

## CANONICAL CONSIDERATIONS ON DIACONAL CONTINENCE

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**RÉSUMÉ** — Une analyse du c. 277 indique que deux obligations distinctes sont imposées aux clercs dans l'Église latine : la continence sexuelle et le célibat. La continence est présentée comme la norme fondamentale. Alors que l'obligation du célibat est mitigée pour les diacres permanents, l'A. ne trouve aucun relâchement de la loi pour l'obligation fondamentale de la continence pour eux en droit canonique. Vérifiant cette conclusion, l'A. examine les dispositions pio-bénédictines concernant le célibat des clercs et la continence, les normes post-conciliaires par lesquelles le diaconat (permanent) fut restauré en Occident et l'histoire législative des dispositions du Code de 1983 à ce sujet. Il suggère que ces normes maintiennent l'obligation de continence pour les diacres permanents mariés. L'A. examine ensuite les quelques arguments de la part d'érudits en faveur du maintien de l'exercice des droits conjugaux par les diacres permanents (principalement des arguments fondés sur le c. 4) et conclut que, bien qu'ils soient potentiellement applicables à ceux ayant reçu les ordres sacrés sans connaître les exigences du droit en la matière, ils sont insuffisants en soi pour entraîner une modification de l'obligation canonique traditionnelle de la continence répétée au c. 277. L'A. invite l'autorité ecclésiastique compétente à articuler en des termes canoniques solides en soi pourquoi l'obligation de la continence ne devrait pas s'appliquer aux diacres permanents mariés ou prendre les moyens nécessaires pour que les programmes de formation des diacres permanents mariés soient conformes à l'exigence de continence cléricale afin que les candidats à l'ordination et leurs épouses puissent prendre une décision éclairée.

### *Introduction*

This article examines the possibility that clerics in the Western Church, including married permanent deacons, are bound by ecclesiastical law to observe continence.<sup>1</sup> This examination is canonical in scope and method,<sup>2</sup> and will be

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<sup>1</sup> Throughout this article “continence” is understood in a canonical (as distinguished from a philosophical) sense to be the complete refraining from sexual intercourse, while “celibacy” is the willed state not to enter marriage. See generally J. LYNCH, “Chapter III: The Obligations and Rights of Clerics [cc. 273-289],” in J.P. BEAL, J.A. CORIDEN, and T.J. GREEN (eds.), *New Commentary on the Code of Canon Law*, New York/Mahwah, Paulist Press, 2000, p. 359 [= *CLSA Comm2*]. “Chastity” is the morally appropriate use of one’s sexual faculties in accord with one’s state in life, which state might or might not permit sexual,

made in three major stages. First, striving to understand ecclesiastical laws in accord with the meaning of their words considered in text and context,<sup>3</sup> we will examine the relevant provisions of the 1983 Code on this matter (CIC 1983, c. 277, §§1-2) to see whether a general obligation of clerical continence, as distinguished from an obligation of clerical celibacy, can be identified in the law, whereupon we will explore the possibility that this general obligation of clerical continence has been revoked or substantially mitigated, at least for married permanent deacons, by other provisions of current canon law (chiefly CIC 1983, cc. 288; 1042, 1°; 1031, §2; 1037; and 1050, 3°).

Second, assuming that a general obligation of clerical continence can be demonstrated according to the terms of the 1983 Code, we will more closely examine the modern canons in light of (a) their 1917 Code predecessors; (b) conciliar and post-conciliar texts that were sources for the 1983 Code on clerical continence, celibacy, and the married diaconate; and (c) the legislative

specifically genital, activity. See *Catechism of the Catholic Church*, 2<sup>nd</sup> ed., Vatican City, Libreria Editrice Vaticana, 1997, nos. 2337, 2348-2350, and 2370 [= CCC]. I shall discuss the 1917 Code's use of the term "chastity" to mean what the 1983 Code calls "continence" in due course. The situation of married men coming into full communion with the Catholic Church and being ordained as Roman Catholic priests as part of what is known as a "pastoral provision" (see generally SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, April 1981, on the reception of U. S. Episcopalians into the Catholic Church, English translation in A. FLANNERY [ed.], *Vatican Council II, More Postconciliar Documents: New Revised Edition*, New York, Costello Publishing Company, 1982, p. 186) is not considered herein.

<sup>2</sup> This study is not, consequently, broadly historical, sacramental, or comparative (with Eastern canon law in particular). Important work has, however, recently been done in these areas, for example, by R. CHOLIJ, *Clerical Celibacy in East and West*, Herefordshire, Gracewing, 1989; S. HEID, *Clerical Celibacy in the Early Church*, San Francisco, Ignatius Press, 2000 [= HEID, *Celibacy*]; and D. KEEFE, SJ, in an unpublished paper, "The Continence Required of the Restored Permanent Diaconate," whose kindness in sharing the results of his theological research I gratefully acknowledge. See also R. CHOLIJ, "The *lex continentiae* and the Impediment of Orders," in *StC*, 21 (1987), pp. 391-418, [= CHOLIJ, "Orders"], critiqued by R. GARRITY, "Spiritual and Canonical Values in Mandatory Priestly Celibacy," in *StC*, 27 (1993), pp. 217-260, [= GARRITY, "Celibacy"]. And see W. WOESTMAN, *The Sacrament of Orders and the Clerical State: A Commentary on the Code of Canon Law*, 2<sup>nd</sup> ed., Ottawa, Saint Paul University, Faculty of Canon Law, 2001 [= WOESTMAN, *Orders*] that features, besides commentary on various canons, valuable documentation on orders and the clerical state.

<sup>3</sup> See CIC 1983, c. 17: "Leges ecclesiasticae intellegendae sunt secundum propriam verborum significationem in textu et contextu consideratam; quae si dubia et obscura manserit, ad locos parallelos, si qui sint, ad legis finem ac circumstantias et ad mentem legislatoris est recurrendum." All citations to and English translations of the 1983 Code of Canon Law will be taken from Canon Law Society of America, *Code of Canon Law, Latin-English Edition, New English Translation*, Washington D.C., Canon Law Society of America, 1999.

history of the relevant 1983 Code canons. Our goal will be to consider whether anything about these precursors to the 1983 Code suggests departing from the interpretation of the modern law proposed in section one.

Third, we will examine the very few post-1983 Code references to diaconal continence in official sources and scholarly writings with the same question in mind.

Assuming that a contemporary obligation of continence is demonstrably imposed on Western clerics and is not otherwise mitigated even for married permanent deacons, we will consider finally the actual obligations of continence binding those married men who have been ordained to the permanent diaconate without an understanding of this canonical requirement and, by way of conclusion, suggest some future responses to these findings.

## 1 — *Overview of the 1983 Code on Clerical Continence and Celibacy*

### 1.1 — Canon 277

Canon 277, situated among the provisions on the rights and obligations of clerics (CIC 1983, cc. 273-289), inaugurates the canonical treatment of this question and explicitly distinguishes between the obligation of clerical continence and that of clerical celibacy. It opens as follows:

Canon 277, §1. Clerics are obliged to observe perfect and perpetual continence for the sake of the kingdom of heaven and therefore (*ideoque*) are bound to celibacy which is a special gift of God by which sacred ministers can adhere more easily to Christ with an undivided heart and are able to dedicate themselves more freely to the service of God and humanity.<sup>4</sup>

By this provision, both the obligation of continence and the obligation of celibacy are clearly imposed on clerics in the West. Clerical celibacy is, however, presented in the law as a secondary good that, while valued in its own right as “a special gift of God by which sacred ministers can adhere more easily to Christ with an undivided heart and are able to dedicate themselves more freely to the service of God and humanity,” is nevertheless ordered to

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<sup>4</sup> CIC 1983, c. 277, §1: “Clerici obligatione tenentur servandi perfectam perpetuamque propter Regnum coelorum continentiam, ideoque ad coelibatum adstringuntur, quod est peculiare Dei donum, quo quidem sacri ministri indiviso corde Christo facilius adhaerere possunt atque Dei hominumque servitio liberior sese dedicare valent.”

the protection and support of a more fundamental good, namely, that of “perfect and perpetual continence for the sake of the kingdom of heaven.”<sup>5</sup> Because these two goods—distinguishable in themselves in that a non-married man must, in accord with sound moral theology, live continently, while a married man may, under certain conditions, choose to live continently or not<sup>6</sup>—are distinguished in the law, one must closely read all subsequent canonical provisions on clerical obligations in these two areas in order to recognize clearly when the law is addressing clerical continence and when it is addressing clerical celibacy.

Canon 277, §2 moves immediately to reinforce what has just been enunciated as the primary good of continence: “Clerics are to behave with due prudence towards persons whose company can endanger their obligation to observe *continentia* or give rise to scandal among the faithful.”<sup>7</sup> (Emphasis added.) It is commonly noted that the 1983 Code speaks of a cleric’s duty to avoid “persons,” whether male or female, who might endanger his commitment to continence, and does not restrict his precautions to females only, as was the case under the 1917 Code.<sup>8</sup> The reason that c. 277, §2 does not direct clerics as a group to avoid those who might endanger their commitment to celibacy is because, I suggest, as I shall discuss shortly, at least some clerics, i.e., married permanent deacons, are not bound by the obligation of celibacy.

<sup>5</sup> “In the Latin Church, ‘clergy are obliged to observe perfect and perpetual continence for the sake of the kingdom of heaven’ (c. 277, §1). *Because of this*, they ‘are obliged to observe celibacy, which is a special gift of God’ (c. 277, §1),” (J. CORIDEN and J. PROVOST, “Canonical Implications Related to the Ordination of Married Men to the Priesthood in the United States of America: Report of an Ad Hoc Committee of the Canon Law Society of America,” in *CLSA Proc*, 58 [1996], pp. 438-451 [= CORIDEN and PROVOST, “Implications”], no. 2 of Obligations and Rights [emphasis added].).

<sup>6</sup> See CCC, nos. 2349-2350 and P. PALAZZINI, “Continentia,” in P. PALAZZINI, ed., *Dictionarium Morale et Canonicum*, vol. 1, Rome, Officium Libri Catholici, 1962, pp. 944-945.

<sup>7</sup> CIC 1983, c. 277, §2: “Debita cum prudentia clerici se gerant cum personis, quarum frequentatio ipsorum obligationem ad continentiam servandam in discrimen vocare aut in fidelium scandalum vertere possit.”

<sup>8</sup> Specifically, CIC 1917, c. 133, §1, discussed below. Underscoring this shift in language are J. LYNCH, “Chapter III: The Obligations and Rights of Clerics [cc. 273-289],” in J. CORIDEN, T.J. GREEN, and D.E. HEINTSCHEL (eds.), *The Code of Canon Law: A Text and Commentary*, New York/Mahwah, Paulist Press, 1985, p. 211 [= *CLSA Comm1*]; G. DALLA TORRE, in *Commento al Codice di Diritto Canonico*, Rome, Urbaniana University Press 1985, p. 163 [= *Commento*]; A. McGRATH, “Chapter III: The Obligations and Rights of Clerics,” in G. SHEEHY (ed.), in *The Canon Law: Letter & Spirit*, Collegeville, The Liturgical Press, 1995, p. 158 [= *Letter & Spirit*]. A shift in language toward “persons” and “continentia” would, of course, be consistent with an argument that continence, and not merely celibacy, is the primary canonical obligation for clerics in this area.

In sum, c. 277 imposes a dual obligation of continence and celibacy on all clerics in the West and underscores the obligation of continence, which it has identified as the primary value to be honored.<sup>9</sup> We need now inquire as to how these general clerical obligations of continence and celibacy might have been mitigated elsewhere in current law at least with specific regard to married permanent deacons.

Canon 288 expressly exempts permanent deacons, not distinguishing between married and non-married deacons, from a variety of obligations otherwise binding on clerics.<sup>10</sup> It is self-evident that c. 277 with its obligation of clerical continence and celibacy is not among the numerous provisions mitigated for permanent deacons.<sup>11</sup> This leaves open, however, the possibility that the obligations might have been mitigated elsewhere. Looking next only at those requirements and prerequisites in those to be ordained that are relevant to this study, three canons are of special interest.<sup>12</sup>

## 1.2 — Canon 1042

First, given the dual obligations of continence and celibacy established in c. 277, c. 1042 affirms the general rule that Holy Orders are not open to married men, though it makes allowance for a married diaconate, as follows: “The following are simply impeded from receiving orders: 1° a man who has a wife, unless he is legitimately destined to the permanent diaconate...”<sup>13</sup> The

<sup>9</sup> The third provision in c. 277 does not materially touch our question. It merely authorizes the diocesan bishop to issue particular norms in support of the obligations set forth earlier in the canon, without repeating or elaborating on what those obligations are. See *CIC* 1983, c. 277, §3: “Competit Episcopo dioecesano ut hac de re normas statuat magis determinatas utque de huius obligationis observantia in casibus particularibus iudicium ferat.”

<sup>10</sup> See *CIC* 1983, c. 288: “Diaconi permanentes praescriptis canonum 284, 285, §§ 3 et 4, 286, 287, § 2 non tenentur, nisi ius particulare aliud statuat.”

<sup>11</sup> See WOESTMAN, *Orders*, p. 202, discussing c. 288, asserts that continence has been mitigated for married permanent deacons, but he does not say where or how. See my discussion of his point at fn. 85 below and accompanying text.

<sup>12</sup> General requirements for ordination are set forth in *CIC* 1983, cc. 1026-1049.

<sup>13</sup> *CIC* 1983, c. 1042: “Sunt a recipiendis ordinibus simpliciter impediti: 1° vir uxorem habens, nisi ad diaconatum permanentem legitime destinetur;...” The contrast with prior law on this point is obvious: *CIC* 1917, c. 987: “Sunt simpliciter impediti:... 2° Viri uxorem habentes;...” Married men seeking ordination under the Pio-Benedictine Code could only do so with a dispensation from the impediment of marriage granted by the Holy See. See *CIC* 1917, cc. 990-991. Canonical issues occasioned by these dispensations are discussed below, esp. at fns. 42 and 43 and accompanying text.

canon, while obviously suggesting a mitigation of the rule of clerical celibacy by expressly referring to married men being ordained to the permanent diaconate, makes no statement in regard to mitigating the express and more fundamental obligation of clerical continence.<sup>14</sup> The two groups of ordinands envisioned in c. 1042, men with a wife and those without, are treated separately in subsequent law.

### 1.3 — Canon 1037

Considering the typical case of men not married who are seeking ordination, c. 1037 states:

An unmarried candidate for the permanent diaconate and a candidate for the presbyterate are not to be admitted to the order of diaconate unless they have assumed the obligation of celibacy in the prescribed rite publicly before God and the Church or have made perpetual vows in a religious institute.<sup>15</sup>

Thus, regardless of the particular order that non-married men are ultimately intending, c. 1037 works in direct support of the two-fold clerical obligations of continence and celibacy set forth in c. 277, §1, expressly in regard to celibacy by directing candidates for orders to undertake that obligation by name, and implicitly with regard to continence, in that Christian men who are not married are, in accord with the moral principles pertaining to their state, necessarily bound by the obligation of continence. No one seriously suggests that celibate clerics are *not* bound by the obligation of continence and the canon does not restate the obvious.

### 1.4 — Canon 1031, §2

Turning specifically to married men seeking orders (and by implication of cc. 277 and 1042, such men may only seek ordination to the permanent

<sup>14</sup> Coriden and Provost do not see an exception to the canonical obligation of continence for married deacons in Canon 1042. See CORIDEN and PROVOST, "Implications," no. 2 of Obligations and Rights, wherein: "The dispensation from the impediment of c. 1042, 1° which permits a married man to be ordained to the priesthood does not explicitly include with it a dispensation from the obligations of c. 277, § 1. *Neither is there an explicit exception in the law for married men ordained to the diaconate*" (emphasis added). Coriden and Provost believe such an exception can be found elsewhere, however, and we will address their claim in due course, at fn. 82 and accompanying text. Similarly, J. PROVOST, "Canon 914," in *RR 1984*, pp. 47-49, at 49 [= PROVOST, "Canon 914"].

<sup>15</sup> *CIC 1983*, c. 1037: "Promovendus ad diaconatum permanentem qui non sit uxoratus, itemque promovendus ad presbyteratum, ad ordinem diaconatus ne admittantur, nisi ritu praescripto publice coram Deo et Ecclesia obligationem caelibatus assumpserint, aut vota perpetua in instituto religioso emisierint."

diaconate), c. 1031, §2 states: “A candidate for the permanent diaconate ... who is married [is not to be ordained] until after completing the thirty-fifth year of age and with the consent of his wife.”<sup>16</sup> There is no doubt, of course, that by expressly admitting married men to the permanent diaconate, the canonical obligation of clerical celibacy, a secondary or derivative good distinguishable from the more fundamental obligation of continence set forth in c. 277 § 1, is abrogated for such men. But no canonical provision makes any reference, let alone an express one, to lifting the clear and unqualified obligation of continence binding all clerics already established. Indeed, the extraordinary phrase “with the consent of his wife” suggests just the opposite.<sup>17</sup>

## 1.5 — Spousal Consent

Very few contemporary authors have asked the question: to what exactly is the wife of a diaconal candidate being asked to consent under the c. 1031, §2, with many major commentaries either passing over in silence this remarkable requirement of uxorial consent or simply mentioning it without analysis.<sup>18</sup> The few who do inquire as to what the wife is being asked to consent suggest issues of matrimonial cooperation and communication. Gilbert, for example, holds uxorial consent to be important “because the diaconal ministry of the

<sup>16</sup> *CIC* 1983, c. 1031, §2: “Candidatus ad diaconatum permanentem *qui non sit uxoratus ad eundem diaconatum ne admittatur, nisi post expletum vigesimum quintum saltem aetatis annum; qui matrimonio coniunctus est, nonnisi post expletum trigesimum quintum saltem aetatis annum, atque de uxoris consensu.*” The italicized passages are not translated.

<sup>17</sup> The consent of the wife must, moreover, be made in writing and included in the documents to be assembled prior to ordination, underscoring the significance of her decision in this regard. See *CIC*,/1983, c. 1050, 3<sup>o</sup>, constituting a second assertion of the wife’s veto power over her husband’s ordination. Although the 1983 Code does not directly address the matter of women marrying (widowed) permanent deacons, the latter of whom would have needed to obtain dispensations for such marriages (*CIC*,/1983, c. 1087), the same specific uxorial consent would seem to be required. See, e.g., UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *National Directory for the Formation, Ministry, and Life of Permanent Deacons in the United States*, no. 75, Washington, D.C., United States Conference of Catholic Bishops, 2005, p. 36.

<sup>18</sup> See, e.g., J. MANZANARES in L. DE ECHEVERRIA (ed.), *Código de Derecho Canónico Edición bilingüe comentada*, Madrid, Biblioteca de Autores Christianos, 1985, p. 493 (no mention); A. MOLINA MELIÁ in A. BENLLOCH POVEDA (ed.), *Código de Derecho Canónico Edición bilingüe, fuentes y comentarios de todos los cánones*, 8<sup>th</sup> ed., Valencia, Edicep, 1994, pp. 459-460 (bare mention); J. GONZÁLEZ DEL VALLE, in E. CAPARROS (ed.), *Code of Canon Law Annotated*, Montréal, Wilson & Lafleur, 1993, pp. 644-645 [= *Code Annotated*] (no mention); DALLA TORRE, *Commento*, p. 605 (bare mention).

husband can put pressures on the marriage.”<sup>19</sup> Geisinger suggests that the wife is consenting to the ordination of her husband and offering assurance to the ordaining bishop that she does not feel his new diaconal duties will interfere with their married life.<sup>20</sup> McGrath believes that the wife must demonstrate that she “knows the nature and extent of the obligations to be undertaken by her husband” but does not describe what those obligations are.<sup>21</sup>

None of these commentators considers the question, however, from this point of view, namely, how it comes to be that the consent of a third party (i.e., not the hierarchically authorized minister and not the *sui compos* recipient) is necessary for any adult to receive any sacrament in the Church.<sup>22</sup> Presumably, though, if the wife’s consent must be obtained prior to a married man’s diaconal ordination, such consent might be withheld, at which point an ordination should not proceed.<sup>23</sup> To attribute this significant power in a wife over her husband’s ordination primarily, let alone solely, to her concerns for the practicalities of domestic life seems strained.

<sup>19</sup> E.J. GILBERT, “Article 1: Requirements in the Candidates [cc. 1026-1032],” in *CLSA Comm1*, p. 726. Lynch does not suggest how diaconal ministry, which in many cases is a part-time occupation, is necessarily more stressful on marriages than full-time ecclesiastical employment can be for married lay employees.

<sup>20</sup> See R.J. GEISINGER, “Article 4: The Required Documents and Investigation [cc. 1050-1052],” in *CLSA Comm2*, p. 1229 (commenting on c. 1050) writes: “[The wife’s] consent rather suggests simply that she will support him in his exercise of sacred ministry. Most fundamentally, the wife’s consent assures all parties that she foresees no threat to her marriage.”

<sup>21</sup> McGRATH, “Chapter III: The Obligations and Rights of Clerics,” in *Letter & Spirit*, p. 558.

<sup>22</sup> See generally *CIC* 1983, cc. 96-98 on the exercise of canonical rights by competent adults. The complex of canons upholding the faithful’s fundamental rights to the sacraments, whether those sacraments are reckoned as being primarily ordered to the salvation of the individual or to the welfare of the community (see *CCC*, nos. 1123, 1129, and 1134) is well known, and includes *CIC* 1983, cc. 18, 213, and 843. To consider analogous cases, certainly the Church would not ultimately refuse baptism to an adult man merely because his spouse opposes his conversion, nor would the Church refuse him confirmation, or Eucharist, or anointing of the sick, and so on, because of spousal objections. For no sacrament, then, besides Holy Orders for a married man, does it appear that any adult in possession of his normal rights is required to obtain the consent of any third-party prior to valid and lawful reception. Such a radical departure from regular sacramental discipline warrants, it seems, a stronger justification than matrimonial harmony among some of those who work for the Church.

<sup>23</sup> “If the husband’s marriage is likely to suffer because of his wife’s lack of support for his diaconal ministry, then *the ordination should not proceed*,” (GEISINGER, “Article 4: The Required Documents and Investigation [cc. 1050-1052],” in *CLSA Comm2*, p. 1229 [emphasis added]).

But the extraordinary and twice-mentioned (*CIC* 1983, cc. 1031, §2 and 1050, 3<sup>o</sup>) requirement of uxorial consent to the husband's ordination would be understandable, indeed, wholly justified, if, as a result of the husband's ordination, the wife were to suffer the loss of one of her own fundamental marital rights<sup>24</sup> as would be the case if all clerics, including married permanent deacons, were bound under c. 277, §1 to the obligation of "perfect and perpetual continence for the sake of the kingdom of heaven." In that case, obviously, the husband's choice to accept ordination and to assume its burdens, including continence (albeit without celibacy) would leave the wife without the opportunity to exercise *her* legitimately acquired conjugal rights. It is in the face of her *own* loss of conjugal rights, I suggest, and not because of some vague notions of marital harmony—and even less to canon law having granted one person a power of personal preference over another's ability to receive a sacrament—that the 1983 Code recognize a wife's extraordinary power of veto over her husband's desire to seek the sacrament of orders.<sup>25</sup>

In sum, the 1983 Code expressly imposes two obligations on Western clerics, one of continence, and one of celibacy, with continence being canonically regarded as the more fundamental (c. 277, §1). Only in regard to the less fundamental of those two obligations, clerical celibacy, is there any relaxation in canonical discipline, though that only insofar as it affects married men seeking ordination to the permanent diaconate (cc. 1037 and 1042). At no point, though, despite expressly exempting permanent deacons from a variety of clerical obligations (c. 288) does the 1983 Code relax the expressly stated and more esteemed obligation of continence for all clerics. Indeed, in one place, modern canon law broadens the protection to be given specifically to clerical continence (c. 277, §2) while in two others, it recognizes that the wife of a man aspiring to be a permanent deacon (because, I have argued, she would suffer the loss of her acquired conjugal rights in the face of her husband's ordination) has the right to prevent that event (cc. 1031, §2 and 1050, 1<sup>o</sup>).

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<sup>24</sup> See *CIC* 1983, c. 1135: "Utrique coniugi aequum officium et ius est ad ea quae pertinent ad consortium vitae coniugalis."

<sup>25</sup> It might also be noteworthy that minor children, even those having attained the use of reason (c. 97) are not asked to consent to the ordination of their father, even though his ordination would, in the event of the death of his wife, their mother, lessen the possibility that a second paternal marriage would secure them at least a step-mother's presence. This seems explained by the fact, however, that minor children have no "right" to a stepmother, and hence suffer no loss of (actual or potential) rights in virtue of paternal ordination, whereas wives *do* have specific conjugal rights that would be compromised by their husband's ordination.

We may now examine more closely the position of the 1983 Code in light of the 1917 Code provisions in this matter to assess the consistency of this interpretation of the 1983 Code with previous law on clerical continence and celibacy.

## 2 — *The Obligation of Clerical Continence in Canonical Tradition*

### 2.1 — The 1917 Code on Clerical Continence and Celibacy

Because the permanent diaconate was not (re)instituted in the West until 1967,<sup>26</sup> no provisions in the 1917 Code specifically discuss permanent deacons and their obligations in regard to continence or celibacy. But there is a substantial amount of material examining the general clerical obligations of continence and celibacy for those in major orders (diaconate, presbyterate, and episcopate) that consequently informs one's reading of the 1983 Code provisions discussed above. Indeed, much of this material is cited as sources for various provisions of the 1983 Code discussed above.<sup>27</sup>

#### 2.1.1 — CIC/1917, c. 132, §1

The cornerstone of the modern discipline on clerical continence and celibacy, c. 277, §1 of the 1983 Code, finds its 1917 Code predecessor<sup>28</sup> in c. 132, §1, that states: "Clerics constituted in major orders are prohibited from marriage and are bound by the obligation of observing chastity, so that those

<sup>26</sup> See PAUL VI, *motu proprio Sacrum diaconatus ordinem*, 18 June 1967, *AAS*, 59 (1967), pp. 697-704, English translation in *CLD*, vol. 6, pp. 577-584 [= PAUL VI, *Sacrum*]. See also PAUL VI *motu proprio Ad pascendum*, 15 August 1972, *AAS*, 64 (1972), pp. 534-540, English translation in *CLD*, vol. 7, pp. 695-698, which supplemented these norms.

<sup>27</sup> I shall rely primarily on the *fontes*, or sources, suggested in Pontificia Commissio Codici Iuris Canonici Authentice Interpretando [= *Commissio*], *Codex iuris canonici, fontium annotatione et indice analytico-alphabetico auctus*, Vatican City, Liberia Editrice Vaticana, 1989.

<sup>28</sup> Four *fontes* for CIC 1983, c. 277, §1 are suggested by the *Commissio*: (a) CIC 1917, c. 132, discussed immediately; (b) CIC 1917, c. 133, §1, warning against clerics associating with women upon whom suspicion can fall, though this seems much better identified as a source for CIC 1983, c. 277, §2; (c) Vatican Council II's decree *Presbyterorum ordinis*, no. 16; and (d) the Synod of Bishops' declaration *Ultimis temporibus*, each of which is discussed below.

sinning against this are sacrilegious, with due regard for the prescription of Canon 214, § 1.”<sup>29</sup> Several observations are in order.

Preliminarily, the 1917 Code uses the term “chastity” (*castitatis*) where the 1983 Code speaks more specifically of “continence.” It must be recalled first that, in accord with sound moral theology, a man who is not married lives chastely only by observing, among other things, continence. To call upon a man who is not married to live chastely, therefore, *was* to call upon him to live continently. A survey of commentaries on the 1917 Code supports the interpretation that what is called “continence” in law today was called “chastity” in the former law and, as is true of modern canon law, that two related but distinct obligations in regard to clerical continence (or chastity) and clerical celibacy were set forth in the 1917 Code.

“Clerical chastity,” writes Abbo-Hannan, “in accordance with the text of the first paragraph of canon 132, implies a two-fold obligation: a negative one, the abstinence from marriage; and a positive one, the preservation of purity of life, i.e., of perfect and perpetual chastity.”<sup>30</sup> Coronata puts it: “The Latin Church precepts perfect chastity for its clerics in major orders whether in celibacy or outside of celibacy.”<sup>31</sup> Or again, as Beste explains, “The celibacy imposed by [c. 132, §1] carries two implications, namely the obligation of abstaining from marriage and of cultivating a manner of purity or perfect

<sup>29</sup> *CIC* 1917, c. 132, §1: “Clerici in maioribus ordinibus constituti a nuptiis arcentur et servandae castitatis obligatione ita tenentur, ut contra eandem peccantes sacrilegii quoque rei sint, salvo praescripto can. 214, § 1.” English translation from E. PETERS (curator), *The 1917 or Pio-Benedictine Code of Canon Law in English Translation with Extensive Scholarly Apparatus*, San Francisco, Ignatius Press, 2000. All translations of 1917 Code provisions are taken from this source. That diaconate was a “major order” was clear from *CIC* 1917, c. 949: “In canonibus qui sequuntur, nomine ordinum *maiorum* vel *sacrorum* intelliguntur presbyteratus, diaconatus, subdiaconatus; *minorum* vero acolythatus, exorcistatus, lectoratus, ostiariatus.” Original emphasis.

<sup>30</sup> J. ABBO and J. HANNAN, *The Sacred Canons*, vol. 1, 2<sup>nd</sup> ed., St. Louis, Herder Book Co., 1960, p. 187 [= ABBO-HANNAN, *Sacred Canons*]. See also S. SIPOS, *Enchiridion iuris canonici*, 6<sup>th</sup> ed., Rome, Orbis Catholicus/ St. Louis, Herder Book Co., 1954, p. 101, wherein: “Clerici in maioribus ordinibus constituti vi en. 132 § 1, positivam habent obligationem servandi perfectam castitatem et negativam abstinendi a matrimonio.” Similarly, F. CAPPELLO, *Summa iuris canonici*, vol. 1, 5<sup>th</sup> ed., Rome, Aedes Gregoriana, 1951, sec. 222, p. 207, wherein: “Omnes clerici sancte religioseque custodire debent castitatem, quae duplicem obligationem, *negativam*, abstinendi a nuptiis, *positivam*, morum puritatem servandi, secumfert.” (Original emphasis, citations omitted.)

<sup>31</sup> M. CONTE a CORONATA, *Compendium iuris canonici ad usum scholarum*, vol. 1, 3<sup>rd</sup> ed., Milan, Marietti, 1944, no. 383, p. 233: “Ecclesia latina suis clericis maioribus castitatem perfectam praecepit sive in coelibatu sive extra coelibatum.” (My translation.)

chastity.”<sup>32</sup> Cloran makes plain the equivalence of the Pio-Benedictine notion of “chastity” with what canon law calls “continence” today:

Clerics who are in major orders are prevented from marrying and are so bound to observe chastity that if they sin against it they are guilty also of sacrilege...The substance of the obligation consists in: (a) celibacy, or refraining from marriage...and (b) chastity, that is, abstaining from all acts of impurity, interior or exterior, which are forbidden by divine law to unmarried persons.<sup>33</sup>

While it is true that the Pio-Benedictine norm does not suggest the obligation of celibacy as being derived from or operating in service to the obligation of continence, no commentator on the Pio-Benedictine Code disputes the claim that distinct obligations of continence (termed chastity) and celibacy are imposed under CIC 1917, c. 132, §1. In this respect c. 277, §1 of the 1983 Code is not an innovation on the values in the old law, but rather a reiteration of them in modern terms.<sup>34</sup>

### 2.1.2 — *Lawful Marriage*

But within these two express obligations, commentators on the Pio-Benedictine law articulated yet a third obligation, one with direct implications for married permanent deacons under the 1983 Code. Vermeersch-Creusen puts it thus: “A triple obligation is imposed on clerics in the Latin Church, namely, of not marrying, of *not using a marriage licitly contracted*, and of preserving by a special title chastity in one’s state” (emphasis added).<sup>35</sup>

<sup>32</sup> U. BESTE, *Introductio in Codicem*, 5<sup>th</sup> ed., Naples, M. D’Auria Pontificius Editor, 1961, p. 191: “Caelibatus, quem canon inculcat, duo importat, obligationem videlicet abstinendi a nuptiis et colendi morum puritatem seu castitatem perfectam.” (My translation.)

<sup>33</sup> O. CLORAN, *Previews and Practical Cases on Marriage*, Milwaukee, Bruce, 1960, pp. 272-273. (Citations and emphases omitted.)

<sup>34</sup> Recall in this light the requirement of c. 6, §2 that current laws, to the extent they refer to older laws, should be interpreted in light of the canonical tradition behind those laws. See CIC 1983, c. 6, §2: “Canones huius Codicis, quatenus ius vetus referunt, aestimandi sunt ratione etiam canonicae traditionis habita.”

<sup>35</sup> A. VERMEERSCH and J. CREUSEN, *Epitome iuris canonici cum commentariis*, vol. 1, 2<sup>nd</sup> ed., Mechelen, Dessain, 1933, sec. 251, p. 220: “Triplex obligatio clericis in Ecclesia latina imponitur, sc. non nubendi, matrimonio licite contracto non utendi, servandi titulo speciali castitatem sui status.” See also L. BOUSCAREN and A. ELLIS, *Canon Law: A Text and Commentary*, 4<sup>th</sup> ed., rev. by F. KORTH, Milwaukee, Bruce, 1966, p. 115 [= BOUSCAREN-ELLIS, *Canon Law*], wherein: “As regards a man *already married*...with a dispensation such a man may be licitly and validly ordained, but he is then forbidden to use the marriage rights, though the marriage remains valid” (original emphasis). See also L. DOMÍNGUEZ, et al., *Código de Derecho Canónico y Legislación Complementaria*, 3<sup>rd</sup> ed., Madrid, Biblioteca de Autores Cristianos, 1949, p. 56.

Various Pio-Benedictine authors underscored the illicitness of married men using marriage after ordination. For example, Wernz-Vidal writes: "Clerics in the Western Church, duly constituted in Holy Orders, are gravely obliged to observe celibacy, such that those who are single, as St. Leo said, must remain single, and those having wives, should act as those not having them. For this reason they cannot licitly nor validly contract marriage, *nor may they licitly use a marriage legitimately contracted before sacred ordination.*"<sup>36</sup> (Emphasis added.) Alonso Lobo states: "Major orders imposes as well the requirement of abstaining entirely from carnal pleasure, whether illicitly enjoyed outside of marriage, or as permitted to the married; thus, if one were to receive major orders while being bound by the matrimonial bond, he would be held, nevertheless, strictly prohibited from the exercise of conjugal acts..."<sup>37</sup> Ayrinhac writes: "A married man may not lawfully receive major Orders as long as his wife lives. (Can. 987.) Should he receive them with a dispensation from the Holy See he would contract the same obligation to chastity as other clerics..."<sup>38</sup> No commentator on the 1917 Code holds licit the use of marriage by men in major orders.

The degree of the canonical castigation of *any* conjugal activity by clerics after ordination can be gauged by the terms of CIC 1917, c. 132, §1, which identifies those violating this norm as "sacrilegious." To see that this stricture applies even to clerics in major orders making use of a lawful marriage, one need only turn to CIC 1917, c. 1114:

Those children are legitimate who are conceived or born of a valid or putative marriage unless the parents, because of a solemn religious profession *or the taking up of sacred*

<sup>36</sup> "Clerici *Ecclesiae occidentalis* in sacris ordinibus rite constituti ad coelibatum servandum graviter obligantur, i. e. qui soluti sunt, ut *S. Leo* loquitur, permanere debent *singulares*, et qui uxores habent, sint tanquam non habentes. Quare saltem matrimonium neque licite nec valide contrahere, nec matrimonio ante sacram ordinationem legitime contracto licit uti possunt." F. WERNZ and P. VIDAL, *Ius canonicum*, vol. 2, 3<sup>rd</sup> ed., Rome, Aedes Gregoriana, 1943, sec. 108, p. 143. (My translation, original emphasis restored.)

<sup>37</sup> "Las órdenes mayores imponen también el deber de abstenerse de todo deleite carnal, ya sea del ilícitamente gozado fuera del matrimonio, ya del que está permitido a los casados; porque, si alguien recibiera las órdenes mayores estando ligado con el vínculo matrimonial, tendría, no obstante, prohibido rigurosamente el ejercicio de los actos conyugales..." (A. ALONSO LOBO in M. CABREROS DE ANTA, ET AL. (eds.), *Comentarios ad Código de Derecho Canonico*, vol. 1, Madrid, Biblioteca de Autores Cristiano, 1958, p. 421 [hereafter *Código*]). (My translation.)

<sup>38</sup> H. AYRINHAC, *General Legislation in the New Code of Canon Law*, New York, Benziger and Co., 1923, no. 275, p. 278.

orders, had been, at the time of the conception, *prohibited from using the marriage contracted earlier* (emphasis added).<sup>39</sup>

There is no doubt but that, in the West, the taking up of diaconal orders would occasion the illegitimacy of a child conceived thereafter, even in valid marriage, due to the canonical prohibition of using marriage after ordination.<sup>40</sup> According to Nau, the consequence of illegitimacy “is made in order to deter those who have made solemn profession or received sacred orders after the marriage from having conjugal intercourse. Conjugal intercourse with the former spouse is sacrilegious.”<sup>41</sup> Commentators on *CIC* 1917, c. 1114, without exception, regarded the consequences of illegitimacy contained herein as being in support of the prohibition against using a valid marriage after the reception of higher orders.<sup>42</sup>

<sup>39</sup> *CIC* 1917, c. 1114: “Legitimi sunt filii concepti aut nati ex matrimonio valido vel putativo, nisi parentibus ob sollemnem professionem religiosam vel susceptum ordinem sacrum prohibitus tempore conceptionis fuerit usus matrimonii antea contracti.” In commenting on violations of *CIC* 1917, c. 132, Regatillo immediately alerts readers to the consequences of illegitimacy found in *CIC* 1917, c. 1114. See, E. REGATILLO *Institutiones iuris canonici*, vol. 1, 6<sup>th</sup> ed., Santander, Editorial Sal Terrae, 1961, no. 246, p. 201: “Castitas perfecta ab eis servanda est, ita ut ne matrimonio ante ordinationem contracto uti possint; quo si utantur et filios generent, hi tamquam illegitimi habentur (c. 1114).” Likewise, ALONSO LOBO, *Codigo*, p. 421.

<sup>40</sup> “The Sacred Orders [referenced in *CIC* 1917, c. 1114] are Priesthood (including the Episcopate) Diaconate, and Subdiaconate.... The necessity of invoking the exception [to legitimacy] contained in the canon will then be very rare...because of the rarity of the concession of dispensation,” (G. McDEVITT, *Legitimacy and Legitimation: An Historical Synopsis and Commentary*, Canon Law Studies, no. 138, Washington, D.C., Catholic University of America, 1941, p. 89 [=McDEVITT, *Legitimacy*]). See also fn. 29, referencing *CIC* 1917, 949. Bánk simply observes that the consequences of illegitimacy arise not from natural law, but from a norm of the Church. See J. BĂNK, *Connubia canonica*, St. Louis, Herder Book Co., 1959, p. 522, wherein: “Hoc fit non ex iure naturae, sed ex dispositione Ecclesiae oritur.” Jone suggests that good faith by one of the parties to the illicit conception might render the offspring legitimate. See H. JONE, *Commentarium in Codicem iuris canonici*, vol. 2, Paderborn, Schöningh, 1954, p. 353.

<sup>41</sup> L. NAU, *Manual on the Marriage Laws of the Code of Canon Law*, New York, Frederick Pustet, 1933, p. 171. Nau somewhat misspeaks, of course, when he refers to “former spouses,” at least in regard to the continence required of those in Holy Orders. No Pio-Benedictine commentator holds that ordination dissolves or annuls the marriage itself, but instead only renders its use illegal. See, e.g., H. AYRINHAC, *Marriage Legislation in the New Code of Canon Law*, 3<sup>rd</sup> ed., New York, Benziger and Co., 1957, p. 296, wherein: “If parties, validly married, make solemn religious profession or receive Sacred Orders, there arises between them an impediment which cannot render their marriage null, since it is indissoluble, but renders relations illegitimate, and the Church looks upon children born of such relations as if they had been born of fornication.” See also BOUSCAREN-ELLIS, *Canon Law*, p. 115, wherein: “...the marriage [of men later ordained] remains valid.”

<sup>42</sup> See C. A. BACHOFEN, *A Commentary on Canon Law*, vol. 5, 5<sup>th</sup> ed., St. Louis, Herder Book Co., 1935, p. 333 is typical: “If one in *higher orders* who had been married

### 2.1.3 — Spousal Consent

Commentators on the 1917 Code also shed light on the notion of uxorial consent to a husband's ordination, even though the 1917 Code itself made no provision for married men to receive Holy Orders.<sup>43</sup> Dom Augustine may be quoted on this point:

A married man, in order to receive higher orders licitly, now needs an Apostolic dispensation. If no dispensation was obtained, such a one, if ordained, is *ipso iure* debarred from the exercise of the order received. Here the [1917] Code is somewhat stricter than the old law, which permitted a married man to receive higher orders *if his wife consented and the bishop sanctioned the vow of chastity to be pronounced by the wife* (emphasis added).<sup>44</sup>

As was suggested in our analysis of the 1983 Code, the 1917 Code's general obligation of continence (called "chastity" then) established under CIC 1917, c. 132, the predecessor norm to CIC 1983, c. 277, applied even to cases of

and with the consent of his wife (now by apostolic dispensation) received Holy Orders would consummate the marriage thus contracted, the offspring would be illegitimate. [This exception] presupposes an *illegitimate use* of a validly contracted marriage." (Original emphasis.) Consider also S. WOYWOD, *Practical Commentary on the Code of Canon Law*, vol. 1, rev. ed., New York, Wagner, 1957, p. 800 [= WOYWOD, *Practical Commentary*]: "The Church under certain conditions gives permission to married persons to enter a religious order or to enter priesthood. When such persons have made solemn religious vows or have received major orders, they are forever forbidden to live in marriage. If they have sexual intercourse after one or both have thus consecrated their lives to God, the child conceived of such intercourse is illegitimate." See also ABBO-HANNAN, *Sacred Canons*, vol. 2, p. 373; P. GASPARRI, *Tractatus canonicus de matrimonio*, vol. II, 9<sup>th</sup> ed., Rome, Typis Polyglottis Vaticanis, 1932, sec. 1112, p. 194; C. DE CLERQ in R. NAZ (ed.), *Traité de Droit Canonique*, vol. 2, 2<sup>nd</sup> ed., Paris, Letouzey, 1954, p. 392; V. HEYLEN, *Tractatus de matrimonio*, 9<sup>th</sup> ed., Mechelen, Dessain, 1945, pp. 386-387; J. PETROVITS, *The New Church Law on Matrimony*, Philadelphia, McVey, 1921, no. 538, p. 381; and A. CANCE, *Le Code de Droit Canonique*, vol. 2, 7<sup>th</sup> ed., Paris, Gabalda, 1946, no. 334, p. 501.

<sup>43</sup> Married men, as noted above, were simply impeded from receiving Holy Orders in virtue of CIC 1917, c. 987, 2°, the dispensation from which impediment was reserved to the Apostolic See. See E. FORBES, *The Canonical Separation of Consorts: An Historical Synopsis and Commentary on Canons 1128-1132*, Ottawa, University of Ottawa, 1948, esp. 176-177; CHOLLU, "Orders," p. 413.

<sup>44</sup> C.A. BACHOFEN, *A Commentary on Canon Law*, vol. 2, 6<sup>th</sup> ed., New York, Benziger and Co., 1936, p. 80. The comment also provides another illustration that the 1917 Code term "chastity" clearly meant "continence," there being no point in imposing a canonical obligation of "chastity" on the wives of married men in the West. Similarly, see H. DAVIS, *Moral and Pastoral Theology*, vol. 4, 3<sup>rd</sup> ed., New York, Sheed & Ward, 1941, p. 39, who notes that the locale wherein this uxorial vow would be observed, i.e., either in a religious institute or in the world, would usually be determined by the age of the wife, with older women being less constrained to enter a supervised environment.

married men being admitted to major orders and, because of the obvious impact of ordination on the wife's exercise of conjugal rights, her consent was required as part of the dispensation process necessary to allow the ordination in the face of CIC 1917, c. 987. Moreover, it seems that the wife's consent had to be formally pronounced because, unlike her husband's obligations in this regard, hers are not already set forth in the text of the law.

#### 2.1.4 — *Preserving the Law*

One final, but crucial, point needs to be made on the importance of Pio-Benedictine legislation on clerical obligations for the proper interpretation of the modern law on continence as it applies to married deacons—even though raising the point here disturbs the chronological order of exposition adopted in this article—namely, that Pope Paul VI, in his 1967 charter for the restored diaconate, *Sacrum diaconatus ordinem*, expressly carried the law of the 1917 Code into his norms for the permanent diaconate in the Latin Church. Writing near the beginning of *Sacrum*, he states:

To begin with, We want to confirm all that is said in the [1917] Code of Canon Law about the rights and duties of deacons, either those rights and duties which they have *in common with all clerics* or those proper to themselves, except where We here state otherwise, and We decree that these rules are to *apply to those who are to be permanent deacons* as well (emphasis added).<sup>45</sup>

Given the ample demonstration that, under the 1917 Code, continence was strictly required of all clerics in major orders, even married ones, and because there is no exemption for married deacons in this regard contained in *Sacrum* (a point demonstrated below) the conclusion seems inescapable that Pope Paul VI, when he restored the permanent diaconate in the West, did so retaining the Pio-Benedictine Code's obligation of continence as binding even on married deacons.

## 2.2 — Conciliar and Postconciliar Treatment of Continence

### 2.2.1 — Canon 277

Despite considerable conciliar and even pre-conciliar discussion about retaining the discipline of clerical celibacy in the West, celibacy was not, (and

<sup>45</sup> “Principio igitur quae in [1917] Codice Iuris Canonici de diaconorum iuribus et officiis, sive omnium clericorum communibus, sive eorundem propriis, statuuntur, ea omnia, nisi aliter cautum fuerit, confirmamus et in eos etiam valere edicimus, qui stabiliter in diaconatu sunt mansuri” (PAUL VI, *Sacrum*, in *AAS*, 59 [1967], p. 698).

even less so was continence) a major theme in council documents.<sup>46</sup> Although four conciliar treatments of celibacy and/or continence can be identified, only one of them, *Presbyterorum ordinis* no. 16, is cited as a source for c. 277.<sup>47</sup> Nevertheless, we will examine briefly all four conciliar references to this matter for the possibility that they might suggest or direct a mitigation in the long-established Western canonical discipline mandating both clerical continence and celibacy.

First, and recognized as a source for c. 277, §1, the Second Vatican Council's *Decree on the Ministry and Life of Priests*, no. 16, opens as follows:

Perfect and perpetual continence for the sake of the Kingdom of heaven was recommended by Christ the Lord. It has been freely accepted and laudably observed by many Christians down through the centuries as well as in our own time, and has always been highly esteemed in a special way by the Church as a feature of priestly life. For it is at once a sign of pastoral charity and an incentive to it as well as being in a special way a source of spiritual fruitfulness in the world.<sup>48</sup>

The correlation between this language and the terms of *CIC* 1983, c. 277 is self-evident. The rest of article 16, focusing on celibacy *per se*, in no way suggests or directs any relaxation of the canonical obligation of continence.

Although not cited as a source for c. 277, clerical continence was also treated briefly in the Council's *Dogmatic Constitution on the Church*, no. 42:

Towering among these counsels is that precious gift of divine grace given to some by the Father (cf. Mt. 19:11; 1 Cor. 7:7) to devote themselves to God alone more easily with an undivided heart (cf. 1 Cor. 7:32-34) in virginity or celibacy. This perfect continence for

<sup>46</sup> See generally, F. WULF, "Commentary on Articles 12-16 of *Decree on the Ministry and Life of Priests*," in H. VORGRIMLER (ed.), *Commentary on the Documents of Vatican II*, vol. 4, St. Louis, Herder Book Co., 1969, p. 279.

<sup>47</sup> See fn. 28, above.

<sup>48</sup> "Perfecta et perpetua propter Regnum coelorum continentia a Christo Domino commendata, per decursum temporum et etiam nostris diebus a non paucis christifidelibus libenter accepta et laudabiliter observata, ab Ecclesia speciali modo pro vita sacerdotali semper permagni habita est. Est enim signum simul et stimulus caritatis pastoralis atque peculiaris fons spiritualis foecunditatis in mundo" (SACROSANCTUM OECUMENICUM CONCILIUM VATICANUM II, "Decretum de presbyterorum ministerio et vita *Presbyterorum ordinis*," 7 decembris 1965, no. 16, in *Constitutiones, Decreta, Declarationes*, cura et studio SECRETARIAE GENERALIS CONCILII OECUMENICI VATICANI II, 1993, p. 662 [= CDD], English translation in A. FLANNERY [ed.], *Vatican Council II: The Conciliar and Post-conciliar Documents*, Northport, NY, Costello Publishing Company/Dublin, Dominican Publications, 1996, p. 892 [= FLANNERY]). The Council Fathers a little later assert, however, that continence is not required of the sacerdotal state by its nature ("Non exigitur quidem a sacerdotio suapte natura..."). They do not consider whether continence might be required of clerics for other reasons, such as cultic *duties*, etc.

love of the kingdom of heaven has always been held in high esteem by the Church as a sign and stimulus of love, and as a singular source of spiritual fertility in the world.<sup>49</sup>

Again nothing in these statements suggests a mitigation of the specific obligation of clerical continence.

In only two other Council documents are the issues of celibacy or continence even briefly mentioned. In the *Decree on the Training of Priests*, no. 10, the Council orders that special attention be given to students training to be priests to the demands of celibate (and consequently continent) living in modern times. Because the document focuses on priests, of course, there is no treatment of issues pertaining to deacons. Promulgated simultaneously, though, the *Decree on the Renewal of Religious Life*, no. 12 makes similar provision for the training of religious, but with somewhat more detail, stating:

The observance of perfect continence touches intimately the deeper inclinations of human nature. For this reason, candidates ought not go forward, nor should they be admitted, to the profession of chastity except after really adequate testing, and unless they are sufficiently mature, psychologically and affectively. Not only should they be warned against the dangers to chastity which they may encounter, they should be taught to see that the celibacy they have dedicated to God is beneficial to the whole personality.<sup>50</sup>

In no promulgated Council document was there any suggestion that the obligation of clerical continence, clearly required under the then-operative 1917 *Code of Canon Law*, was to be relaxed.

The only other document cited as a source of c. 277, §1 comes from the declaration of the Second Synod of Bishops, *Ultimis temporibus*.<sup>51</sup> Besides

<sup>49</sup> "Inter quae eminet pretiosum gratiae divinae donum, quod a Patre quibusdam datur (cf. Mt. 19, 11; 1 Cor. 7, 7) ut in virginitate vel coelibatu facilius indiviso corde (cf. 1 Cor. 7, 32-34) Deo soli se devoteant. Haec perfecta propter Regnum coelorum continentia semper in honore praecipuo ab Ecclesia habita est, tamquam signum et stimulus caritatis, ac quidam peculiaris fons spiritualis foecunditatis in mundo" (SACROSANCTUM OECUMENICUM CONCILIUM VATICANUM II, "Constitutio dogmatica de Ecclesia *Lumen gentium*," 21 novembris 1964, no. 42, in *CDD*, p. 172, English in FLANNERY, p. 401).

<sup>50</sup> "Cum observantia continentiae perfectae profundiores naturae humanae inclinationes intime attingat, candidati ad professionem castitatis ne accedant neve admittantur, nisi post probationem vere sufficientem et cum debita maturitate psychologica et affectiva. Ipsi non solum de periculis castitati occurrentibus moneantur, sed ita instruantur ut coelibatum Deo dicatum etiam in bonum integrae personae assumant" (SACROSANCTUM OECUMENICUM CONCILIUM VATICANUM II, "Decretum de accommodata renovatione vitae religiosae *Perfectae caritatis*," 28 octobris 1965, no. 12, in *CDD*, pp. 343-344, English in FLANNERY, p. 618).

<sup>51</sup> See SECOND GENERAL ASSEMBLY OF THE SYNOD OF BISHOPS, declaration *Ultimis temporibus*, November 30, 1971, in *AAS*, 63 (1971), pp. 915-918, though the *fontes* edition of the 1983 Code directs, mistakenly I suggest, the reader to pp. 912-915. An English translation is available in *CLD*, vol. 7, pp. 341-365; see also WOESTMAN, *Orders*, pp. 272-274 for the most relevant passages in translation.

simply noting, however, that this document applies to priests, and not to deacons, there is no direct discussion of clerical continence therein anyway.

In brief, none of the sources cited as *fontes* for c. 277, §1 suggests any mitigation of the canonical obligation of continence applicable to clerics in the West.<sup>52</sup>

### 2.2.2 — Canon 1042, 1°

Neither brief conciliar reference to the restored diaconate is listed by the *Commissio* as a source for c. 1042, 1°. *Lumen gentium* no. 29 and *Ad gentes* no. 16 do not, in any event, make reference to the specific obligations of married deacons. On the other hand, *Sacrum*, nos. 11 and 13 are listed as sources for c. 1042, 1°. *Sacrum*, no. 11 is discussed below in light of c. 1031, §2. *Sacrum*, no. 13 directs that married deacons be examined to determine whether their households are orderly and are possessed of a good reputation. No discussion of continence is contained therein.

### 2.2.3 — Canon 1031, §2<sup>53</sup>

Two sources are cited as *fontes* for the requirement that candidates for the married diaconate must have obtained age thirty-five and must have the consent of their wives, namely, the Second Vatican Council's *Decree on the Training of Priests, Optatam totius*, (28 October 1965) no. 12 (which addresses only the question of age, not spousal consent) and Paul VI's General Norms for Restoring the Permanent Diaconate, *Sacrum diaconatum ordinem*, nos. 5 and 12 (also addressing only age-based restrictions). Continence is not explicitly addressed in either document.

Curiously, however, this same papal, postconciliar document *did* call for careful ascertainment of the wife's consent to her husband's ordination, and yet the obviously relevant paragraph is not mentioned as a source for c. 1031, §2 or c. 1050, 3°. That provision, taken from Paul VI's *Sacrum diaconatum ordinem*, is as follows:

<sup>52</sup> The *Commissio* sources cited for c. 277, §§2-3 are simply *CIC* 1917, c.133, §1 and *Presbyterorum ordinis* no. 16, already discussed in light of their impact on c. 277, §1.

<sup>53</sup> Regarding c. 1050, 3° (a reiteration of the spousal consent requirement first raised in c. 1031, §2) there are no *fontes* suggested by the *Commissio*. I shall, however, shortly suggest at least one document that could have been listed as a *fons* for the spousal consent requirement, though whether it is attributable to c. 1031, §2 or to c. 1050, 3° is immaterial.

11. Older men, whether celibate or even those joined in marriage, can be called to the diaconate; but these are not to be admitted unless there is shown not only the wife's consent but also her blameless Christian life and those qualities which will neither impede nor bring dishonor on the husband's ministry.<sup>54</sup>

Paul VI, as shown above, had retained the obligation of continence for married permanent deacons. Here, the pope is making explicit the implicit but universally observed requirement of spousal consent (a consent, I have argued, to the loss of her conjugal rights consequent to her husband's ordination) prior to the admission of married men to orders. The continuing relevance of this provision from *Sacrum* is demonstrated, moreover, by the citations made to it in the Joint Declaration on the Diaconate issued 22 February 1998 by the Congregation for Education and the Congregation for the Clergy, discussed below.

#### 2.2.4 — *Legitimacy*

The canonical ramifications of "legitimacy," and more negatively "illegitimacy," have been all but eliminated in the 1983 Code.<sup>55</sup> The interest in legally characterizing *children* born outside of lawful wedlock, then, as "sacrilegious," "adulterous," "incestuous," "nefarious," and so on, is a relic of the past.<sup>56</sup> But the omission of canonical consequences *for children* based on parental misconduct in no way, of course, rehabilitates that parental conduct or makes it acceptable. The fact that canon law no longer labels certain children as "incestuous" or "adulterous" does not mean that the 1983 Code condones incest or adultery by parents. Similarly, that children conceived by clerics after the reception of major orders are no longer called "sacrilegious" cannot be used to claim that the Church no longer regards such exercises of marital privileges as sacrilegious. Indeed, during the coetus discussion of what became

<sup>54</sup> "Grandioris aetatis viri, sive caelibes sive etiam matrimonio coniuncti, ad diaconatum vocari possunt; hi vero ne admittatur, nisi constet non solum de uxoris consensu, sed etiam christiana morum probitate illisque dotibus, quae viri ministerium nec impediunt nec dedecorent" (PAUL VI, *Sacrum*, no. 11, p. 700; my translation; see also *CLD*, vol. 6, p. 580).

<sup>55</sup> *CIC* 1983,c. 1137: "Legitimi sunt filii concepti aut nati ex matrimonio valido vel putativo." The 1983 Code no longer disables any person for any office in the Church or canonical state in life based the marital status of that person's parents. The 1917 Code, in contrast, disabled "illegitimate" children from a variety of offices in the Church. See, e.g., *CIC* 1917,cc. 232, 320, 331, 504, 984, 991, and 1363.

<sup>56</sup> See WOYWOD, *Practical Commentary*, p. 802; McDEVITT, *Legitimacy*, pp. 31-34.

c. 277, §1, a brief but important exchange occurred on this point between a consulting father and the coetus secretary: “One Father suggests that it be stated that the violation of the *perfect continence* described in §1 carries with it the sin of sacrilege. Response: *This is true*, but the matter belongs to moral theology” (emphasis added).<sup>57</sup>

This exchange illustrates concisely both the idea that clerical continence, even after Vatican II and the promulgation of *Sacrum*, was viewed as an obligation distinct from celibacy and binding under pain of sacrilege, and that the omission from the revised law of the negative consequences that arise when married clerics exercise conjugal rights was due not to a relaxation of the obligation of clerical continence, but rather to the decision to remove from the proposed law a fact that was deemed to belong more properly to moral theology.

We may now examine the textual history of the 1983 Code on the obligation of clerical continence and celibacy to see whether anything in that history suggests that the law is not to be understood according to its plain terms, those terms already having been shown to be consistent with the 1917 Code in this area.

### 2.3 — Legislative History of 1983 Code Provisions on Clerical Continence

The development of what eventually became c. 277 of the 1983 Code, the norm by which the dual obligations of clerical continence and celibacy are set forth in the revised law, passed through, as did most other canons of the new Code, basically three earlier versions. The history of these revisions sheds important light on the interpretation of the final form the law attained in the promulgated 1983 Code.<sup>58</sup>

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<sup>57</sup> “Dicatur quod violatio perfectae continentiae de qua in § 1 secumfert peccatum sacrilegii (aliquis Pater). R. Hoc verum est, sed pertinent ad theologiam moralem” (PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, “Liber II: De populo Dei,” in *Comm*, 14 [1982], p. 170).

<sup>58</sup> The correlations proposed here, while not official, are not controversial. See generally, E. PETERS, *Tabulae congruentiae inter Codicem iuris canonici et versiones anteriores canonum, with a Multilingual Introduction*, Montréal, Wilson & Lafleur, 2002, p. xvii. Besides the legislative history of c. 277 which is very important for this study and which is therefore discussed at some length herein, the textual development of the other relevant provisions of the 1983 Code (namely *CIC* 1983,cc. 288; 1031, §2; 1042, 1°; and 1050, 3°) was inconsequential for our purposes. The import of these canons can be sufficiently grasped without reference to their various earlier (and, in fact, virtually identical) drafts.

We may begin by briefly noting that c. 277, §3, an unremarkable provision for our purposes, underwent little modification during the revision process. Originally it appeared as c. 136, §2 of the *Schema de populo Dei*,<sup>59</sup> whence it became c. 251, §2 of the 1980 *Schema Codicis*,<sup>60</sup> and from there developed into c. 280, §2 of the 1982 *Schema Codicis*,<sup>61</sup> before its final appearance in the 1983 Code. Between the 1980 *Schema* and the 1982 *Schema*, the requirement that bishops hear the presbyteral council before enacting particular legislation in this area was dropped in order to afford the bishop greater flexibility in suiting his diocesan legislation to local needs.<sup>62</sup>

Undergoing even less change was what resulted in a provision more important for our purposes, namely, c. 277 § 2 (reinforcing the protection due to the practice of continence among clerics). Originally it appeared as c. 136, §1 of the *Schema de populo Dei*,<sup>63</sup> whence it became c. 251, §1 of the 1980 *Schema Codicis*,<sup>64</sup> and from there developed into c. 280, §1 of the 1982 *Schema*

<sup>59</sup> “Competit Episcopo dioecetano ut hac de re, audito Consilio presbyterali, normas statuat magis determinatas utque de servata hac obligatione in casibus particularibus iudicium ferat,” (PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Schema canonum Libri II de Populo Dei*, Vatican City, Typis Polyglottis Vaticanis, 1977, c. 136, §1 [= *Schema de populo Dei*]).

<sup>60</sup> “Competit Episcopo dioecetano ut hac de re, audito Consilio presbyterali, normas statuat magis determinatas utque de servata hac obligatione in casibus particularibus iudicium ferat,” (PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Schema Codicis iuris canonici iuxta animadversiones S.R.E. Cardinalium, Episcoporum Conferentiarum, Dicasteriorum Curiae Romanae, Universitatem Facultatumque ecclesiarum necnon Superiorum Institutorum vitae consecratae recognitum*, Vatican City, Libreria Editrice Vaticana, 1980, c. 251, §1 [= 1980 *Schema Codicis*]).

<sup>61</sup> “Competit Episcopo dioecetano ut hac de re normas statuat magis determinatas utque de huius obligationis observantia in casibus particularibus iudicium ferat,” (PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Codex iuris canonici: Schema novissimum iuxta placita Patrum Commissionis emendatum atque Summo Pontificio praesentatum*, Vatican City, Typis Polyglottis Vaticanis, 1982, c. 280, §2 [= 1982 *Schema Codicis*]).

<sup>62</sup> The *coetus* discussion of the proposed requirement that the bishop hear the presbyteral council before issuing such norms was split over its possible negative impact on episcopal discretion, and the proposal was rejected. See PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, “Schema ‘de populo Dei’: Caput II: De clericorum obligationibus et iuribus,” in *Comm*, 14 (1982), p. 78.

<sup>63</sup> “Debita cum prudentia clerici se gerant cum personis quarum frequentatio suam obligationem ad continentiam servandam in discrimen vocare aut in fidelium scandalum cedere possit,” (*Schema de Populo Dei*, c. 136, §1).

<sup>64</sup> “Debita cum prudentia clerici se gerant cum personis quarum frequentatio suam obligationem ad continentiam servandam in discrimen vocare aut in fidelium scandalum cedere possit,” (1980 *Schema Codicis* c. 251, §1).

*Codicis*,<sup>65</sup> before its final appearance in the 1983 Code. From the very outset of this canon, however, the value of continence was, as we noted earlier, stressed by making it, as opposed to celibacy, the object of special protection among clerics in the West.

It is, however, with the legislative history of the primary statement of the obligations of clerical continence and celibacy, namely *CIC* 1983, c. 277, §1, that two very important and illustrative developments come to light.

First, in the original version of what became the pivotal c. 277, §1, that is, in c. 135, §1 of the *Schema de populo Dei*, and in the identical version of the same norm, namely c. 250, §1 of the 1980 *Schema Codicis*, there was set forth the dual obligation of continence and derivatively, celibacy, that we recognize in the current law: “Clerics are obliged to observe perfect and perpetual continence for the sake of the kingdom of heaven and therefore are bound to celibacy.”<sup>66</sup> Absent from these first two versions, however, was the articulation of why celibacy has value in its own right, at least, that is, beyond its serving as protection for the more fundamental good of continence. This welcome articulation of the value of celibacy in its own right appeared in the 1982 *Schema Codicis*, c. 279, §1,<sup>67</sup> and, as we have seen, was carried into the final form of the canon in the 1983 Code without amendment.

Second, and even more importantly, each of the first three drafts of the canonical articulations of the clerical obligations of continence and celibacy contained an express exemption for married deacons in regard to both obligations, *but this exemption was completely dropped from the final promulgated version of the law.*

Canon 135, §2 of the *Schema de populo Dei* read as follows: “Men of mature age, promoted to the stable diaconate, who are living in marriage, are

<sup>65</sup> “Debita cum prudentia clerici se gerant cum personis, quarum frequentatio ipsorum obligationem ad continentiam servandam in discrimen vocare aut in fidelium scandalum vertere possit,” (1982 *Schema Codicis*, c. 280, §1).

<sup>66</sup> “Clerici obligatione tenentur servandi perfectam perpetuamque propter Regnum coelorum continentiam ideoque ad coelibatum adstringuntur,” (*Schema de Populo Dei*, c. 135, §1, and, identically, 1980 *Schema Codicis*, c. 250, §1; my translation).

<sup>67</sup> “Clerici obligatione tenentur servandi perfectam perpetuamque propter Regnum coelorum continentiam, ideoque ad coelibatum adstringuntur, quod est peculiare Dei donum, quo quidem sacri ministri indiviso corde Christo facilius adhaerere possunt atque Dei hominumque servitio liberiori sese dedicare valent,” (1982 *Schema Codicis*, c. 279, §1). See GARRITY, “Celibacy,” p. 241, where the author praises the additional terminology as being “more conciliar, theological, and pastoral....”

not bound to the prescription of §1; these, however, upon the loss of their wife, are bound to celibacy.”<sup>68</sup> Plainly, any obligations of clerical continence and celibacy imposed on permanent deacons would have been abrogated by this language, and only if such men later lost their wives would the express obligation of celibacy begin to apply to them, along with, of course, the implied obligation of continence binding on all men who are not married.

The second draft of this canon not only preserved the exemption from continence for permanent deacons, but it even removed the obligation of consequent celibacy for those who might lose their wives after ordination: “Men promoted to the permanent diaconate, living in marriage, are not bound to the prescription of §1.”<sup>69</sup> This clear exempting language was carried into the 1982 *Schema Codicis* without change.<sup>70</sup> Had this provision remained into the 1983 Code, there is no doubt but that it would have provided an express exemption for permanent deacons in regard to the express obligations of continence and celibacy imposed on them elsewhere in the law.

But this exemption for permanent deacons wholly disappeared from the final version of the law, leaving only the enunciation of the dual obligations of continence and celibacy already described in c. 277 and as mitigated with regard only to celibacy for married permanent deacons in cc. 1042 and 1031.<sup>71</sup> One may observe that changes in the text of the law coming after the submission of the 1982 *Schema* to Pope John Paul II would seem to bear in a marked way the imprint of papal intention. Consider the remarks of then Pro-President for

<sup>68</sup> “Praescripto § 1 non tenentur viri maturioris aetatis in matrimonio viventes qui ad diaconatum stabilem promoti sunt; qui tamen et ipsi, amissa uxore, ad coelibatum servandum tenentur,” (*Schema de Populo Dei*, c. 135, §2; my translation).

<sup>69</sup> “Praescripto § 1 non tenentur viri qui in matrimonio viventes ad diaconatum permanentem promoti sunt,” (1980 *Schema Codicis*, c. 250, §2; my translation).

<sup>70</sup> “Praescripto § 1 non tenentur viri qui, in matrimonio viventes, ad diaconatum permanentem promoti sunt,” (1982 *Schema Codicis*, c. 279, §2; my translation).

<sup>71</sup> Provost, who does not believe that permanent deacons are bound to continence under 1983 Code, concedes this crucial point, namely, that an exception for permanent deacons was proposed, but was dropped from the revised Code before promulgation. See J. PROVOST, “Permanent Deacons in the 1983 Code,” *CLSA Proc*, 46 (1984), p. 186 [= PROVOST, “Deacons”], wherein he states, “No exception [to c. 277] is made for permanent deacons, although one had been included in the earlier drafts of the canon” (my emphasis). Provost grounds his argument against obligatory diaconal continence solely on the acquired rights language found in *CIC* 1983, c. 4, which I will address at fn. 83 and accompanying text.

Incidentally, CHOLIJ, “Orders,” pp. 414-415, outlines a very similar development in the history of c. 1087, the norm establishing Holy Orders as an impediment to marriage. Here, too, an exemption for married deacons, allowing them to remarry after the death of

the Pontifical Commission for the Revision of the Code of Canon Law, Abp. Rosalio Castillo Lara:

But in a special way I feel it is my duty to express, in the name of the entire Commission, our gratitude to His Holiness John Paul II, who wished to study personally the [1982] *Schema novissimum*, which was submitted to him on 22 April [1982], and to subject to a detailed examination the more important problems, with the help of a commission of experts and of another commission of qualified prelates, devoting many sessions of collegial work to the task and who finally decided on its promulgation. This Code, therefore, is a pontifical law, not merely because it was promulgated by the authority of the Supreme Pontiff, but also *because it bears the imprint of personal interest of the Roman Pontiff and of the specific legislative will.*<sup>72</sup>

Without the proposed exemptions in place for married permanent deacons, of course, there is no basis upon which to doubt but that the provision of c. 277, §1 binding all clerics in the West to the primary good of continence is applicable without distinction based on order.<sup>73</sup>

### 3 — *Post-1983 Code References to Diaconal Continence*

In normative post-1983 Code ecclesiastical documentation, there is only one clear (albeit very brief) reference to the obligation of clerical continence for married deacons, and one other oblique reference to it in a companion document. There are also a few brief discussions of it in scholarly studies. We should now consider these appearances.

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a first spouse, was dropped by Pope John Paul II during his final review of the proposed 1983 Code, “perhaps” suggests Cholij of the pope, “being conscious, among other things, of its ecumenical implications and of the ancient tradition of the Church.” The law of clerical celibacy, not being the focus of this study, though, I can only point out this apparently related development for the use of others, though I believe the same papal concerns that Cholij suggests regarding the impediment of orders might have influenced the Holy Father’s decision to eliminate the exemption from obligatory continence that married deacons almost received from the penultimate draft of what finally appeared as c. 277, §1. See also W. VARVARO, “Proposed Legislation for the Permanent Deacons: Developments and Difficulties,” in *CLSA Proc*, 43 (1981), p. 251.

<sup>72</sup> PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, “Discourse of the Pro-President Archbishop Rosalio Castillo Lara, S.D.B.,” in *Promulgation and Official Presentation of the Code of Canon Law*, Vatican City, Typis Polyglottis Vaticanis, 1983, pp. 17-18. Emphasis added.

<sup>73</sup> See GARRITY, “Celibacy,” p. 241, where the author admits: “[Canon] 277, §1 obliges *clerics* (broadly, including deacons) [to continence and celibacy].” Original emphasis. Garrity thinks an exemption even for continence can be found for married deacons elsewhere in the law, and I address his assertion at fn. 82 and accompanying text.

### 3.1 — Ecclesiastical Documentation

Canon 236 of the 1983 Code outlines in only the broadest terms the educational program to be followed in training men for the permanent diaconate.<sup>74</sup> In 1998, the Congregation for Catholic Education and the Congregation for the Clergy issued a complex of documents beginning with a “Joint Declaration and Introduction” (Joint Declaration) prefacing the Congregation for Education’s “Basic Norms for the Formation of Permanent Deacons” (Basic Norms) and the Congregation for the Clergy’s “Directory of the Ministry and Life of Permanent Deacons” (Directory).<sup>75</sup> By its own terms, the Joint Declaration “is to be regarded as a formal, general, executory Decree (cf. c. 32).”<sup>76</sup> As a result, given the provision of c. 33, §1 whereby “general executory decrees...do not derogate from laws, and their prescripts which are contrary to law lack all force,”<sup>77</sup> it must be recognized that nothing in the Joint Declaration or its companion documents can abrogate from any norms demonstrated to be part of canon law. These universal documents are still worthy of attention, however, if only to underscore a greater need for precision in addressing this topic in the future.

The Directory, at no. 61, states:

Married deacons should feel especially obliged to give clear witness to the sanctity of marriage and the family. The more they grow in mutual love, the greater their dedication to their children and the more significant their example for the Christian community.... This love grows thanks to chastity which flourishes, even in the exercise of paternal responsibilities, by respect for spouses and the practice of *a certain continence*. This virtue fosters a mutual self-giving which soon becomes evident in ministry (emphasis added).<sup>78</sup>

<sup>74</sup> *CIC* 1983, c. 236: “Aspirantes ad diaconatum permanentem secundum Episcoporum conferentiae praescripta ad vitam spiritualem alendam informantur atque ad officia eidem ordini propria rite adimplenda instruantur: 1° iuvenes per tres saltem annos in aliqua domo peculiari degentes, nisi graves ob rationes Episcopus dioecesanus aliter statuerit; 2° maturioris aetatis viri, sive caelibes sive coniugati, ratione ad tres annos protracta et ab eadem Episcoporum conferentia definita.”

<sup>75</sup> These documents, originally published by Liberia Editrice Vaticana, are widely available on the Internet. For the Latin text, see [http://www.vatican.va/roman\\_curia/congregations/ccatheduc/documents/rc\\_con\\_ccatheduc\\_doc\\_31031998\\_directorium-diaconi\\_lt.html](http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_31031998_directorium-diaconi_lt.html). For English translations, see, e.g., [http://www.vatican.va/roman\\_curia/congregations/ccatheduc/documents/rc\\_con\\_ccatheduc\\_doc\\_31031998\\_directorium-diaconi\\_en.html](http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_31031998_directorium-diaconi_en.html).

<sup>76</sup> Joint Declaration, prefatory section, but not otherwise numbered.

<sup>77</sup> *CIC* 1983, 33, §1: “Decreta generalia exsecutoria, *etiamsi edantur in directoriis aliusve nominis documentis*, non derogant legibus, et eorum praescripta quae legibus sint contraria omni vi carent” (Italicized passages translated.)

<sup>78</sup> “Diaconus uxoratus peculiari se teneri officio sentiat claram reddendi testificationem sanctitatis matrimonii et familiae. Quo magis enim coniuges mutuo in amore

Despite its having absolutely no precedent in the canonical literature concerning the clerical obligation of continence, no explanation of the novel phrase “a certain continence” is given here or elsewhere in the Joint Declaration materials. Of course, the idea that married deacons are called to any degree of continence within marriage would come as a surprise to most modern observers,<sup>79</sup> but the phrase seems not to have provoked comment. What the phrase “a certain continence” cannot result in, however, given the force of c. 133, §1, is an abrogation of the express canonical obligation of continence presented in c. 277 for all clerics.

The other apparent reference to continence possibly suggesting a mitigation in the obligation comes in Basic Norms no. 68:

For married candidates, to live love means offering themselves to their spouses in a reciprocal belonging, in a total, faithful and indissoluble union, in the likeness of Christ’s love for his Church; at the same time it means *welcoming children*, loving them, educating them and showing forth to the whole Church and society the communion of the family (emphasis added).<sup>80</sup>

It is possible that the phrase “welcoming children” could be construed, as indeed could other phrases in this section, simply as an expectation for married deacons that must be in place *before* ordination. For that matter, nothing in the character of the married diaconate would seem to be inconsistent with directing a spirit of openness to children in cases of adoption or guardianship, though this seems unlikely as a dicasterial motive in using the phrase. Nevertheless, the phrase “welcoming children” could also be understood as implying the

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creverint, eo amplior fiet eorum donatio filiis facta, eoque pariter erit efficacius eorum exemplum apud christianam communitatem....Hic amor crescit propter virtutem castimoniae, quae quidem semper floret etiam per exercitium paternitatis responsabilis, una cum acquisita coniugis aestimatione et cuiusdam continentiae consuetudine. Talis virtus adiuvat maturam hanc donationem, quae cito manifestatur in ministerio.”

<sup>79</sup> Some might react to the suggestion with more than surprise. Consider GARRITY, “Celibacy,” p. 246: “The only important question that matters today is this, *Should* [married clerics in ancient times] have felt obliged to [practice continence]? *Should* married clerics [today] feel any obligation to cease from marital relations after the time of ordination? The answer, of course, is **No**. No law, written or unwritten, should impose, or should ever have imposed, such a ridiculous obligation on married clerics. To allow the force of a law or an expectation such as that would be to approve of the worst kind of anti-corporeal bias.” Original emphasis. Garrity simply assumes, of course, that the motive behind continence for married clerics is an anti-corporeal attitude.

<sup>80</sup> “Candidatis autem uxoratis vivere amorem significat se ipsos propriis mulieribus tradere in mutua donatione cum vinculo exclusivo, fidei et indissolubili, ad imaginem amoris Christi erga suam Ecclesiam; pariter significat filios acceptare, amare et educare atque communionem familiarem in universam Ecclesiam et societatem transmittere.”

exercise of conjugal rights, albeit in a morally upright manner. If that is the meaning to be ascribed to the phrase, then the norms for interpreting general executory decrees in cases of conflict with law must be recalled and applied.

In brief, it would be difficult to make the case that one short phrase and one aside in a joint dicastery document are sufficient to reverse a centuries old and unanimously conceded canonical tradition of “perfect and perpetual continence” among Western clerics in major orders. Indeed, in light of the clear provisions of c. 33, §1, a provision whose very existence recognizes that from time to time phrases in general executory decrees might conflict with laws, the argument for innovation fails on its face. The simpler explanation would seem to be that the phrases were used loosely by dicasteries unaware of the formidability of the tradition and, in any event, not in a way intended to legislate nor capable of legislating contrary to it.

### 3.2 — Scholarly Work

Virtually no Western authors defend the exercise of conjugal rights by married deacons, though perhaps this is because so few seem to be aware of the arguments that can be adduced against the practice. Such arguments as are raised in support of conjugal exercises by married deacons are usually (with the possible exception of Provost’s remarks to the Canon Law Society of America in 1984,<sup>81</sup> discussed shortly) superficial. Coriden and Provost, for example, consider married clerics, whether deacons or priests, exempt from the general obligation of continence thus: “[I]n virtue of canon 4, the acquired rights of married persons are not abrogated by the 1983 code and the marital rights of married clergy (c. 1135) overrides [sic] the restrictions in c. 277, §1.”<sup>82</sup> No additional support for the assertion is suggested by its authors, so the claim can be assessed only on its own terms.

Now c. 4 states: “Acquired rights and privileges granted to physical or juridic persons up to this time by the Apostolic See remain intact if they are in use and have not been revoked, unless the canons of this Code expressly

<sup>81</sup> PROVOST, “Deacons” esp. p. 186.

<sup>82</sup> CORIDEN and PROVOST, “Implications,” no. 2 of Obligations and Rights. See also GARRITY, “Celibacy,” p. 241, wherein: “Despite the letter of the law [c. 277], married deacons are clearly not bound to continence. They have acquired a right to marital relations with their wives (cc. 4; 1135, 1055, §1).” Likewise, PROVOST, “Canon 914,” at p. 49. Garrity’s assertion can be, I think, adequately addressed here along with that Coriden and Provost. But see also fn. 84.

revoke them.”<sup>83</sup> Several observations are in order. First, it is not immediately clear that c. 4 is appropriately cited as protective of the conjugal rights of married persons at all, given that such rights are not conferred on spouses “by the Apostolic See,” but rather by natural law.<sup>84</sup> This understanding of the natural or even divine origin of, here, conjugal rights, still leaves open, of course, the possibility that certain rights, including conjugal ones, may be freely foregone by those seeking admission to a specific status, function, or office in the Church. A single man’s foregoing his fundamental or natural right to marry prior to admission to Holy Orders is an example sufficient to carry this point.

Second, if conjugal rights of married deacons are, even to some degree, a subject of c. 4, a very strong argument can be made that such rights *have* been revoked by the Apostolic See with regard to married clerics in the West, that being the conclusion reached herein with regard to both the 1917 and the 1983 Codes of Canon Law. Third, it must be noted that “married clergy” are not the proper subjects of rights under c. 1135, but rather obviously, married persons in general are. The second half of the Coriden and Provost assertion therefore begs the question, for nothing in it addresses the specific obligation of continence that married clerics are called to assume under c. 277, and to which their wives are apparently asked to consent under cc. 1037 and 1050.

Woestman does not discuss the obligation of continence in commenting on c. 277, where one might have expected to see the matter treated, but he does mention it in regard to c. 288 (the canon by which permanent deacons are exempted from several clerical obligations) as follows: “Although this canon makes no reference to c. 277, §1 and the obligation of clerics to observe celibacy and perpetual continence, legitimately married permanent deacons are not bound by celibacy and perpetual continence. However, they are bound by conjugal chastity.”<sup>85</sup>

<sup>83</sup> CIC 1983, c. 4: “Iura quaesita, itemque privilegia quae, ab Apostolica Sede ad haec usque tempora personis sive physicis sive iuridicis concessa, in usu sunt nec revocata, integra manent, nisi huius Codicis canonibus expresse revocentur.”

<sup>84</sup> Caution in distinguishing between “acquired rights” as described in c. 4 and, say, one’s “innate rights” not derived from ecclesiastical law, is rightly suggested by A. MENDONÇA, “Book I: General Norms,” in *Letter & Spirit*, p. 3; J. HUELS, “Introductory Canons [cc. 1-6],” in *CLSA Comm2*, pp. 51-52; T. I. JIMÉNEZ URRESTI, in *Código*, p. 13; and P.V. PINTO, *Commento al Codice di Diritto Canonico*, in P.V. PINTO (ed.), 2<sup>nd</sup> ed., Vatican City, Libreria Editrice Vaticana, 2001, p. 2.

<sup>85</sup> WOESTMAN, *Orders*, p. 202. The notion of “conjugal chastity” is not developed by Woestman, but it seems not to be a kind of chastity distinct from any another, but rather simply a specification of the context (here, matrimonial) wherein the single virtue of chastity is practiced.

First, one should observe that all married Christians, not just permanent deacons, are bound to observe “conjugal chastity,” but since neither c. 277 nor c. 288 even mentions “chastity,” clerical or otherwise, reading an explicit *canonical* obligation of “chastity” into the terms of these canons is unsupported. More importantly, though, it seems a conclusion exactly the opposite of Woestman’s should be drawn regarding the failure of c. 288 to include an exemption from the obligation of continence imposed on all clerics in c. 277, i.e., not that such an exemption should be recognized, but that an exemption on this precise point was clearly withheld.

We can now bring together these two strains of thought, namely, that permanent deacons are included in the imposition of continence binding all clerics (CIC 1983, c. 277) and that they are (allegedly) exempt from such obligation in virtue of their acquired right to conjugal relations (CIC 1983, c. 4) by looking more closely at the remarks of Dr. James Provost to the Canon Law Society of America on this topic. He states:

[There remains] the problem of canon 277. This is the canon which imposes perfect and perpetual continence on all clerics. No exception is made for permanent deacons, although one had been included in the earlier drafts of the canon. Does this mean that married permanent deacons as of November 27, 1983 had to cease having marital relations with their wives? The text of the law would seem to impose this “for the sake of the kingdom of heaven”. However, through matrimony each of the spouses acquires “equal obligations and rights to those things which pertain to the partnership of conjugal life” (c. 1135), and sexual cooperation is part of the permanent consortium (c. 1096, § 1). Since the new code does not take away acquired rights unless they are expressly revoked by the code (c. 4), and since canon 277 does not explicitly state it is revoking the acquired marital rights of married deacons, continence is not being imposed on them even though the law reads that way.<sup>86</sup>

There are some key acknowledgements of major points in this passage, including: first, that c. 277 clearly imposes continence on all clerics, including permanent deacons; and second, that an exception to the law of continence for permanent deacons was proposed but was dropped from the 1983 Code before promulgation. Yet there is no suggestion in Provost’s remarks that permanent deacons ordained under the 1983 Code are not included in the scope of c. 277. The most Provost argues, and I think correctly, is that one cannot lose a fundamental or acquired right without consent, and that consent cannot have been obtained from men (and their wives) who were unaware that a fundamental right (conjugal relations) would be lost upon ordination. Provost’s argument, however, that permanent deacons are immune *by law* from the obligation of continence because no express mention of them is made in

<sup>86</sup> PROVOST, “Deacons,” p. 186.

c. 277 fails for the simple reason that law, having imposed (or better here, reiterated) a given obligation on a class of persons, does not need to engage in the redundant exercise of expressly saying, in effect, that “no exception for a subset of those persons is granted” in order for that obligation to be binding on the subset of persons in the class.

Against c. 277, establishing the obligation of perfect and perpetual continence on clerics in the West, an obligation consistent with and unanimously upheld by commentators on the parallel provisions of the 1917 Code, an obligation left undisturbed by the Second Vatican Council and imported into post-conciliar papal legislation even for married deacons, and an obligation prevailing after the elimination of an express exception in its regard for permanent deacons during the canonical revision process, only three challenges can be raised: 1) a very short, unprecedented and unexplained phrase in a recent, and otherwise quite extensive, dicastery document; 2) a few short comments in scholarly materials; and 3) the living assumption of thousands of married men ordained to the permanent diaconate and their wives.<sup>87</sup> The first two points have been addressed above; I now consider only the last.

#### 4 — *The Situation of Permanent Deacons Today*

Despite the reservations expressed above on the applicability of Canon 4 to issues of the obligations of continence on married deacons, it is nevertheless consistent with, I suggest, a deeper principle that is relevant here, namely, that one cannot be held to have surrendered fundamental rights without an express awareness that that is being done. Thousands of married men have been ordained to the permanent diaconate in recent decades.<sup>88</sup> Neither they nor their wives have been informed as to the possibility, let alone as to the canonical conclusion explored herein, that admission to major orders in

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<sup>87</sup> There is little reason to doubt but that the great majority of those responsible for forming men in the permanent diaconate also share this assumption regarding the alleged non-applicability of c. 277 to married permanent deacons, but as the *personal* rights of these individuals are not potentially affected by the resolution of this question, I focus here on the situation of those men and women whose rights *are* potentially affected.

<sup>88</sup> See “Catholic World Statistics,” in M. BUNSON (ed.), 2003 *Catholic Almanac*, Huntington, IN, Our Sunday Visitor, 2003, p. 340. This section of the almanac reports over 27,000 permanent deacons world-wide as of 1 January 2001. The great majority of these men are married. See, e.g., UNITED STATES CONFERENCE OF CATHOLICS BISHOPS, “Report on the Permanent Diaconate in the United States and its Territorial See as of December 31, 1996,” reporting 90% of its permanent deacons as being married. It is common knowledge that over half of the world’s permanent deacons are in the United States of America.

the Western Church carries with it the obligation of “perfect and perpetual continence for the sake of the kingdom of heaven.” These husbands and wives, therefore, cannot be held to have *consented* to the surrender of a right to something as fundamental as conjugal relations and for *that* reason it seems that they should not be bound to observe c. 277, which provision would otherwise be clearly applicable to clerics in their position and their wives.<sup>89</sup>

It would, on the other hand, be difficult to try to parlay this widespread inadvertence to the requirement of clerical continence among permanent deacons into a “custom contrary to law.”<sup>90</sup> First, acting out of ignorance of a legal requirement does not seem to be the equivalent of acting with the intention to establish a law that is demanded by the plain terms of c. 25.<sup>91</sup> Moreover, to claim custom as a canonical defense for clerical non-continency in the West raises questions about related matters as whether married permanent deacons around the world constitute “a community capable of receiving a law” and, especially given the express castigation of clerical non-continence as “sacrilegious” under the 1917 Code, even about whether such a practice might indeed be “contrary to divine law.”<sup>92</sup> Finally, however, because

<sup>89</sup> Recall that GARRITY, “Celibacy,” p. 241, states that “married deacons...have acquired a right to marital relations with their wives...” If this were meant in a descriptive sense as referring to those men already ordained without knowledge of the obligation of continence, I would agree. But Garrity holds the no-continence position prescriptively, i.e., he asserts that married deacons (or priests) should not, even in the future, be included under c. 277. See fn. 78.

<sup>90</sup> *CIC* 1983, c. 24, §2: “Nec vim legis obtinere potest consuetudo contra aut praeter ius canonicum, nisi sit rationabilis; consuetudo autem quae in iure expresse reprobatur, non est rationabilis.”

<sup>91</sup> *CIC* 1983, c. 25: “Nulla consuetudo vim legis obtinet, nisi a communitate legis saltem recipiendae capaci cum animo iuris inducendi servata fuerit.” See also MENDONÇA, “Book I: General Norms,” *Letter & Spirit*, p. 23, no. 74, b, and P. LOMBARDIA, in *Code Annotated*, p. 96, but compare HUELS, “Title II: Custom [cc. 23-28],” *CLSA Comm2*, p. 90. The post-Conciliar age is not the first wherein, it seems, confusion obtained about the obligation of clerical continence. Heid suggests, for example, that such confusion was fairly common in the ancient Church, and that there developed various responses to clerics ordained in good faith without awareness of the celibacy and/or continence obligations of their state. Such responses were rarely penal in nature, and seldom resulted even in deposition from the clerical ranks, but instead, where such clerics refused to accept the normative character of the obligations, they eventually lost the right to engage in ministry. See HEID, “General Index,” in *Celibacy*, p. 365 for numerous entries under “continence/celibacy, ignorance of rule of.”

<sup>92</sup> *CIC* 1983, c. 24, §1: “Nulla consuetudo vim legis obtinere potest, quae sit iuri divino contraria.” Recall the recognition of clerical non-continency as a species of “sacrilege” set forth during the canonical revision process and described in fn. 57 and its accompanying text.

such a practice is, it seems certain, one actually “contrary to canon law,” it could obtain force of law only if it was “legitimately” observed for “thirty continuous and complete years.”<sup>93</sup> The norm in question, of course, c. 277 of the 1983 Code, while consistent with earlier law, has itself been in place only for some twenty years.<sup>94</sup>

## 5 — *Concluding Remarks*

The conclusion suggested by this article is that a major, long-standing, and unquestioned canonical obligation of clerics in the Western Church—namely, complete sexual continence for married men in major orders—has, with almost no conscious advertence, been forgotten in the span of hardly a generation. A limited range of responses to such a dramatic event seems feasible.

If such a development truly reflects the mind of the Church, then it seems incumbent on the proper ecclesiastical authority to enunciate the reasons behind such a major change in discipline, lest the example of what otherwise might seem like an amnesic development of practice be established and accepted. In other words, there is need to demonstrate why the law must be accommodated to the practice, lest law fall into disrepute. As a variation on this, if a distinction in the clerical obligation of continence exists, however hidden, between deacons and priests, that distinction should be clearly articulated, lest a practice that might be tolerated for those in a lower level of Holy Orders be inappropriately applied to those in a higher. If, however, a change in the traditional Western discipline of clerical continence for those in major orders was not intended and therefore, at best, the current situation of

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<sup>93</sup> *CIC* 1983, c. 26: “Nisi a competenti legislatore specialiter fuerit probata, consuetudo viginti iuri canonico contraria aut quae est praeter legem canonicam, vim legis obtinet tantum, si legitime per annos triginta continuos et completos servata fuerit; contra legem vero canonicam, quae clausulam contineat futuras consuetudines prohibentem, sola praevalere potest consuetudo centenaria aut immemorabilis.”

<sup>94</sup> According to HUELS, “Title II: Custom [cc. 23-28],” *CLSA Comm2*, p. 92, “Observance of a contrary custom is also interrupted if a new law or norm is enacted that repeats the law or norm to which the custom was contrary.... If the custom continues after the interruption, a new period of thirty years would be required for it to attain the force of law, barring no further interruptions.” See also MENDONÇA, “Book I: General Norms,” in *Letter & Spirit*, p. 24. Thus, even if one wished to argue that the practice of a non-continence permanent diaconate can be dated to the time of *Sacrum*, the 1983 Code’s reiteration of the obligation of continence for all clerics in the West means that the 30 years of custom contrary to the clerical obligation of continence set forth in c. 277 cannot have run until late November 2013, at the earliest.

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non-continencc among married permanent deacons is markedly anomalous, then that fact should be admitted and forthrightly addressed. In this last case, one wherein a practice must be brought into conformity with law, the example of King Josiah upon rediscovering the forgotten Law (2 Kings 22-23) might be instructive.

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