

Memorandum on Rev. William Woestman's advisory opinion on Canon 277 § 1¹

Rev. Woestman's advisory opinion² on Canon 277 § 1 did not directly respond to my writings on this topic,³ but for convenience I will comment on his remarks as if my position on Canon 277 had been discussed. Woestman is well qualified to make arguments against my interpretation of the law and he sets out his views reasonably. May my responses to him occasion insights for others into this matter.

Observations on the question posed to Woestman

The original question, as it was posed to Woestman, subtly distorted, I think, the debate concerning clerical continence. A questioner wrote: "After reading on the internet that all permanent deacons are obliged by the code of canon law 'to observe perfect and perpetual continence,' a deacon and his wife are most disturbed and distressed." Of course they would be distressed by such a prospect. It makes the Church, or at least canon law, seem unpredictable, unjust, and not a little unrealistic. But none of these imputations regarding the Church or her legal system are accurate. The first step toward correcting such misimpressions, and toward resolving an important point of clerical discipline, is to frame the issue rightly.

I have not argued that the Code of Canon Law—by which one means, of course, that complex of canons promulgated by John Paul II in 1983 to be understood and applied as a whole—obliges married permanent deacons and their wives to continence. To the contrary, I have from the outset argued that the Code of Canon Law read as a whole, and the natural law that stands behind it, exempts from the obligation of continence men who were ordained without knowledge of, or consent to, the obligation (which I argue is) set out in Canon 277. Peters, *Studia Canonica*, 177-178. I have proposed no change in the conduct of married clergy and their wives at present and, depending on which of the potential resolutions of this issue the Church eventually chooses (see below), perhaps no change for married men already ordained, and their wives, ever.

¹ 1983 CIC 277. § 1. Clerics are obliged to observe perfect and perpetual continence for the sake of the kingdom of heaven and therefore 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.

² See William Woestman, "Canon 277 § 1: obligation of continence for validly married clerics", *2011 Roman Replies and CLSA Advisory Opinions* (Canon Law Society of America, 2011) 74-76, available on-line at <http://www.canonlaw.info/PDF-Woestman%20Opin.pdf>.

³ Chiefly, Edward Peters, "Canonical considerations on diaconal continence", *Studia Canonica* 39 (2005) 147-180, available in PDF at <http://www.canonlaw.info/Studia%20c.%20277.pdf>, and Edward Peters, "Diaconal categories and clerical celibacy", *Chicago Studies* 49 (2010) 110-116, available in PDF at http://www.canonlaw.info/a_deacons5.htm. A complete directory of my writings, and those of several others, concerning Canon 277 is available at http://www.canonlaw.info/a_deacons.htm.

What I *have* argued, and still hold, is that *Canon 277* of the 1983 Code obliges married clerics (deacons in my *Studia Canonica* article, but the arguments apply even more strongly to priests) to perfect and perpetual continence, and that (setting aside cases of married men ordained without awareness of this obligation who, along with their wives, must be treated separately) the disconnection between, on the one hand, the plain text of Canon 277 and the canonical tradition behind the canon, and on the other hand the conduct of virtually all married clergy and their wives, must, for the sake of those directly involved and for good order in the Church, be reconciled. Peters, *Studia Canonica* 179-180. I have suggested four ways that the necessary reconciliation of law and life in this matter can come about.

The Church can:

- (1) conclude that Canon 277 obliges all married clerics to perfect and perpetual continence and, after a suitable period of formation, allow married men already ordained, and their wives, to consent to such observance or give up active ministry;
- (2) conclude that the theology of orders suffices, after all, for the Roman Church to drop her ancient expectation that deacons and their wives observe continence, but requires her to retain her ancient discipline in regard to priests who, with their wives, would be given, as above, a suitable period of time and formation to make an informed and free choice in the matter;
- (3) require deacons and priests to commit to and practice some form of “periodic continence” as is done by some Eastern Churches; or,
- (4) ratify the abandonment of *any* expectation of continence for married clerics in the West.

It is beyond my ken as a canonist to know which of these four resolutions is soundest, but a choice among these four options is inevitable.⁴ The resolution of this debate should be decided, I think, by something more than protracted inadvertence.

Consideration of Woestman’s responses, according to numbered paragraphs

[1] Woestman acknowledges that, when married men were ordained in the West over recent centuries, they were expected to observe perfect and perpetual continence, as were their wives. This is, I think, a very important (and accurate) concession to grant. We may go on to say that continence for Western married clerics, although rarely consulted during the last millennium, has been unanimously expected by ecclesiastical authority since antiquity.⁵

⁴ I suppose a fifth option is possible: the first, second, or third option is decided upon and clergy formation programs are adapted accordingly. But married men already ordained, and their wives, are left in peace. I offer no opinion on the prudence of such a bifurcated approach, but I caution against it being confused with the fourth option, namely, the express or tacit ratification of the abandonment of continence among married clergy. The fourth option is itself a *choice* and, not to do *anything*, now that the matter is being frankly discussed, is, at some point down the road, to choose the fourth option.

⁵ Peters, *Studia Canonica*, 156-162. While my published studies only go back to the 1917 Code, a number of historians and theologians have traced the obligation of perfect and perpetual continence to primitive Christianity. See generally Liotta (1971), Cochini (1981/1990), Cholij (1989), Stickler

[2] I am aware of a few cases of married Protestant ministers being ordained to Catholic priesthood beginning in the 1950s, but I have never seen, and Woestman seems not to have, any documentation on the conditions under which they were ordained. These cases cannot be taken as evidence, therefore, of either a retreat from or a reinforcement of the obligation of clerical continence. As for married men coming into full communion and being ordained in accord with Benedict XVI's ap. con. *Anglicanorum coetibus* (2009) documentation on these cases, too, is slight. I see no evidence for or against clerical continence in them.

[3] I agree that the Second Vatican Council's const. *Lumen gentium* (1965) does not address continence for deacons.⁶ But from conciliar silence on the matter I would construe, if anything, and contrary to Woestman, conciliar *consent* to the unanimous interpretation of the then-applicable Canon 132 § 1 of the Pio-Benedictine Code,⁷ whereby continence was required of *all* clerics, married and single. *Qui tacet consentire videtur*. Reg. Iur. XLIV (1298); see also Peters, *Studia Canonica*, 156-160. Thus, while I suggest refraining from construing much of anything from silence, I think it insupportable to construe from *silence* on a point of law, an *abrogation* of a law unquestionably observed for many centuries, by dint of something as vague as 'implicit implication'.⁸

I thank Woestman for calling attention to Jorge de Otaduy's brief comment that "married deacons are not obligated to keep perfect continence and may continue their married life."⁹ This text was not available to me when I wrote my *Studia Canonica* article, else, I would have responded then as I respond now: Otaduy simply *asserts* the non-obligation of continence. He does not *demonstrate* it against the plain text of Canon 277 § 1 or against the ancient Western tradition that held, without exception, all married clerics to be bound by continence. Indeed, Otaduy's reading of Canon 277 § 1 forces him to "adapt" the express reiteration of the *continence* obligation found in Canon 277 § 2 to fit his opinion about § 1, rather than conform-

(1993/1995), Heid (1997/2000), Keefe (1998), and McGovern (1998). Those works are cited in full at: http://www.canonlaw.info/a_deacons.htm.

⁶ Although not expressly speaking to deacons, *Lumen gentium* 42 does present continence in terms that a married deacon, and his wife, could appreciate: "perfect continence, out of desire for the kingdom of heaven, has always been held in particular honor in the Church. The reason for this was and is that perfect continence for the love of God is an incentive to charity, and is certainly a particular source of spiritual fecundity in the world."

⁷ 1917 CIC 132. § 1. Clerics constituted in major orders are prohibited from marriage and are bound by the obligation of observing chastity, so that those sinning against this are sacrilegious, with due regard for the prescription of Canon 214 § 1.

⁸ I would offer a similar response to Woestman's suggestion that conciliar or post-conciliar use of the phrase "*in matrimonio viventibus*" (living in marriage) to describe 'clerics who are married' suffices to reverse many centuries of unanimously recognized legal obligation. Such would be, if nothing else, quite an interpretational burden to hang from a present active participle.

⁹ See Jorge de Otaduy, commentary on Canon 277, in E. Caparros, et al., ed., *Exegetical Commentary on the Code of Canon Law* (Midwest Theological Forum and Wilson & Lafleur, 2004) II/1:349.

ing his opinion on both paragraphs to suit the plain text of the law. My position, in contrast, requires no manipulation of either provision within Canon 277.

Finally, I think, contrary to Woestman, that the obligation of continence for deacons (and *a fortiori* priests) is stated clearly, first in 1917 CIC 132, incorporated by reference into Paul VI's ap. lit. *Sacrum diaconatus ordinem* (1967),¹⁰ whence into Canon 277 of the 1983 Code.

[4] Woestman acknowledges here, as he has before,¹¹ that the text of Canon 277 does *not* exempt married clergy from the obligation of perfect and perpetual continence. Again, this is a remarkable concession from one who holds that continence is not obligatory for all clerics. But, Woestman goes on to suggest that continence is “excluded by the circumstances and the whole context in which the law was written.” My discomfort with implicit revocation of ancient obligations against the plain text of the law and against unbroken historical development persists.

As for the canonists whom Woestman suggests shared his position in the past, I have commented in several places against this claim, but two points may be repeated: first, widespread *inadvertence* to the obligation of continence should probably not be construed as meaning anything, but, if it is to be construed as meaning something, it should be construed as widespread *acceptance* of an obligation whose existence was unquestioned; second, a number of other canonists (e.g., Provost and Coriden) *do* admit that the obligation of continence *survived* into the 1983 Code, and, unable to avoid the import of Canon 277, they use *other* arguments (which I have addressed elsewhere) to attempt to defeat the obligation. Peters, *Studia Canonica*, 152 and 174-177.

[5] Advocates of the obligation of perfect and perpetual continence for all Western married clerics and their wives need not accept a picture of John Paul II as a stealth Legislator who, when as a bishop he voted in 1964 to restore the diaconate as a permanent rank of Orders,¹² was plotting to bide his time until he could be elected pope, just to surprise clerics and their wives with a dramatic requirement—although Woestman's injection of a bit of levity to this effect is appreciated. In any case, I have discussed at length what I think John Paul II accomplished by *removing* from Canon 277 the express exception for deacons (but not for priests) that had been proposed for them in earlier drafts of the canon.¹³ The burden is not on me to

¹⁰ “Therefore, in the first place, all that is decreed in the [1917] Code of Canon Law about the rights and obligations of deacons, whether these rights and *obligations be common to all clerics*, or proper to deacons—all these, unless some other disposition has been made—we *confirm and declare to be in force also for those who will remain permanently in the diaconate.*” AAS 59 (1967) 698, Vatican trans., emphasis added. See generally Peters, *Studia Canonica* 162.

¹¹ See Peters, *Studia Canonica*, 175-176, highlighting comments that Woestman offered in his treatise *The Sacrament of Orders* (2001).

¹² And *not*, as it is usually described, to restore “the permanent diaconate”, which characterization is a post-conciliar neologism importing problematic thinking into the theology of holy orders. Peters, *Chicago Studies*, 110-112.

¹³ See Peters, *Studia Canonica*, 167-171, and my Brief memorandum of 19/20 February 2011, available on-line at <http://www.canonlaw.info/PDF-MEMO%20on%20277.pdf>.

prove what dropping an exception to a rule means for those were going to be exempted from the rule; rather, the burden is on those who still claim that, despite the loss of the exemption, the rule does not apply to them.

Scholion on Canon 1087

Woestman mentions another scenario that deserves a longer reply.

He posits a widower deacon who petitions Rome for a dispensation from Canon 1087¹⁴ to enable him to enter a new marriage while remaining in ministry. The cleric receives the petitioned dispensation for marriage, but “at the same time [it] ... oblige[s] the deacon and his new wife ‘to observe perfect and permanent continence.’” We are to take such a scenario, I suppose, as something approaching unthinkable.

But is it?

Consider: Why does a widower deacon need a dispensation to marry again? Because he labors under an impediment against marriage per Canon 1087. Why does he labor under that impediment? Because he freely sought, duly prepared for, consented to, and received sacred ordination. During the lengthy period of preparation for ordination, he and his wife were expressly informed that reception of holy orders would mean that he was incapable of entering another marriage for the rest of his life.¹⁵

Now, is a widower deacon *owed* a dispensation from celibacy to permit him a second marriage? No.¹⁶ Would the granting of a dispensation therefore be a favor to him? Yes. And if these things are so, would it be unjust to grant the favor—indeed, the very favor petitioned, namely, the ability to enter *marriage*—upon a condition which does not eviscerate the favor itself? I cannot see how. So, the question squarely presents itself: *Does* expecting continence of a remarried cleric and his new wife eviscerate the favor of the dispensation to allow the cleric to marry at all?

Surely no Catholic labors under the misunderstanding that sexual relations, even consummation, are necessary for the validity and sacramentality of Christian marriage. All of the benefits

¹⁴ 1983 CIC 1087. Those in sacred orders invalidly attempt marriage.

¹⁵ While explanation of the *continence* obligation attached to holy orders is virtually absent from formation programs for married men and their wives, the obligation of *celibacy* is regularly explained to them. Note, that the minimalistic requirements for dispensing widower deacons from celibacy, briefly in place from 1997 to 2005, have been replaced with stricter norms: <http://www.bostondiaconate.org/News/CircularLetter0603.pdf>.

¹⁶ While I deny that a dispensation from celibacy is “owed” to a widower deacon with small children, I recognize the difficulties such cases occasion. Hard cases, however, make bad law. I have suggested, on these and other grounds, a solution to the problem of widower deacons being left with small children: raise the age required for admitting married men to the diaconate from 35 to 50 (or whatever age is necessary to be sure that minor children are not in the home). Peters, *Chicago Studies*, 114.

of *marriage*—intrinsic indissolubility, sacramental graces, spousal companionship and practical assistance,¹⁷ civil and social stability, and so on—all of these are accorded the deacon and his new wife consequent to a dispensation from celibacy. Only one thing, the right to sexual relations, is withheld,¹⁸ but then, *that* right was, or should have been, mutually surrendered by the deacon and his first wife upon admission to holy orders anyway.

Conclusion

As noted above, Woestman did not pen his advisory opinion in reply to my articles, and so I have reacted herein primarily to *his* observations. I think I have answered them reasonably completely in the confines of a memorandum, but I would be happy to expand on my remarks as others might find useful.

At some point, however, I believe it incumbent upon those who disagree with my position on Canon 277 to deal directly with the extensive arguments that I and others have offered regarding the obligation of perfect and perpetual continence for clerics in the Western Church. To date, no one has taken on those arguments in any systematic way, and only a very few, such as Woestman, have even offered different *arguments*.

If my interpretation of Canon 277 is correct, then preparations for what I called above Option One need to be undertaken; if my interpretation of Canon 277 is partially correct, then preparations for Options Two or Three needs to begin. And if my interpretation of Canon 277 is wrong, then, of course, no changes whatsoever in the expectations, formation, or conduct of Western married clerics and their wives will be required, and Western discipline for married clerics, after centuries of holding to a far stricter norm, would have ceased, almost overnight, and without hierarchic articulation, to attain even to the East's post-Trullan minimalist expectations for married clergy in this regard.

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¹⁷ Recall that the factor *prompting* the petition for dispensation in the first place is supposed to be the need of small children for a mother. But must a mother to step-children have sex with their father in order to fulfill her role as a step-mother? I am not asking whether sexual relations between a husband and his second wife are normal, or good, or expected. I grant those things. I am asking whether sexual relations are necessary for a second wife to mother her husband's children? If not, how can the failure to engage in such relations defeat the purpose for which the dispensation to marriage was granted at all?

¹⁸ Strictly speaking, a second thing is withheld from a non-consummated Christian marriage, namely, "extrinsic indissolubility" per Canon 1056. But, in short, this simply means that the pope, *and only the pope*, and not the couple themselves or any other authority, could dissolve such a marriage. The chances of a pope actually dissolving such a marriage are, of course, vanishingly small.