewed the act of killing a person who has inflicted no harm as "utterly wrong" and asserted that "it is never lawful ... to kill innocent persons".¹³⁹ It was in the context of harm and innocence that Vitoria argued against the scope of a foreign power's right to punish the wicked. A state has authority over foreigners, in addition to their own subjects, to prevent them from causing harm to others.¹⁴⁰ This authority allows for a foreign power to prohibit the practice of nefarious customs as their continuation will inflict harm on the innocent.

Vitoria's argument for justified war was utilised by Spain to invade the Americas. The newly discovered Americas served as a potential western sea passage to the West Indies which would allow easier access to the spice islands. The highly lucrative spice trade at this time was monopolised by the Portuguese.¹⁴¹ The Spanish monarchy requested permission from the Pope to invade and gain title over any newly discovered lands on the basis that the native inhabitants were practising immoral behaviours that would deprive them of spiritual salvation. In response to this request, Pope Alexander VI issued the Papal Bull *Inter Caetera*.¹⁴² This Bull granted Spain title to all lands discovered and to be discovered in the New World on the condition that the invaders improve the social practices of the established native population.

137 William Bain "Vitoria: the law of war, saving the innocent, and the image of God" in Stefano Recchia and Jennifer M Welsh (eds) *Just and Unjust Military Intervention* (Cambridge University Press, Cambridge, 2013) 70 at 70.

138 At 71.

139 Francisco de Vitoria *On the Law of War* (Anthony Pagden and Jeremy Lawrance (eds), Cambridge University Press, Cambridge, 2012) at 305. On the intellectual context of Vitoria and his writings, see Anthony Pagden *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (Cambridge University Press, Cambridge, 1982); and Margaret R Greer, Walter D Mignolo and Maureen Quilligan (eds) *Rereading the Black Legend: The Discourses of Religious and Racial Difference in the Renaissance Empires* (University of Chicago Press, Chicago, 2007).

140 Bain, above n 137, at 75.

141 David James Owens "Spanish-Portuguese Territorial Rivalry in Colonial Río de la Plata" (1993) 19 *Yearbook (Conference of Latin Americanist Geographers)* 15 at 17.

142 Pope Alexander VI *Inter Caetera* (Holy See (translators), Papal Bull issued by the Holy See, Vatican City, 1493).

While Vitoria's theory of justified war was affirmation of a means to exact legitimate political power beyond the boundaries of Christian Europe to defend the innocent, it implied that moral social customs could only be established where Christian Europeans implemented institutions that stabilised European possession over native property.¹⁴³ One method for achieving this means of stabilisation was by expanding the Papal jurisdiction to spiritual matters. Pope Alexander VI viewed the social practices of the Native Americans, including the practice of homosexuality, as needing to be exposed to punishment if native society was to naturally develop in a way which enabled them to achieve a meaningful relationship with God.¹⁴⁴ Homosexuality soon became a discouraged form of sexual expression given its Christian correspondence to societal harm. "Sodomites" were publicly executed to encourage a natural form of sexuality to take social precedence.¹⁴⁵ These extraordinary responses to traditional Native American behaviours were justified on the basis that the societal norms of the "native savage" would eventually develop to mirror the social practices of Christian Europe, which would result in spiritual liberation.¹⁴⁶

VI OTHER JUDICIAL PRONOUNCEMENTS

The jurisdiction of the Catholic canon law encompasses two forums: the external forum and the internal forum. The external forum encompasses matters of public governance while the internal forum applies to the relationship between an individual and God.¹⁴⁷ While the internal forum is the more important of the two jurisdictions, the external forum is the location from which rules referring to the internal forum are communicated.¹⁴⁸ Therefore, the method used for articulating the law is similar to that used in common law jurisdictions, which utilise legislation to communicate the law to the wider population.¹⁴⁹ Within common law jurisdictions, judges can interpret the scope of the law and develop the law to accommodate the modern social climate.¹⁵⁰ Similarly, Catholic canon law allows for authoritative statements by Bishops and Popes to become a part of the law, after those statements have been authentically interpreted by the legislator, for the purpose of developing new

143 Bain, above n 137, at 79.

144 At 80.

145 Jonathan Goldberg "Sodomy in the New World: Anthropologies Old and New" (1991) 29 Social Text 46 at 48.

146 At 48.

147 Coriden, above n 4, at 37.

148 At 37.

149 Eamonn G Hall "Reflections of a Common Law Lawyer on the Canon Law" (2013) 102(405) Studies 81 at 89.

150 Courts of New Zealand "Our court system" <www.courtsofnz.govt.nz>.

parts of law which sometimes conflict with historical canon law.¹⁵¹ However, the Catholic canon jurisdiction does not have a method to clarify how these conflicts should be mitigated.¹⁵² One method that could be adopted is the solution of the common law, which is to define legal principles that are able to adapt to social developments.

Both the common law jurisdictions of England and Wales and New Zealand have acknowledged that a routinely mechanical application of the law is sometimes undesirable to achieve the true desired effect of that rule. Instead, the effect of a law must be assessed against its societal background. If this process is not engaged with, the true heart of the law becomes shrouded and mottled by now dismissed theoretical concepts and obsolete social practices.

A England and Wales

In *Gillick v West Norfolk and Wisbech Area Health Authority*, Lord Scarman reasoned that it was the mark of a great judge to search for a legal principle at the heart of the law, to discard details appropriate to earlier times, and to apply the principle in a way that satisfies the requirements of the modern era.¹⁵³ Lord Scarman's process of seeking out the heart of the law, and applying that heart to the context of modern social circumstances, emphasises the idea that the original intent of the lawmaker must be central to any modern application of that law.

The Catechism of the Catholic Church fails to dissect the historical reasoning and societal circumstances influencing the original natural law position. Thomas Aquinas' assessment of natural law is influenced by the scientific thought of medieval Europe. Aquinas benefited from the reasoning of Avicenna, Averroes and Maimonides.¹⁵⁴ The idea of God being the creator of all divine and physical matter was a theological conclusion in medieval Jewish, Christian and Islamic law.¹⁵⁵ In each of these communities there was a wide-ranging discussion of the relationship between theology, philosophy, the natural sciences, human nature and faith.¹⁵⁶ Aquinas argued that metaphysics can prove that the existence of all matter is linked to God. There was no conflict between creationism and the claims of the natural sciences given that the natural sciences are the study of change, and creation is not a change; it was a logical conclusion based on the principle of cause and effect.¹⁵⁷ Given this reasoning, it is inevitable that innate goods also originated by way of creation. These goods must serve

151 Coriden, above n 4, at 33.

152 Hall, above n 149, at 9.

153 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL) at 183.

154 Carroll, above n 100, at 680.

155 At 681.

156 At 681.

157 At 682.

some purpose. Aquinas identified this purpose as a series of guiding principles that must be followed to bring one closer to God.¹⁵⁸ The practice of homosexuality was seen as a diminishment of the design of the human body, which had been created to serve a particular purpose. This purpose was one of procreation.

With modern scientific and theological progression, Aquinas' reasoning is now outdated and should be reconsidered. Modern biological thought suggests that homosexuality is caused by a mixture of genetic, hormonal and environmental factors. It is not a choice but rather a naturally occurring orientation.¹⁵⁹ Therefore, it cannot be immoral within the Catholic canon law, as God created all matter in his image. Sexuality has a divine purpose – that is, to further the relationship between the individual and God – and homosexual orientation must serve this divine purpose. The Church has a duty to reconsider Aquinas' theory of sexual morality given that its literal application, in the context of modern society, ignores the heart of the law.¹⁶⁰ The heart of marriage is to utilise sexuality to achieve a loving relationship with God through achievement of the ultimate friendship between spouses.¹⁶¹ Failure to amend the law inspires continued damage and confusion to true societal virtue.

B New Zealand

In *Attorney-General v Family First New Zealand*, Williams J stated that it is only by considering and "understanding the older doctrinal foundations ... [that] underlying principles may be discerned that can still perform a useful organising function without disrupting our long preference for adaptive incrementalism".¹⁶² The search for these principles aids in the avoidance of inconsistent application within the modern societal context.

Legal principles remain at the heart of the Catholic canon. The principles found at the heart of the institution of marriage are found in Genesis 2:24: "a man [shall] leave his father and mother and shall cleave unto his wife: and they shall become one flesh".¹⁶³ This verse identifies three underlying and interrelated principles: leaving, cleaving and becoming one.¹⁶⁴ Societal morality and tradition, during the original composition of Genesis, were heavily influenced by the historic marriage contract. The

158 At 681.

159 Robert L Kinney III "Homosexuality and scientific evidence: On suspect anecdotes, antiquated data, and broad generalizations" (2015) 82 *Linacre Q* 364 at 372.

160 O'Sullivan, above n 67, at 381.

161 Massey, above n 33, at 75.

162 *Attorney-General v Family First New Zealand* [2022] NZSC 80, [2022] 1 NZLR 175 at [169].

163 *The New Jerusalem Bible* (1985) at Genesis 2:24.

164 Ikechi Chidi Ekpendu "Understanding the Concept of 'Leave to Cleave' in Gen 2:24 and Mark 10:7 as a Model for Political and Societal Marriage Dynamics" (2016) 21 *JHSS* 39 at 44.

purpose of marriage was only able to be achieved where procreation and the continuation of some sort of lineage was established.¹⁶⁵ In the modern societal context these principles can be applied quite satisfactorily to de facto relationships and to both heterosexual and homosexual marriages or civil unions.¹⁶⁶ A couple is expected to leave the familiar patterns of former friendships to develop their love towards one another. They are also expected to love one another and be strictly monogamous.¹⁶⁷ This principle encourages a couple to work through disagreements to continue to grow as one. Lastly, a couple must become one. This principle was formulated on the idea that people will have innate behavioural differences, whether these be opinions or motivations.¹⁶⁸ Unity in marriage is achieved through compromise, where individual behaviours are adjusted to improve one's understanding of a spouse's needs and desires.

In the modern societal context, the institution of marriage has been developed as a public affirmation of a couple's love for one another. The historical perception of marriage as an agreement between two families has been largely replaced by most Catholics who favour the modern understanding of marriage.¹⁶⁹ Correspondingly, the requirement of procreation has been dissolved. Given that marriage is now associated primarily with mutual love between two consenting individuals, there is no reason that its scope cannot extend to various monogamous relationships that are based upon love.¹⁷⁰ To condemn these relationships is an act of discrimination that potentially prevents homosexual couples from subjectively realising true Christian perfection.¹⁷¹ To continue to discriminate in this manner violates the central natural law principle of respecting human life.

VII SUGGESTIONS FOR REFORM

It should be emphasised that the Catholic Church is not a bigoted institution unwilling to respond to recent liberal societal developments. Just like any other legal jurisdiction, reform of existing law is a difficult process. Within the context of Catholic canon law, this process is further delayed by religious tradition.¹⁷² Where the Church is considering the development of its legal stance, it has a responsibility to identify the heart of the relevant canon law rules and apply those rules in the context of modern society without affecting the true reasoning behind those rules. Any developments cannot

165 Brundage, above n 104, at 57.

166 Ekpendu, above n 164, at 40.

167 At 44.

168 At 43.

169 Diamant, above n 22.

170 Confalonieri, above n 78, at 35.

171 O'Sullivan, above n 67, at 389.

172 Brendan Daly "Synodality and its Consequences for Canon Law" (paper presented at Health and Integrity in Church and Ministry Conference, University of Divinity, 2019) at 94.

be based purely on contemporary populism.¹⁷³ Instead, they must echo naturally existing human goods and obligations. While these difficulties do exist, the growing support for reform, which is echoed by a substantial quantity of the clergy and Church hierarchy, indicates that revision of the Catechism of the Catholic Church would be appropriate in the modern societal context.

There are several avenues that could be utilised by the Catholic Church hierarchy to develop the position reached in the Catechism of the Catholic Church. While these developments may appear to be radical, the widespread advocacy for reform by members of the Catholic Church and the existence of numerous liberal canons imply that the true enforceability of the current law, within the context of the spiritual jurisdiction, is largely superficial. Regardless of its ostensible authority for most Catholics, a failure to explicitly denounce its position provides *prima facie* validation of homophobic discrimination or abuse.

A Legalisation of Gay Marriage

The place of sexuality within Catholic canon law is inherently linked to the institution of marriage.¹⁷⁴ Recognition of the homosexual's right to marriage would confirm the Church's acceptance of homosexuality's place within the structure of a virtuous society.¹⁷⁵ Furthermore, it would efficiently clarify the intent behind the Church's recently implemented laws on the rights of homosexuals to be cared for and respected in society. Implementation would also detach the Church from the burden of the manualist tradition where behaviours are explicitly decided as either right or wrong.

The manualist tradition prevents the law from being successfully responsive to the needs and expectations of the modern congregation.¹⁷⁶ Modern moral theologians and canonists have been reluctant to incorporate thought beyond that of the foundational canon experts such as Aquinas into the traditional position of the Catholic canon. This is due to a fear that the heart of that law will be lost.¹⁷⁷ Typically, the intent of canonists is not to create works of great originality or to be responsive to the needs of individuals or groups. Rather, they view their purpose as one of production.¹⁷⁸ Canonists must produce clear and general answers for an audience craving authoritative solutions and uniform results.¹⁷⁹ Their own reasoning is usually omitted. While this method is to some degree

173 Oliver Roy "Populism and Christianity: The Tale of Two Continents" *Berkley Forum* (online ed, Washington, 18 December 2019).

174 Pickett, above n 1, at 40.

175 Confalonieri, above n 78, at 66.

176 At 63.

177 Reid, above n 60, at 235.

178 At 236.

179 At 237.

justified given the divine nature of the law, it fails to critically examine the application of the law in the context of modern society. Seeking to implement non-adaptive rules blunts the ability of the law to provide authoritative solutions under modern societal circumstances.

Modern Catholic society is receptive to both the underlying virtues of the Church as well as to larger events in society and the world. States with an overwhelming Catholic majority, such as Ireland, Spain and Argentina, have all legalised same-sex marriages regardless of the official position reached in the Catechism of the Catholic Church.¹⁸⁰ The Church must adapt its official position to reflect the desires of its wider congregation. If this is not done, the position of the canon law will continue to cause confusion and emotional distress to both homosexual Catholics and Catholics who have friends or family members that identify as homosexual, who will be unsure of their position in the scope of the spiritual jurisdiction.

The Church has previously legislated that homosexuals need to be treated with respect and compassion.¹⁸¹ The true effect of this canon is diminished by an inability to develop the rights of homosexuals to be included within the scope of marriage. Respect and compassion cannot be achieved without the acknowledgement of homosexual relations as divine acts of love that bring one closer to God. Homosexuality is no longer understood to be a condition; it is a naturally occurring sexual orientation that must be recognised as a reflection of God's image in some capacity.¹⁸² Without recognition of the right for homosexuals to marry, the laws pertaining to respect and compassion fail to enable Catholics to truly accept and understand individuals who identify as homosexual.

B Legalisation of the Same-Sex Civil Union

The Pope's recent support for this institution inspires confidence that same-sex civil unions can be included within the Catholic canon law.¹⁸³ While a civil union is not a marriage, legalisation of same-sex civil unions would be an official recognition of the legitimacy of homosexual relationships within the spiritual jurisdiction. This recognition would prevent those who use the confused Catholic canon position as a justification for homophobic behaviour from claiming a divine right to deprive others of their right to engage in a loving relationship with God. The true Catholic duty, to treat homosexual individuals with respect and compassion in day-to-day life, should not be able to be so easily avoided.¹⁸⁴ It would also encourage these duties to be acknowledged by the numerous

180 Diamant, above n 22.

181 Pope John Paul II and Cardinal Ratzinger, above n 49.

182 Andrew L Whitehead and Joseph O Baker "Homosexuality, Religion, and Science: Moral Authority and the Persistence of Negative Attitudes" (2012) 82 Sociological Inquiry 487 at 491.

183 Pieter Vree "*Imbergoglios* or Standard Franciscan Procedure?" (2021) 88(2) New Oxford Review 36 at 37.

184 At 37.

jurisdictions that still utilise the official position of the Church to support the maintenance of criminalising homosexuality.

Traditional Catholic teaching enables politically motivated Catholics to challenge societal developments that threaten their authority over the population. Many predominantly Catholic states that are not consistently exposed to more liberal arguments and reasoning utilise religious law to influence domestic social behaviour and morality. For example, after the government of Belize decriminalised homosexuality in 2016,¹⁸⁵ the Catholic Church of Belize filed an appeal to reinstate criminalisation.¹⁸⁶ The Catholic Church of Belize argued that decriminalisation was part of "an orchestrated plan of demonic darkness to dethrone God from our Constitution and open massive gateways to demonic influence and destruction that will affect generation after generation to come".¹⁸⁷ The multiple sources of more liberal canon law emphasise that the argument made by the Catholic Church of Belize is prejudicial and should not exist within the context of modern society.

C Discontinuing the Requirement of Abstinence Outside Marriage

While the canon law concerning sexuality confirms that any sexual activity outside a marriage is prohibited, it has conformed in part to modern social practices. Sexual activity outside marriage is seen as a deprivation of an individual's ability to further their relationship with God in the bounds of the spiritual jurisdiction.¹⁸⁸ However, the law tolerates these behaviours as they have little influence over societal virtue. Currently, the law only recognises this exception with heterosexual intercourse.¹⁸⁹ This is due to its familiarity with the strict requirements towards sexuality in general. Sex requires the pairing of male and female genitalia to achieve biological parenthood. As homosexual intercourse is unable to achieve biological parenthood, it is seen as an assault on moral society.

As with the suggestion to legalise same-sex civil unions, the Church should recognise that sexual relations outside marriage do not harm one's relationship with God. This would encourage liberal reforms to domestic legislation.¹⁹⁰ In many states, cultural and religious beliefs are formidable barriers to the implementation of LGBT-friendly legislation in general. Both Eastern European and African states with large Catholic populations, such as Hungary, the Czech Republic, Slovakia, Lithuania, Nigeria, Lebanon and Kenya have been reluctant to incorporate same-sex rights into

185 *Orozco v Attorney General of Belize* SC (Belize) 668/2010, 10 August 2016.

186 *Attorney General v Orozco* CA CIV (Belize) 32/2016, 30 December 2019.

187 "Decriminalising homosexuality will have dire ripple effects: Churches" *Amandala* (online ed, Belize, 25 November 2011).

188 Finnis, above n 38, at 104.

189 Pietkiewicz and Kołodziejczyk-Skrzypek, above n 46, at 1578.

190 Hall, above n 149, at 88.

domestic legislation.¹⁹¹ More liberal reform in these states is often due to the presence of overseas pressure from non-state actors.¹⁹²

The Pope intended that the adjustments made to the law – that is, that homosexuals be treated with respect, compassion and sensitivity – would have universal application. There are penalties for breaches to this law within the spiritual jurisdiction.¹⁹³ However, some Catholics justify their purposeful ignorance of this law on the basis that a homosexual has engaged in same-sex activities so is no longer awarded these defences at law due to their impacts on wider societal morality.¹⁹⁴ Discontinuing the requirement of strict abstinence outside marriage for both homosexual and heterosexual couples would prevent same-sex relations from being viewed as inherently immoral.¹⁹⁵ It would better enforce the modern adjustments to the law and prevent confusion as to the scope of tolerance needed to escape the punishment of the spiritual jurisdiction.

VIII CONCLUSION

The official position of the Catholic canon regarding homosexuality is no longer able to be justified within the context of modern society. While there is a large body of Catholic support for an extension of the spiritual jurisdiction to same-sex relations, there has been a failure on the part of the Church hierarchy to actively consider the influence of this canon over the official identification of the law. Consequently, the moral status of same-sex relations remains affixed to outdated medieval philosophical and scientific thought.

While development to any of the positions articulated in the Catechism of the Catholic Church is difficult and cannot be based purely on the reasoning of contemporary populism, there is sufficient existing canon law to support the obvious shifts in modern societal morality. Various Popes and high-ranking members of the clergy have expressed their dissatisfaction with both the historical and contemporary treatment of homosexuals by the Church. They have encouraged the official position of the Catholic canon law to be adjusted to acknowledge societal developments and modern academic assessments of morality. Catholic congregations have also echoed this encouragement. To some degree, the advocacy of both members of the clergy and the congregation has not gone unnoticed. There has been a successful adjustment of the law regarding the duties of Catholics to treat homosexuals with respect, compassion and sensitivity. A failure to do so constitutes a breach of the spiritual jurisdiction. However, for these adjustments to be recognised as having universal application,

191 Diamant, above n 22.

192 Diamant, above n 22.

193 Coriden, above n 4, at 37.

194 Macedo, above n 47, at 31.

195 At 33.

the Church must clarify that homosexuality is not unnatural and accept that homosexual relationships do bring individuals closer to God.

Furthermore, the foundation of the official canon is structured around the positions developed by natural law theorists. The conclusions reached by these theorists are largely inspired by historic institutions that shaped societal expectations as to what behaviours should be desirable to fulfil an economic or political purpose. Natural law assumes that there are inherent naturally occurring goods in each person and that the behaviours needed to achieve these goods must be reflected by the standards of societal morality. On this basis, naturally occurring goods have always existed. Logically, a good cannot be said to have always existed if it is clearly linked to the development of an institution or is structured to fit a political purpose.

Without development, the legal position of the Church will continue to encourage the preservation of homophobic legislation in several predominantly Catholic jurisdictions. It is the duty of the Church to prevent oppression of the vulnerable and to work towards the achievement of justice for those people. In numerous jurisdictions, homosexuals still do not enjoy the same rights as those who are heterosexual. Reforming the official canon position will likely inspire legislative development beyond the minimum bounds of respect, compassion and sensitivity.