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The Doctrine of Marriage in the Theologians of Lutheran Orthodoxy

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THE purpose of this article is to survey the teaching of the orthodox Lutheran theologians on marriage from the end of the sixteenth into the first third of the eighteenth century, with particular reference to the influence of these theologians on the traditional doctrine of The Lutheran Church — Missouri Synod.

In general, the orthodox theologians systematize, expand, apply, and fortify with additional Scriptural support the doctrinal tradition on marriage which they inherited, particularly where a sharp polemic issue divided the Lutherans from the Roman Catholics, the Calvinists, or the sectarians. With the passage of time, however, some differences of opinion and interpretation appear.

We should expect this. During the century and a half under consideration conditions changed greatly in Lutheran Europe. The theologians were not theorizing in a political and social vacuum. Their discussions were thoroughly existential. They were consciously applying not only God's Word, but the principles of "right reason," of natural law, of imperial legislation, of provincial statutes, and of local customs to the immediate and current problems of marriage and family life.[1] They wrote in the awareness that "there is a mighty difference between God's Law and local legislation."[2] They appealed in support of their opinions not only to the Sacred Scriptures, but to "all human reason,"[3] to other theologians (including non-Lutheran theologians), to the illustrious fathers and doctors of the Church, to the authorities of classic antiquity, to the

great commentators on Roman, Imperial, and canon law, and to the ever-increasing number of distinguished Evangelical jurisconsults. In this situation it is not always easy, or even possible, to determine how much the Sacred Scriptures and how much the more environmental factors enter into a given decision or opinion.

As circumstances require, and not always consistently, they cite the traditional legal maxims and vulgar axioms. "Consent, not intercourse, makes a marriage," which they are careful to define as a *jurist's,* not primarily a theological, maxim,[4] is one. "Decisions should be based, not on examples, but on rules" [5] is another. "If after betrothal a condition supervenes which, if it had existed at the time of betrothal, the bride would never have consented to marriage, then the judge ought to be more disposed to break the betrothal," [6] is a third. "Moses is not our government in Germany, but the Jews' in the land of Canaan," [7] and, "In contracting marriage one must consider not only what is licit, but what is decent and seemly," [8] are others. We could cite more. Yet the theologians rarely rest their proof on such pat assertions.

The opinions and decisions which the theological faculties delivered in concrete cases submitted to them are sometimes a more accurate mirror of the opinions of the theologians of the period than their systematic, abstract, often philosophical presentations of marriage in their formal handbooks of dogmatics, even though the opinions tended to draw much of their documentation from the dogmatics. For the most part these collections of opinions and decisions are frankly partisan and tendential. They exist to furnish orthodox consistories and faculties with precedents.[9]

Two late orthodox Lutheran dogmaticians exerted a strong direct influence upon The Lutheran Church — Missouri Synod during its formative period, inasmuch as their compendia were for many years the textbooks in dogmatics at Concordia Theological Seminary in St. Louis. The first is Christian Loeber (1683—1747), whose dogmatics the Venerable Carl Ferdinand William Walther had reprinted without change from the original edition [10] for use in this country.[11] Loeber devotes a little over two pages (590 to 592) in this work to the discussion of marriage and the family. The second was John William Baier (1647—1695), whose *Compend of Positive Theology* Walther completely re-edited [12] and

amplified — somewhat selectively — by the addition of extensive illustrative material from both later and earlier authors.

Two basic principles characterize the orthodox theologians' approach to the problems of marriage.

The first is *that marriage is always to be discussed as a divinely instituted order in the Church.*[13] The dogmaticians are careful students of the Scriptures. They are determined to apply the principles which their exegetical studies have furnished to the problems of marriage. But there are evidences of a thoroughly human uncertainty about the correctness with which they have resolved the conflicts that arise in specific issues and in specific cases.

The second principle is a corollary of the first: *Theologians must always exert their influence on the side of matrimony, never against it.* This resulted in a tendency for the opinions of theological faculties to be more severe and less considerate of human values than the opinions and decisions of the law faculties of the same universities, since the jurists did not feel themselves quite so securely bound to this principle.[14]

Because the orthodox theologians are so much a product of *their* environment, and because *we* follow different legal principles, lack a canon law on marriage, and have a different sociological background, it is not always possible for us to apply every conclusion of theirs to the Church of the Augsburg Confession on this continent in 1953.

The Forbidden Degrees

The forbidden degrees of relationship in betrothal and marriage set up in Leviticus 18 and 20 are obligatory on all people at all times.[15] The forbidden degrees of relationship apply not only to persons, but also to grades.[16]

The theologians summarize the provisions of these chapters in three rules:[17]

1. In the direct line of ascent and descent, God forbids marriages in all grades;

2. In the collateral line, God forbids marriages in the first grade of the unequal line and in the second grade of the unequal line;

3. Prohibitions that apply in consanguinity apply also in affinity.

Affinity is established not only by marriage, but also by betrothal

(Gen. 19:8, 14)[18] and illicit intercourse.[19] As a result the theologians seriously argue the following case: If after marriage a man has intercourse with his wife's mother or sister or other relative whom God's law forbids him to touch, must he thereafter flee the embrace of his own wife as incestuous? Some said No; others, on the basis of Lev. 20:14, said Yes.[20] Affinity affects only the person who marries into a relationship, not his relatives; two brothers can marry two sisters, or a father and a son can marry a mother and her daughter.[21] Deut. 27:22 proves that half brothers and half sisters may not marry.[22]

A man cannot marry his deceased wife's sister (Lev. 18:16-18; 20:21). So the orthodox theologians[23] rule consistently, although not without some vigorous dissent from interested princes, jurists, and more liberal theologians.[24]

Similarly, the orthodox theologians held that a man cannot marry his deceased wife's niece[25] or his deceased nephew's widow.[26] On marriage with a deceased brother's betrothed there was a difference of opinion.[27]

Some orthodox theologians held that all marriages within the forbidden grades were to be dissolved. Others conceded that where the Mosaic legislation attaches the death penalty, marriages contracted within the forbidden degrees of relationship are incestuous and nullities, but asserted that where the Mosaic legislation merely denounced "childlessness" as a penalty upon such unions, marriages already contracted might be tolerated.[28] Such toleration was not a dispensation; all agreed that marriages within the forbidden degrees admitted no dispensation.

Affinity arising from legal relationships (adoption, guardianship, etc.) and spiritual affinity (sponsor-godchild) are not diriment impediments.[29]

God's Law does not forbid marriages in the second and third grade of consanguinity in the equal line. There is no evidence that they have baleful consequences either eugenically or from the standpoint of domestic felicity.[30] Technically they are permissible and dispensable. But the orthodox theologians and consistories almost unanimously regard such marriages as undesirable, at least in the second grade. Since this grade is next to one for-

bidden by God, Christians should abstain from such marriages (1 Corinthians 9).[31]

A masoretic tendency to build a fence about the Law likewise reappears in the orthodox opinion on the propriety of marriage in the second (to a lesser degree, in the third) kind *(genus)* of affinity.[32] The earlier theologians concede such marriages without reluctance.[33] But rigor soon replaces this liberality.[34]

Parental Consent

The consent of parents is *ordinarily*[35] essential to a valid betrothal or marriage (Gen. 21:21; 24:3, 4; 28:1; 29:19; 34:4, 16; 38:6; Ex. 20:12; 21:9, 10; 22:16, 17, 29; 34:16; Num. 30:4-6; Deut. 5:16; 7:3; 22:29; Judg. 1:12, 13; 11:39; 12:9; 14:2, 3; 21:1; 2 Sam. 13:13; Jer. 29:6; Tobit 6:13 Vulgate; 7:15; Ecclus. 7:27; Matt. 15:4; 1 Cor. 7:36, 38; Eph. 6:2; Col. 3:20).[36] It is not merely a matter of *propriety,* but of ordinary *necessity* by divine law.[37]

Without parental consent, betrothals are neither binding nor valid,[38] and marriages are illegitimate,[39] inefficacious, and invalid.[40] The consent even of an impious, unrighteous, cruel, drunken, spendthrift father is necessary (Gen. 29:19; 1 Peter 2:18).[41]

When both parents are alive, the consent of the father ordinarily cancels out the dissent of the mother,[42] but in extraordinary cases the will of the mother supersedes the will of the father, "if the mother is an Abigail and the father a Nabal."[43] The mother's consent is not as necessary as the father's, but it is required when the father is not available.[44]

The obligation to obtain parental consent continues throughout the lifetime of the parent(s).[45]

Where both parents are dead, the consent of the grandparents, if alive, replaces that of the parents.[46] Some held that, in the absence of a positive law to the contrary,[47] the consent of tutors, guardians, and collateral relatives is not absolutely necessary, but should be secured out of consideration for them and for public opinion.[48] Others used the Fourth Commandment to make the consent of those who succeed to the parental office (tutors, guardians, next-of-kin, relatives) essential when the parents were dead.[49]

Parents may give their consent expressly or tacitly (Num. 30:

4, 5).[50] Parental consent may be general (at least where children have reached their majority); it should be at least special (Gen. 24:3; 28:1) or, better still, individual.[51] Once parents have given it, they cannot withdraw it without grave cause.[52]

Parental consent is not *absolutely* necessary. Other agencies, such as the consistory[53] or the local political authorities,[54] can supply it.

Parents are not to abuse their authority, or deny consent without good cause. They can be required to give reasons for withholding consent (but a clandestine betrothal is in itself reason enough),[55] and they cannot permanently prevent their children from marrying (Ex. 34:16; Jer. 29:6; 1 Cor. 7:2, 36).[56] Likewise, parents cannot compel their children to marry against the latter's will (Gen. 24:58; Eph. 6:4; Col. 3:21).[57] On the other hand, parents can break clandestine betrothals, even when oath bound, especially if they are contrary to propriety and public morals,[58] as long as the matter is *res integra*. If intercourse has followed, some hold that parents must tolerate the marriage,[59] but others assert the parental right to invalidate the betrothal even in such a case (Ex. 22:17).[60]

Disparity of Religion and Cult

Disparity of religion and cult is undesirable, dangerous (Deut. 7:3; 1 Kings 11:1; 1 Cor. 7:39; 2 Cor. 6:14; Titus 3:10; 2 John 10), and, in a sense, illicit. It is an impediment to the contracting of a betrothal or marriage, but it is not a diriment impediment to a betrothal or marriage already contracted or consummated (1 Cor. 7:13, 16; 1 Peter 3:1).[61]

Identity of religion is essential to the safety of a marriage.[62] In the Holy Roman Empire marriages among the religions tolerated by the Peace of Westphalia could not be prohibited, but they are to be discouraged.[63]

In mixed marriages, when they cannot be avoided, the interests of orthodoxy must be fully safeguarded. A Roman Catholic or Calvinist spouse has to promise and swear that "he will not only not solicit the adherent of the purer [i.e., the Lutheran] religion to embrace his own or to take upon himself privately to practice (the heretical) religion, but also permit the children given by God to such a marriage to be initiated into the Evangelical [i.e., Lutheran] religion and to be reared therein."[64]

BETROTHAL

The existence of betrothal as an institution is justified by Scriptural example, by the dignity of marriage, the requirements of public decency, and the necessity of discovering whether possibly some defect in the marriage exists.[65]

Betrothal *(sponsalia)* is of two kinds. A betrothal *de praesenti* cannot be dissolved.[66] A betrothal *de futuro* is conditional and does not establish an efficacious obligation under the Sixth Commandment. Violation of a betrothal *de futuro* is a sin against the Eighth Commandment. Intercourse converts a betrothal *de futuro* into a betrothal *de praesenti*.[67]

The theologians carefully distinguish between mere *tractatus sponsalitii* (betrothal negotiations) — from which either party can withdraw without obligation, dishonor, or sin — and actual betrothals.[68]

A betrothal is a mutual and solemn promise of future nuptials; in God's sight the betrothed persons are indissolubly bound to one another in such a way that ordinarily a violation of the betrothal bond is adultery (Gen. 19:8, 14; 29:21; Deut. 20:7; 22:23, 24; Matt. 1:20; Luke 1:27).[69]

Much is made of the invocation of the Holy Trinity at formal betrothals.[70]

A valid betrothal requires the consent of the contracting parties. The consent should be expressed in words; but some theologians would be content if the contracting parties expressed consent by visible signs, such as the acceptance of a betrothal token, or the joining of the right hands, or even, if the father (but not tutors, brothers, or relatives) arranged the betrothal, by being present and consenting tacitly.[71]

At least two respectable witnesses ought to be present at betrothals, but clandestine betrothals (i.e., without witnesses) are valid, especially if confirmed with an oath and if the contracting parties are *sui iuris* and have not been publicly betrothed to someone else.[72]

Conditional betrothals are valid if the condition does not militate against the purpose of matrimony. A condition that is unjust, unreasonable, infamous, or contrary to public morality is regarded

as an invalid *condition,* and the consent is deemed to be unconditionally valid.[73]

The consistory is to pronounce the party who refuses without sufficient cause to keep a betrothal *de praesenti* a malicious deserter; is to forbid him to marry during the lifetime of the other party unless dispensed to marry outside the country; and is to pronounce the innocent party free of the obligation to marry the guilty party. It is to urge the innocent party not to marry; but if the innocent party cannot live chastely without marriage, marriage cannot be forbidden.[74]

Betrothals cannot be broken by mutual consent. Nor can either party to the betrothal break it unilaterally even for cause. But consistories or marriage courts can dissolve betrothals[75] if the betrothals are nullities because of lack of consent, if one of the parties commits adultery[76] or malicious desertion, or if certain other, variously defined, contingencies take place.[77]

Betrothals are nullities if diriment error of name or person or quality, manifest deceit, drunkenness, levity, insanity, fear,[78] or violence impeded or vitiated the just, free, full, and sincere consent of either party.[79]

The theologians generally hold error as to the virginity of the woman[80] to be a "substantial" error.[81] If a man believes the woman to whom he betroths himself is a virgin, and it becomes clear that she is not, the matrimonial court may urgently counsel the man to marry the woman, but it cannot compel him to do so.[82]

Various theologians list other grounds for which a consistory can dissolve a betrothal:[83]

1. Wittingly taking a medicine designed to produce sterility, since procreation of children is the chief end of marriage (Gen. 1:27, 28; Tobit 8:7-9; 1 Tim. 2:15).[84]

2. Voluntary and malicious homicide (Gen. 9:6; Num. 35:31), theft,[85] sorcery,[86] lese majesty, plots against the other's life, and similar atrocious crimes.

3. Demonstrated inability to procreate, or an accident making the other party unfit for marriage, such as supervenient impotence, frigidity, paralysis of the reproductive organs, etc.

4. Unremitting insanity or mental illness.[87]

5. Leprosy (Lev. 13:46), elephantiasis, epilepsy, paralysis,

syphilis *(gallica scabies, die Franzosen),* and other incurable, contagious, and repulsive diseases.[88]

6. Notable deformity (loss of nose, an eye, amputation of a limb, and so forth).

7. Change of status (as when one party was accounted *civiliter mortuus* and branded as infamous because of commission of a crime).

8. Extended, unexplained, uncondoned, and unwarranted absence (for three or five years, or even less).[89]

If a betrothal has been contracted contrary to law (say in Denmark, which forbade marriages between nobles and commoners), or if, for example, bad faith entered into the contract, the marriage court, where intercourse has not taken place, may apply the principle of leniency *(epikeia)* in dissolving the betrothal.[90]

A betrothed person cannot seek dissolution of a betrothal because he or she discovers a vicious character trait in the other party.[91]

The theologians emphasize that betrothal is not to be equated with marriage. The distinction is Scriptural. Betrothal and marriage differ in name, definition, point of time, proximate efficient cause, matter, form, purpose, subject, effect, and the possibility and mode of dissolution.[92] It is the difference between μνηστεύω and γαμέω, between a promise and its fulfillment, between a contract and the discharge of the obligation, between the affection of a betrothed couple and the affection of husband and wife, between a wife promised and a wife given, between marriage *quoad* οὐσίαν *per sponsalia ratum* and marriage *per usum coniugalem consummatum.*[93] Betrothal establishes an obligation to a future marriage;[94] it becomes marriage as much by nuptial consent as by intercourse.[95]

It is argued that the passages from the Sacred Scriptures conventionally used to prove the identity of betrothal and marriage (Gen. 29:21; Deut. 22:24; Matt. 1:20) are not absolutely decisive; we must consider the difference in social conditions. The Israelites called the affianced bride a wife not because there was no difference between matrimony begun and matrimony consummated, but because she was a wife hoped for, contracted for, promised and future. We cannot say simply that betrothal has all the force of marriage

and therefore can be dissolved only for causes for which marriage can be dissolved; "some kind of difference certainly seems to have intervened between the betrothals of the Israelite people and those contracted according to our customs." [96]

MARRIAGE

Marriage is an indissoluble association, or having-been-joined-together, of one man and one woman, in accordance with the divine institution, born of the mutual consent of both parties, for the purpose of procreating offspring and affording mutual help in life.[97]

The necessity for the consent of the contracting parties is resourcefully "proved" from (1) the original institution (Gen. 2:24; cp. Deut. 21:11); (2) obvious ratiocination (Boethius, *De consolatione philosophiae,* IV, 2); (3) the information derived from approved examples (Gen. 24:57; 28:2; Judg. 14:5; Tobit 7:8, 15); (4) the provisions of canon and civil law; (5) the disadvantages of the contrary; and (6) the terms of the antitype (Ps. 45:10, 11).[98]

Intercourse is not of the essence of marriage, and marriage can exist before and without intercourse.[99]

Various classes of persons are forbidden to marry:[100]

1. Persons under the age of puberty (fourteen in the case of males, twelve in the case of females).

2. Eunuchs, castrated and impotent persons.[101]

3. On the marriage of the aged past the age of procreation, a difference of opinion exists. Since they cannot procreate, some would classify them with the impotent;[102] other theologians insist that they can properly be allowed to marry, even though they cannot bear children, in view of passages like Gen. 2:18; 1 Kings 1:1-3; Eccles. 4:9, 10; and 1 Cor. 7:2,9.[103]

4. Lepers (Lev. 13:46), epileptics, syphilitics, and others suffering from similar contagious, offensive, and incurable diseases.[104]

5. Morons *(fatui)* and those suffering from unremitting insanity.[105]

In the case of divorced persons, the right of the innocent party to remarry should be withheld for a time, say six months or a year.[106] The guilty party should be forbidden or at least counseled not to remarry;[107] in any case he should be allowed to remarry only with

the express permission of the political and church authorities and only after he has demonstrated his repentance over a considerable period of time. In such an instance he should not ordinarily be permitted to remarry before the innocent party does, since a reconciliation is always possible. He may not properly marry his quondam partner in adultery,[108] and he must transfer his domicile and place of business elsewhere.[109]

Marriage is not merely a civil contract,[110] notwithstanding blessed Martin Luther's dictum "Marriage is a purely civil and secular thing." [111]

While it is not *sacramentum* in the narrow sense of the term, marriage is *sacram* (Eph. 5:23; 1 Cor. 11:3, 4).[112]

The ecclesiastical ceremony *(benedictio sacerdotalis)* [113] is part of the *bene esse* but not of the *necesse* of marriage.[114] The ecclesiastical ceremony is of divine origin (Gen. 1:28; 24:60; Ruth 4:11; Tobit 9:9-11; 1 Cor. 7:39).[115] In the Lutheran Church only marriages which had received such sacerdotal blessing were deemed ecclesiastically legitimate.[116]

The ceremony is ordinarily to take place in church, in the presence of the couple's relatives and friends.[117]

The proper minister of the priestly blessing is the pastor of the bride. No other pastor may solemnize the marriage without the ordinary's consent.[118]

Previous inquiry by the pastor is to cover possible violation of prohibited degrees, the licitness and validity of the betrothal, the religious affiliation of both parties, adequacy of parental consent, proof of death of the former spouse in the case of a widow(er), absence of another marriage obligation, and proof of singleness in the case of persons from outside the community.[119]

The reading of the banns on three separate Sundays at divine service in the parishes of both the bride and the groom is to precede the ceremony unless dispensed with.[120]

A Lutheran pastor's competence to solemnize marriages is not absolutely limited to his coreligionists.[121]

Solemnization of the marriages of Lutherans by heretical ministers of religion is ordinarily strongly disapproved.[122]

Sex relations in marriage are primarily for conception. Other accidental aspects, in as far as they are discussed, are not stressed.

But sex relations are not intrinsically sinful, and intercourse for the sake of procreation is not the only licit and decent kind (Prov. 5:18; 1 Cor. 7:2, 5, 7).[123]

Intercourse with a menstruating woman is wrong (Lev. 15:24; 18:19; 20:18; Ezek. 18:6; 22:10), although we cannot prove that it is a mortal sin in the New Testament.[124]

It is not wrong for a husband to have intercourse with his pregnant wife unless there is danger of a miscarriage.[125]

A couple may not vow perpetual continence by mutual consent.[126]

Impotence resulting from the malice of men, accident, or illness is to be borne as a visitation from God (Is. 56:4, 5; Ecclus. 30:21; Matt. 10:29).[127]

Birth control as such is not extensively discussed, but certain birth control practices are condemned both expressly[128] and by implication.[129] The use of abortifacients[130] and of medicines designed to produce sterility is condemned.[131]

Although the procreation of children is frequently defined as the primary purpose of matrimony (Gen. 1:27, 28; Tobit 8:9; 1 Tim. 2:15),[132] other ends are sometimes put first, as when Quenstedt defines the ultimate and highest end of marriage as the glory of God.[133]

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FOOTNOTES

1. See, for instance, Tilemann Hesshusius, *Von Eheverloebnissen und verbotenen Gradibus* (Erfurt, 1584), folio A-iij.
2. Conrad Dieterich, *Consilia und Bedencken . . . ueber gewisse und hochwichtige Casus und Faelle,* ed. Helwig Dieterich (Nuernberg, 1689), p. 95.
3. Hesshusius, *op. cit.,* folio D-iij.
4. *"Nuptias non concubitus sed consensus facit"* (John Gerhard, *"De coniugio," Loci Theologici,* XXV, ed. Edward Preuss [Berlin, 1869], VII, par. 100, p. 69). Hesshusius (*op. cit.,* folio E-iv) quotes a similar maxim: *"Consensus facit matrimonium, non nuptiae* (consent, not the wedding ceremony, makes a marriage)."
5. *"Non exemplis, sed regulis iudicandum est"* (Louis Dunte, *Decisiones mille et sex casuum conscientiae* [3d ed.; Ratzeburg, 1664], pp. 826—27). Cp. Gal. 6:10.
6. *"Si post sponsalia talis casus supervenit, qui si tempore sponsaliorum affuisset, sponsa in matrimonium nunquam consensisset, tunc iudex ad dirimenda sponsalia propensiorem esse debet"* (George Dedekennus, *Thesaurus consiliorum et decisionum,* ed. John Ernest Gerhard [Jena, 1671] III, 819).
7. *"Moses non nostrum est magistratus in Germania, sed Iudaeorum in terra Canaan"* (*ibid.,* p. 87).

8. *"In contrahendis nuptiis non solum quod liceat sed quod deceat et honestum sit spectandum est."* 1 Thess. 5:22 and 1 Cor. 10:27 are cited to bolster the principle (*Allerhand auserlesene rare und curioese Theologische Bedencken von den Heyrathen mit der Verstorbenen Frauen-Schwester / Schwester-Tochter / Brudern Wittwe / Brudern-Tochter u. d. m., Zusammen getragen von D. I. P. O. A. F.* [Frankfurt-Leipzig, 1733], p. 17).
9. Dedekennus-Gerhard expressly avoids contradictory (i. e., unorthodox) opinions on principle (*op. cit.,* III, 129) and carefully annotates decisions which actually or apparently diverge from the orthodox norm.
10. *Die Lehre der Wahrheit zur Gottseligkeit, das ist, Theologia positiva, deutsch* (Altenburg, 1711).
11. Christian Loeber, *Evangelisch-Lutherische Dogmatik* (St. Louis: Dette, 1872).
12. Carl Ferdinand William Walther, *Johannis Gulielmi Baieri Compendium Theologiae Positivae, adiectis notis amplioribus, quibus doctrina orthodoxa . . . explicatur atque ex Scriptura Sacra eique innixis rationibus theologicis confirmatur* (St. Louis: Concordia-Verlag, 1879).
13. Gerhard, *op. cit.,* VII, par. 1, p. 1.
14. A particularly striking example is provided by a betrothal case involving a girl under the age of 15, submitted to the faculties of Law and Theology at the University of Rostock in 1603 and reported in Dedekennus-Gerhard, *op. cit.,* III, 49, 50. We note in general a growing difference of opinion between the jurists and the theologians throughout this period. For example, Brunnemann (1681) reports a case in which a widower wanted to marry his deceased wife's niece, to whom he had publicly betrothed himself; the theological faculty opinion was absolutely negative, but the law faculty held that a dispensation to marry was possible, subject to a fine (*Allerhand . . . Bedencken,* pp. 194—215). We can account for this difference in part by the rivalry and emulation between the faculties of these two disciplines at the various universities, and in part by the fact that the law faculties' sense of the obligation to perpetuate the past diminished more rapidly.
15. Dedekennus-Gerhard, *op. cit.,* III, 220—98, 825—38; Gerhard, *op. cit.,* VII, pars. 258—324, pp. 154—90; Caspar Erasmus (Jesper Rasmussen) Brochmand, *Universae Theologiae Systema* (Ulm: 1638), pp. 1478—79, 1505—08; John Conrad Dannhauer, *Theologia Casualis* (Greifswald, 1706), pp. 271, 272; Solomon Deyling, *Institutiones Prudentiae Pastoralis* (Leipzig, 1734); Dieterich, *op. cit.,* pp. 141—223; David Hollaz, *Examen Theologicum Acroamaticum* (Leipzig, 1741), pp. 1376—1380; Leonard Hutter, *Compendium Locorum Theologicorum,* ed. Daniel Janus (Leipzig, 1747), p. 626; John Andrew Quenstedt, *Theologia Didactico-Polemica* (Wittenberg, 1691), IV, 469—74. Hesshusius calls Leviticus 18 the "source and fountain of all legislation on marriage vows and matrimony" (*op. cit.,* folio A-iv). In a theological opinion rendered in 1681, Philip James Spener held that the prohibitions of Leviticus 18 belonged not to *natural* Moral Law, but to *positive* Moral Law (*Allerhand . . . Bedencken,* p. 68). Christian August Crusius, *Kurzer Begriff der Moraltheologie* (Leipzig, 1772), II, 1624, relates Lev. 18:6-18 to the law of love for one's neighbor.
16. So also the famed jurist Benedict Carpzov, in his *Iurisprudentia Ecclesiastica,* II, Tit. VI, Def. XCII (cited in *Allerhand . . . Bedencken,* pp. 17, 18). Gerhard, *op. cit.,* VII, pars. 275—77, pp. 161—63 (who quotes Chemnitz, Brenz, Selneccer, Osiander, and Bidembach); Brochmand, *op. cit.,* p. 1479; Quenstedt, *op. cit.,* IV, 470, 471; Valentine Ernest Loescher, *Unschuldige*

Nachrichten (1724), p. 320ff., in Baier-Walther, *op. cit.*, III, 758, 759. Crusius limited the extension only to *equivalent* cases, where *equivalent* reasons apply (*op. cit.*, II, 1641—43).

17. Gerhard, *op. cit.*, VII, par. 275, p. 161; George Koenig, *Casus conscientiae* (Nuremberg, 1654), pp. 775—93.
18. Hesshusius cites explicit instances: A son may not marry his father's betrothed, who would have become his stepmother, or the mother of the girl with whom he had publicly betrothed himself, even though he had neither married nor had intercourse with the daughter; a girl cannot marry either the father of her betrothed, who would have become her father-in-law, or her mother's betrothed, who would have become her stepfather (*op. cit.*, folios D-j to D-ij). Brochmand, *op. cit.*, p. 1509; Gerhard, *op. cit.*, VII, par. 155, pp. 94, 95. Deyling held that a man's marriage to the sister of his late betrothed was dispensable (*op. cit.*, pp. 535, 536). He also differentiates "perfect" affinity (the result of intercourse) from "imperfect" affinity (the result of betrothal) (*ibid.*, pp. 531, 532).
19. Dedekennus-Gerhard, *op. cit.*, III, 289, 290; Hesshusius, *op. cit.*, folios E-iii/iv; Dieterich, *op. cit.*, p. 119; Gerhard, *op. cit.*, VII, pars. 282, 378 to 380, pp. 165, 221—23. Gerhard holds that a marriage contracted in ignorance of affinity arising from illicit intercourse is not to be dissolved. The Dresden Consistory ruled that a man could not marry a woman with whose niece he had had illicit intercourse (Dunte, *op. cit.*, pp. 836, 837).
20. Brochmand, *op. cit.*, pp. 1522, 1523.
21. Hesshusius, *op. cit.*, folio F-j; John Musaeus, *De consanguinitate et affinitate commentatio*, ed. Immanuel Proeleus (Leipzig: no date), p. 42.
22. Hesshusius, *op. cit.*, folio B-iv; Brochmand, *op. cit.*, p. 1512.
23. Dedekennus-Gerhard, *op. cit.*, pp. 243—53. *Allerhand . . . Bedencken* (pp. 17, 18) cites the ruling of Benedict Carpzov, in his *Iurisprudentia Ecclesiastica, loc., cit.*, four rulings of the Supreme Consistory from 1607 to 1627 (pp. 18, 19), and quotes the jurist Theodore Reinking as declaring that such a marriage was forbidden to a prince of the empire in 1625 (p. 21). The Wittenberg Consistory divorced a widower who married his deceased wife's sister and allowed both parties to marry elsewhere (Dunte, *op. cit.*, p. 823). Balduin branded such marriages as incestuous and intolerable even after consummation (*Casus conscientiae*, p. 1217). The Leipzig Consistory (1647, 1650), *General-Superintendens* Walther of Zelle (1656), the Hamburg Ministerium (1651, 1657), and the theological faculty of the University of Jena of the period handed down opinions to the same effect (Dedekennus-Gerhard, *op. cit.*, III, 824—31). The Meissen Consistory prohibited a widower from marrying his deceased wife's half sister (Dunte, *op. cit.*, p. 832).
24. Thus in 1630 the law faculty of the University of Tuebingen described intercourse with a deceased wife's unmarried sister in anticipation of future marriage as not really incest and declared that marriage between such persons was not forbidden by divine or natural law and was dispensable (*Allerhand . . . Bedencken*, pp. 151—54). In 1652 the law faculty of the University of Rinteln ruled that according to the Word of God an Evangelical prince might marry his deceased wife's sister and could dispense his subjects similarly; this began a controversy that became increasingly bitter as it continued and led to the Oettingen Colloquy in 1681. In 1706 the Rev. Dr. John Melchior Goetz, *Superintendens* at Halberstadt, obtained a dispensation from the King of Prussia to marry

his deceased wife's sister; this touched off another controversy (*ibid.*, pp. 247—63). In 1681 Spener, in the course of a long correspondence, declared that a widower cannot with a good conscience marry his deceased wife's sister; however, he would regard such a marriage, once contracted, as *pro rato* (but not *pro recto*), would be unwilling to urge its dissolution, and would counsel the confessor of the couple to absolve them (*ibid.*, pp. 67—90). On May 12, 1706, the theological faculty of the University of Helmstedt held that marriage with a deceased wife's sister was not contrary to divine or natural law, that it is dispensable by the *Summus Episcopus* (i. e., the Prince), and that it may even be desirable in the light of 1 Tim. 5:8 (*ibid.*, pp. 223—26).

25. Deyling, *op. cit.*, pp. 534, 535. So also the Constitutions of Frederick II of Denmark and Norway (Brochmand, *op. cit.*, p. 1510). In 1667 John Mueller of Hamburg declared against such a marriage (Dedekennus-Gerhard, *op. cit.*, III, 840, 841). In 1674 the Leipzig law faculty ruled that marriage in the second degree of affinity of the unequal line admits no dispensation (*Allerhand . . . Bedencken*, pp. 169—72). Ten years earlier (1664) the theological faculty of the University of Jena, while taking a stricter view itself, conceded that a dispensation might be possible in the case of a marriage with a deceased wife's niece (Dedekennus-Gerhard, *op. cit.*, III, 831, 832). In 1691 Lyncker ruled that it is not contrary to divine law for a widower to marry his deceased wife's niece with a dispensation (*Allerhand . . . Bedencken*, pp. 47—60); in 1700 he ruled in the same way on a marriage with a maternal uncle's widow (*ibid.*, pp. 40—47). Crusius held that Lev. 18:14 did *not* forbid marriage with the deceased wife's niece (*op. cit.*, II, 1643). In 1657 the theological faculty of the University of Leipzig had held that marriage with a deceased wife's *step*niece admitted no dispensation (Dedekennus-Gerhard, *op. cit.*, III, pp. 264, 265).

26. On the basis of Lev. 18:14 and 20:20 (Dieterich, *op. cit.*, pp. 112—18).

27. Some, like Brochmand in Denmark (*op. cit.*, p. 1509), said No absolutely. Others took the view of the Consistory of Electoral Saxony, which regarded it as dispensable but undesirable (Dunte, *op. cit.*, p. 832).

28. Deyling, *op. cit.*, p. 538; Baier-Walther, *op. cit.*, III, 770—72. The Dresden Consistory (1585) ruled that marriage to a stepsister's daughter, once consummated, did not have to be dissolved; the jurisconsult Carpzov approved the ruling, but the theologians generally disagreed (Dedekennus-Gerhard, *op. cit.*, III, pp. 264, 265).

29. Hesshusius, *op. cit.*, folio C-iv; Gerhard, *op. cit.*, VII, pars. 364—77, pp. 213—21. Koenig, however, following a number of distinguished Lutheran jurists, held that the *imperial* law on this point forbade marriage between a godfather and a godchild (*op. cit.*, pp. 793—97).

30. Dieterich, *op. cit.*, pp. 104—08.

31. So the Wittenberg theological faculty (Dunte, *op. cit.*, p. 835); Hesshusius, *op. cit.*, folio C-ij. Dannhauer held that such marriages are lawfully permitted only to princes (*op. cit*, p. 273). Dieterich, in a theological opinion, discouraged a couple so related from seeking a dispensation, because (1) theologians hold that such dispensations should be moderate and rare; (2) the grade is next to a grade forbidden by God; (3) dispensations should be sought not rashly or lightly, but only for high, great, considerable, persuasive, equitable, and necessary causes; (4) dispensation should not become dissipation; (5) the law which binds all should not be violated for the convenience of one person; (6) granting such a dispensation without grave cause is a multiple mortal sin. He himself would

not counsel granting such a dispensation, because (1) it runs counter to the salutary statutes we have observed for so many years; (2) this grade is next to one that God forbids; (3) the statute forbids marriage even in the third grade of the equal line; (4) others have vainly sought such a dispensation; (5) such a dispensation would bring our laws into contempt; (6) no high, great, etc., reasons exist. (*Op. cit.*, pp. 121—217.) With reference to the third degree local positive legislation varied (Hesshusius, *op. cit.*, folios C-ij/iv; Dieterich, *op. cit.*, p. 91; Dunte, *op. cit.*, pp. 833, 834, 837; Dedekennus-Gerhard, *op. cit.*, III, 265—80, 838—41).

32. *Ibid.*, pp. 281—89, 842—49. Cases in point are a widower's marriage with his deceased brother-in-law's widow (second kind) or with the widowed second wife of his deceased first wife's brother-in-law (third kind). — Opinions about the value of such "fences" varied. Hesshusius writes: "It is praiseworthy and right that secular Christian governments should forbid marriages in the second grade in the equal line and the third grade in the unequal line for the sake of decency and honor, so that Christians may contract matrimony the more cautiously and hold God's earnest commandment in greater esteem. The government has its authority from God, and Christians are obliged for conscience' sake to obey such laws and precepts as are not contrary to God's Word and natural law. Christian government has the authority to dispense in the case of grades of positive law for grave cause." (*Op. cit.*, folio C-iv; similarly Baier-Walther, *op. cit.*, III, 764.) Spener says of the "fence" that "concerning [it] one might well inquire of the well-intended diligence [which built the fence] whether it had not occasioned more damage than advantage" (*Allerhand . . . Bedencken*, p. 130).

33. Hesshusius, *op. cit.*, folios F-ij/iv.

34. Mentzer argues that a widower cannot marry the widow of his deceased wife's deceased brother, since he could not marry the daughter (Dunte, *op. cit.*, p. 836). Gerhard counsels against the marriage of a widower's son with his second wife's daughter by a previous marriage on the basis of Lev. 18:11 (Dunte, *op. cit.*, p. 835). The Meissen Consistory declares that public decency and the possibility of scandal militate against the marriage of two brothers with a mother and a daughter (Dunte, *op. cit.*, p. 834). Some Church Orders (*Electoral Saxony 1555*, p. 122, for instance) expressly forbade the marriage of a stepfather to a stepson's widow; so also Mentzer, Gerhard, and Brochmand, on the principle *in contrahendis nuptiis non solum quod liceat sed quod deceat et honestum sit spectandum est*, but Benedict Carpzov, John Adam Osiander, and Spener (1691) held such marriages to be dispensable (*Allerhand . . . Bedencken*, pp. 128 to 132). Dieterich, in an opinion (1632) on the marriage of a widow with her deceased sister-in-law's widower, cites the dissent of Mentzer and Gerhard and concludes that such a marriage is to be discouraged as long as the matter is still open; but if the couple is betrothed and they cannot or will not be persuaded to desist, they are to be married with full solemnity (*op. cit.*, pp. 104—12). The theological faculty of the University of Rostock held that a widower could not marry his deceased wife's stepmother on the basis of Lev. 20:14 (Dunte, *op. cit.*, p. 835). Spener, however, held (1678) that marriage to a brother's sister-in-law is not incestuous and that, once betrothed, the man must marry the woman (*Allerhand . . . Bedencken*, pp. 144—50); he also approved (1704) a marriage between a widower and his deceased wife's stepdaughter as dispensable (*ibid.*, pp. 154, 155).

35. Thus Gerhard excepts parents who are insane, captive in foreign lands,

or absent for long periods, or who otherwise represent extraordinary cases (*op. cit.,* par. 58, p. 44). Quenstedt, *op. cit.,* IV, 454; Hollaz, *op. cit.,* p. 1368.

36. Dedekennus-Gerhard, *op. cit.,* III, 99—134, 804, 805; Brochmand, *op. cit.,* p. 1469; Baier-Walther, III, 747; Koenig, *op. cit.,* pp. 763—72; Dannhauer, *op. cit.,* p. 284; Deyling, *op. cit.,* p. 514; Matthias Hafenreffer, *Loci* Theologici, 2d ed. (Tübingen, 1601), p. 441. The Council of Trent, in the decree *De reformatione matrimonii* (Sess. 24), anathematizes "those who falsely declare that marriages contracted without the consent of their parents are invalid and that the parents can make them either valid or invalid." The *Gloss* on the chapter *Mulier* (32, question 2) says: "As far as oaths and marriage are concerned, parental authority ceases when a child reaches the age of adulthood."
37. Gerhard's argument in favor of this proposition (*op. cit.,* VII, pars. 57—85, pp. 43—62) is ingenious, at least. Orthodox theologians, following blessed Martin Luther, often use the term "clandestine betrothal" to mean merely a betrothal without parental consent (Deyling, *op. cit.,* p. 514). If the parents are dead, betrothals are technically clandestine unless contracted in the presence of two honorable witnesses (*ibid.,* pp. 516, 517). In rejecting the Roman Catholic view, Quenstedt notes that, according to Peter Suavis' *Historia Concili Tridentini,* VIII, 835, 136 bishops at the Council of Trent originally spoke in favor of requiring parental consent, 57 took a contrary view, and ten suspended judgment (*op. cit.,* IV, 458).
38. Hesshusius, *op. cit.,* folio F-iv.
39. Brochmand, *op. cit.,* pp. 1476, 1491, 1492.
40. Quenstedt, *op. cit.,* IV, 451, 452, 454—58.
41. Gerhard, *op. cit.,* VII, par. 91, p. 65; Brochmand, *op. cit.,* pp. 1494, 1495.
42. Gerhard, *op. cit.,* VII, par. 87, p. 64. Kuester, quoted in Baier-Walther, *op. cit.,* III, 748. The Meissen Consistory vacated a betrothal in which the mother but not the father had consented (Dedekennus-Gerhard, *op. cit.,* III, 119, 120).
43. Dannhauer, *op. cit.,* p. 285; Brochmand, *op. cit.,* p. 1493.
44. The Meissen Consistory held that a betrothal approved by the mother could not afterward be dissolved by the father and brothers (Dedekennus-Gerhard, *op. cit.,* III, 134). The Wittenberg Consistory gave the consent of the mother precedence over the dissent of guardians and relatives (*ibid.*). So also Gerhard, *op. cit.,* VII, par. 95, p. 67. The Leipzig Consistory vacated the betrothal that a young woman contracted without her widowed mother's consent (*ibid.,* p. 119).
45. Deyling, *op. cit.,* p. 518; Kuester, quoted in Baier-Walther, *op. cit.,* III, 748. Children who are *sui iuris* under *civil* law through having reached majority must by *divine* law still secure their parents' consent (Gerhard, *op. cit.,* VII, par. 93, p. 66). The Wittenberg Consistory vacated the betrothal of a widow who had betrothed herself without her father's consent (Dedekennus-Gerhard, *op. cit.,* III, 119).
46. Deyling, *op. cit.,* p. 514. So also Gerhard (*op. cit.,* par. 97, pp. 67, 68), who argues that if the parents and the grandfather are alive, the latter's consent may be more desirable than the former's. An interesting 17th-century decision of the Jena theological faculty argues: "When two persons voluntarily and unconditionally plight their marital troth to one another, such a betrothal remains a marriage before God, and their consciences are bound to one another. . . . Although in the Electoral Mar-

riage Constitutions and in the codes of other jurisdictions adhering to the Augsburg Confession it is contemplated that when the physical parents are dead, the consent of the grandmother and of other near relatives is required and that in the contrary case the contracted betrothal is invalid; nevertheless experience indicates that properly staffed consistories in comparable cases are wont not to dissolve out of hand an otherwise tolerable betrothal because of the lack of relatives' consent, but rather to regard the reasons for the dissent than the dissent itself." (Dedekennus-Gerhard, *op. cit.,* III, 807, 808.)

47. Like the decree of the Nuremberg senate, October 8, 1572 (Koenig, *op. cit.,* pp. 770—72).
48. The Wittenberg Consistory upheld a betrothal that an orphaned girl contracted without the knowledge of her foster parents, but with her foster sisters as witnesses (Dedekennus-Gerhard, *op. cit.,* III, 132). Gerhard holds that the consent of an orphan's brothers or other near relatives is desirable, but not as necessary as that of parents (*op. cit.,* VII, par. 96, p. 67).
49. Hesshusius, *op. cit.,* folio F-iv; Brochmand, *op. cit.,* p. 1495; Dannhauer, *op. cit.,* p. 285; Quenstedt, *op. cit.,* IV, 454. Gerhard says that the consent of a trustee *(curator)* is not necessary and that legal opinion on the necessity of a guardian's consent is divided (*op. cit.,* VII, par. 94, pp. 77, 78).
50. Deyling, *op. cit.,* p. 519. But children should seek the expressed consent of their parents (Gerhard, *op. cit.,* VII, par. 88, p. 64). The Wittenberg Consistory upheld a betrothal in which the mother had concurred tacitly (Dedekennus-Gerhard, *op. cit.,* III, 122).
51. Gerhard, *op. cit.,* VII, par. 98, p. 68.
52. Deyling, *loc. cit.*
53. *Ibid.,* p. 518.
54. Gerhard, *op. cit.,* VII, par. 90, p. 65. The theological faculty of the University of Wittenberg held that a nobleman who had neglected his daughter in childhood could not interfere with her betrothal to a young commoner (Dedekennus-Gerhard, *op. cit.,* III, 106; cp. p. 108, also p. 804). Maurice's *Saxony* Church Order had held that betrothals without parental consent were generally illegal, but if the man is at least twenty and the woman at least eighteen, and if they have repeatedly and respectfully, directly and through intermediaries, sought parental consent in vain, although the parents have no grave reason for objecting, the couple is to be authorized to marry (Dunte, *op. cit.,* p. 811; cp. Brochmand, *op. cit.,* p. 1476).
55. Gerhard, *op. cit.,* VII, par. 89, pp. 64, 65.
56. Brochmand, *op. cit.,* p. 1494.
57. *Ibid.,* pp. 1476, 1495; Hesshusius, *op. cit.,* folio F-iv. Brochmand himself points out, however, that a betrothal demonstrably exacted under fear and parental threatening is illegitimate and dissoluble (*op. cit.,* pp. 1496, 1497).
58. *Ibid.,* pp. 1495, 1496.
59. So the Wittenberg theological faculty (Dedekennus-Gerhard, *op. cit.,* III, 99; Dunte, *op. cit.,* pp. 848, 849). The Rostock theological faculty ruled that if a girl marries without her father's consent, she is to seek his forgiveness and do public penance, and he is to declare to the local authorities and to the local clergy that he *ratifies* the nuptials with his parental consent (*ibid.,* p. 849). Whether or not such postnuptial con-

sent is retroactive is a moot question; Gerhard says it is not (*op. cit.*, VII, par. 92, pp. 65, 66), but Deyling says it is (*op. cit.*, p. 519).

60. Brochmand, *op. cit.*, p. 1493; Deyling, *op. cit.*, pp. 516, 517; Jena theological faculty, Dunte, *op. cit.*, pp. 818, 819. The same faculty held that clandestine betrothals, even when followed by intercourse, are still invalid and whoredom until publicly affirmed before honorable witnesses; thereafter the marriage is to take place at once, that the child may come to an honorable and reputable estate (*ibid.*, p. 823). In another opinion (1622) it held that a young man whom a designing girl had seduced, and who after intercourse was induced to promise marriage, was not bound so long as his father withheld consent (Dedekennus-Gerhard, *op. cit.*, III, 115—18).
61. *Ibid.*, pp. 172—79; Dunte, *op. cit.*, pp. 826, 827; Koenig, *op. cit.*, pp. 757 to 763; Brochmand, *op. cit.*, pp. 1482, 1526.
62. *Ibid.*, pp. 1473—76.
63. The theological faculty of the University of Rostock held (1616) that it was the common sense of orthodox theologians, based on the Scriptures, that an orthodox Christian ought not marry a person of another religion, that it was not scandalous to present this doctrine from the pulpit, and that a preacher who would publicly preach a contrary doctrine was setting forth a novel opinion (Dedekennnus-Gerhard, *op. cit.*, III, 173—75).
64. Deyling, *op. cit.*, pp. 559, 560; cp. pp. 553, 554. In a case where a young woman was betrothed to a Roman Catholic with the stipulation that she become a Roman Catholic, the theological faculty of the University of Jena held (1597) that such a stipulation was improper and that she was not under any obligation to comply with it (Dedekennus-Gerhard, *op. cit.*, III, 179). Quenstedt discusses the issue of mixed marriages with particular reference to persons of princely estate (*op. cit.*, IV, 474—77).
65. Gerhard, *op. cit.*, VII, par. 151, p. 92.
66. Dedekennus-Gerhard, *op. cit.*, III, 58—65.
67. Martin Chemnitz, *Loci Theologici*, revised ed. Polycarp Leyser (Wittenberg, 1615), III, 213—15; Gerhard, *op. cit.*, VII, pars. 124—41, pp. 81 to 88; Baier-Walther, *op. cit.*, III, 749.
68. So, for instance, Deyling, *op. cit.*, p. 509.
69. Mentzer in Dunte, *op. cit.*, p. 821; Brochmand, *op. cit.*, pp. 1468—69. Public betrothals cannot be revoked, in view of our blessed Lord's words, "What God hath joined together," etc. (Hesshusius, *op. cit.*, folio F-iv.) Brochmand (*op. cit.*, p. 1492) and Quenstedt (*op. cit.*, IV, 451), following the ancient Fathers, call betrothal an inchoate *(inchoatum, initiatum)* marriage.
70. Of great interest is "the counsel and opinion on the question whether a man who has betrothed himself to a girl in the devil's name is obliged to fulfill such a promise" by John Mueller of Hamburg (1648). He emphasizes the greatness of the offense committed; recounts out of his own experience in Hamburg a horror tale of a demonic apparition at the wedding feast of a couple who similarly betrothed themselves with an invocation of Satan; and urges the couple to repent, confess their lapse to their father confessor at the first occasion, ask him for holy absolution, consolation, and the intercession of the congregation, and to plight their troth to each other in the name of the Holy Trinity. (Dedekennus-Gerhard, *op. cit.*, III, 802, 803.)
71. For example, Gerhard, *op. cit.*, VII, par. 123, p. 81. But Kuester, follow-

ing Leyser, insists on unambiguous words (quoted in Baier-Walther, *op. cit.*, III, 750). Both the Wittenberg and Jena theological faculties held that a young man's mere expression to a young woman of the hope that it might be God's will for him to marry her, or the mere giving of a ring by a young woman to a young man, does not constitute legitimate consent (Dedekennus-Gerhard, *op. cit.*, III, 83). The Wittenberg theological faculty also held that parents or foster parents cannot betroth a minor daughter without her consent (Dedekennus-Gerhard, *op. cit.*, III, 86, 87). An impoverished suitor's deliberate deceit in grossly misrepresenting his financial status and prospects, and his consequent inability to perform certain stipulations of the betrothal contract, was made a ground for vacating a betrothal *propter puri et liberi consensus defectum* by the Jena theological faculty in 1630 (*ibid.*, III, 823, 824, but cp. pp. 179, 180).

72. *Clandestinitas sola non vitiat matrimonium.* Gerhard, *op. cit.*, VII, pars. 143—49, pp. 88—92; Dedekennus-Gerhard, *op. cit.*, III, 140, 810 to 816. Witnesses are necessary only to *prove* the betrothal (Deyling, *op. cit.*, p. 512). But see note 37 above. — Betrothals can be contracted by a properly witnessed letter or by intermediaries (Deyling, *op. cit.*, p. 515), as long as the contracting parties know each other at least by reputation (Gerhard, *op. cit.*, VII, par. 150, p. 92).
73. Dannhauer, *op. cit.*, p. 284.
74. Theological faculties of the Universities of Jena, Rostock, and Wittenberg, in Dunte, *op. cit.*, pp. 827, 828.
75. Dedekennus-Gerhard, *op. cit.*, III, 186—219, 818—24.
76. Brochmand (*op. cit.*, pp. 1502, 1503) cites 1 Cor. 7:4. Deyling calls violation of the betrothal bond quasi adultery (*op. cit.*, p. 542). Incestuous relations with relatives of the other party are particularly reprehensible and create an affinity which invalidates the betrothal (Gerhard, *op. cit.*, VII, par. 166, p. 98). Adultery also includes betrothal with another person, "because betrothal is truly inchoate marriage, and a most efficacious obligation arises therefrom (Deut. 22:23; Matt. 1:20)" (Brochmand, *op. cit.*, p. 1498; Dedekennus-Gerhard, *op. cit.*, III, 159).
77. Gerhard, *op. cit.*, VII, pars. 166, 167, pp. 98, 99; Deyling, *op. cit.*, pp. 541, 542; Brochmand, *op. cit.*, pp. 1470, 1471, 1502, 1503.
78. Not filial reverence for father or mother, however (Consistory of Electoral Saxony, in Dunte, *op. cit.*, p. 824).
79. Dedekennus-Gerhard, *op. cit.*, III, 144—59, 816; Dunte, *op. cit.*, p. 812, Baier-Walther, *op. cit.*, III, 749. In the case of drunkenness, caution and nice judgment is necessary (Brochmand, *op. cit.*, p. 1497; Koenig, *op. cit.*, pp. 772—75; Dannhauer, *op. cit.*, p. 281).
80. Or, in general, of the man as well, according to Gerhard.
81. Deyling, *op. cit.*, p. 512.
82. Gerhard, *op. cit.*, VII, pars. 109—12, pp. 73—76; Dunte, *op. cit.*, pp. 850, 851; so also the Dresden Consistory (Dedekennus-Gerhard, *op. cit.*, III, 210) and the Constitutions of Frederick II of Denmark and Norway (Brochmand, *op. cit.*, p. 1502). The issue is extensively argued because of the provisions of canon law, which did not regard error as to virginity as ground for vacating a betrothal, and because of Lev. 21:7; Deut. 22: 13-21; and Matt. 1:19. Gerhard holds that the Deuteronomy passage no longer applies. Dannhauer holds that error as to virginity is a legitimate ground for dissolution even after the marriage is consummated (*op. cit.*, pp. 279, 280). Dunte holds that unless the fornication is obvious (as in

the case of pregnancy), the consistory is not to dissolve the betrothal, and the man may not present elaborate proof of the woman's immorality (*op. cit.*, p. 829).

83. Gerhard, *op. cit.*, VII, pars. 166, 167, pp. 98, 99; Brochmand, *op. cit.*, pp. 1470, 1471; Deyling, *op. cit.*, pp. 541, 542.

84. Brochmand, *op. cit.*, p. 1501.

85. So the Constitutions of Frederick II of Denmark and Norway (Brochmand, *op. cit.*, p. 1501).

86. *Veneficium*, which includes both the practice of black magic and the mixing of poisonous potions. According to the theological faculty of the University of Jena, pronouncing (1668) on an interesting case in which an allegedly psychic soldier had accused a young woman of sorcery, sorcery is a ground for breaking a betrothal *quoad vinculum* (Dedekennus-Gerhard, *op. cit.*, III, 822).

87. Insanity developing or discovered between the betrothal and marriage is a ground for dissolving the betrothal because an insane person cannot give the nuptial consent (Brochmand, *op. cit.*, p. 1503, 1504).

88. The Constitutions of Frederick II made *discovery* of such diseases after betrothal ground for vacating it. If they were *contracted* after betrothal, a certain time was allowed for the recovery of health, after which the healthy party could seek dissolution of the betrothal (Leviticus 13 and 14) (Brochmand, *op. cit.*, p. 1514).

89. Deyling's list (*op. cit.*, pp. 541, 542) includes capital and irremissible hatred (which Brochmand, *op. cit.*, pp. 1500, 1501, expressly refuses to allow), contempt of the other party, and an *attempt* to become betrothed to someone else.

90. Gerhard, *op. cit.*, VII, par. 106, p. 72.

91. So the theological faculty of the University of Leipzig in Dunte, *op. cit.*, p. 813. But Justus Feuerborn (Balthasar Mentzer's son-in-law) held that a consistory could permit a betrothed woman to *postpone* marriage with a demonstrably "tyrannical" betrothed, on the analogy of a separation from bed and board (*ibid.*, pp. 828, 829).

92. Gerhard, *op. cit.*, VII, par. 169, p. 100; Deyling, *op. cit.*, pp. 544, 545; John Francis Buddeus, *Institutiones Theologiae Moralis* (Leipzig, 1715), pp. 566, 567. "A betrothal properly so called, which is the promise of future marriage and is contracted by betrothal consent, does not introduce so final and indissoluble a bond as a valid marriage, which is contracted through nuptial consent publicly and solemnly given with the sacerdotal blessing and the handing over of the bride into the marital power of the groom" (Gerhard, *op. cit.*, VII, par. 656, p. 439). Thus a betrothal based upon a stipulation — such as, in case of disparity of religion, that each promises that the other can freely exercise his or her religion — can be broken if the contract is violated, but a marriage cannot (*ibid.*, par. 135, p. 86). Again, insanity is ground for dissolving a betrothal but not a marriage (*ibid.*, par. 689, pp. 455, 456).

93. Quenstedt, *op. cit.*, IV, 452, 453.

94. Deyling, *op. cit.*, p. 540.

95. Gerhard, *op. cit.*, VII, par. 152, p. 93. Gerhard carefully differentiates the betrothal consent from the nuptial consent, but recognizes both as the proximate efficient cause of marriage (*ibid.*, par. 124, p. 81).

96. *Ibid.*, par. 168, pp. 99, 100. The quoted clause reads: "*Videtur quidem*

discrimen quoddam intercedere inter sponsalia populi Israelitici ac nostris moribus contracta."

97. Baier-Walther, *op. cit.,* III, 779; compare also Buddeus, *op. cit.,* pp. 564, 565.

98. Gerhard, *op. cit.,* VII, par. 55, pp. 41, 42; Quenstedt, *op. cit.,* IV, 452. The theological faculty of the University of Leipzig (1634) sustained the validity of a marriage between an army lieutenant and an army captain's mistress, although the lieutenant had given false Christian and family names to the officiating pastor, asserted afterward that he had acted only *pro forma* and had answered *Jahr* (year) instead of *Ja* (yea) to the question whether he took the woman to be his wedded wife (Dedekennus-Gerhard, *op. cit.,* III, 857). Internal acts alone are not sufficient to contract marriage (Baier-Walther, *op. cit.,* III, 749). John Adam Osiander proved that *consensus mutuus facit matrimonium* from Deut. 22:23, 24 (quoted *loc. cit.*)! — A young man who has violated a girl can be urged and exhorted to marry her and, if he refuses, can be punished by the civil authorities, but he cannot be compelled to marry her (Dedekennus-Gerhard, *op. cit.,* III, 87). The principle — only as a surrogate of marriage, however — that a man must either marry or endow a girl he violates *(stuprator ab se vitiatam aut ducat aut dotet)* is recognized (Deyling, *op. cit.,* p. 577); hence marriage is not always to be insisted upon in the case of violation.

99. Gerhard, *op. cit.,* VII, pars. 413, 414, pp. 242, 243. Mentzer says that honorable intercourse is the use of matrimony, not its efficient cause; the consent that is the efficient cause of matrimony is not any kind of consent, but legitimate and full, not only betrothal-consent but nuptial-consent (Dunse, *op. cit.,* p. 822).

100. Gerhard, *op. cit.,* VII, pars. 231—36, pp. 138—42.

101. Dannhauer, *op. cit.,* p. 520; Baier-Walther, *op. cit.,* III, pp. 754, 756; Buddeus, *op. cit.,* p. 551. But Gerhard points out that persons whose reproductive organs are whole and whom God and the medical profession may be able to help should not be prohibited from marrying unless the defect is clearly irremediable. The Leipzig Consistory defended (1660) a marriage between two persons one of whom was known to be incapable of intercourse, but the orthodox theologians held such a marriage, if contracted, to be a nullity and to be forbidden by all means if not yet contracted (Deyling, *op. cit.,* pp. 549, 550). But see also note 129 below as well as *Allerhand . . . Bedencken,* pp. 229, 230.

102. Caspar Finck held that women over sixty should not be permitted to marry (in Dunte, *op. cit.,* pp. 804, 805); Dunte himself says that no rule can be laid down.

103. The Rostock theological faculty held (1572) that since after the Fall marriage serves as a remedy against evil desire, marriage ought not to be disapproved for persons past the age of child bearing (Dedekennus-Gerhard, *op. cit.,* III, 54). Marriage between the young and the aged ought to be discouraged, but disparity of age is not an absolute impediment, according to Gerhard (*op. cit.,* VII, pars. 397, 398, pp. 233, 234).

104. These diseases disqualify for marriage on eugenic grounds, according to Dannhauer; the principle "It is better to marry than to burn" applies only to those suited for marriage (*op. cit.,* pp. 262—64). — The betrothal and marriage of dwarfs, according to Gerhard, should be discouraged for eugenic reasons, but cannot be forbidden outright (*op. cit.,* VII, par. 234, p. 140). The Dresden Consistory ruled favorably on the marriage of two dwarfs with each other (Dedekennus-Gerhard, *op. cit.,* III, 57).

105. Gerhard, *op. cit.,* VII, par. 228, pp. 136, 137; Brochmand, *op. cit.,* pp. 1473 to 1497. But the deaf and mutes may marry (*ibid.,* pp. 1497, 1498).

106. The Meissen Consistory ruled against marriage of a *de facto* deserted woman with her unmarried lover (Dedekennus-Gerhard, *op. cit.,* III, 374). The Jena theological faculty (1621) withheld permission to marry from a deserted woman who was pregnant by her lover (*ibid.,* pp. 374, 375).

107. Dedekennus-Gerhard, *op. cit.,* pp. 373—75. The theological faculty of the University of Jena ruled that an adulterer, or a person divorced for other reasons, may not remarry (Dunte, *op. cit.,* p. 857). The Meissen Consistory ruled (1560) against permitting a remarriage in such a case and recommended that the adulterer and his new spouse-elect be banished (Dedekennus-Gerhard, *op. cit.,* III, 373, 374).

108. So the Constitutions of Frederick II of Denmark and Norway (Brochmand, *op. cit.,* pp. 1498, 1499), Mentzer, and "many" other Lutheran theologians, following canon law (Dunte, *op. cit.,* p. 826). Contrary dispensations from the *impedimentum criminis* should be conceded only rarely (Gerhard, *op. cit.,* VII, pars. 381—85, pp. 223—25). Such permission was granted in exceptional cases by the Wittenberg (Dedekennus-Gerhard, *op. cit.,* III, 172) and Meissen (Dunte, *op. cit.,* p. 826) Consistories. But Deyling reports that in his day Lutheran consistories tended to make exceptions on the condition that the customary solemnities be omitted and that the couple change its residence elsewhere (*op. cit.,* pp. 551, 552).

109. Gerhard, *op. cit.,* VII, pars. 662, 705, pp. 418, 419, 464, 465. The Consistory of Electoral Saxony held that Matthew 19 and 1 Corinthians 7 really forbid remarriage to the guilty party, and this must be the official counsel; but if they cannot live chastely, let them leave the country and marry outside it (Dedekennus-Gerhard, *op. cit.,* III, 373).

110. Deyling, *op. cit.,* p. 546.

111. *"Matrimonium est res mere civilis et saecularis."* See Gerhard *op. cit.,* VII, pars. 696, 700, pp. 459—62.

112. *Ibid.,* pars. 14—40, pp. 8—31; Brochmand, *op. cit.,* p. 1486; Deyling, *op. cit.,* pp. 506, 507.

113. Dedekennus-Gerhard, *op. cit.,* III, 298—308, 850—58.

114. Gerhard, *op. cit.,* VII, pars. 409—12, pp. 239—42; Baier-Walther, *op. cit.,* III, 751—54; the theological faculties of the universities of Wittenberg and Leipzig (in Dunte, *op. cit.,* pp. 847, 848), Rostock (1622) (Baier-Walther, *op. cit.,* III, 754), and Jena (1657) (in Dedekennus-Gerhard, *op. cit.,* III, 850—53). See especially Paul Graff, *Geschichte der Auflösung der alten gottesdienstlichen Formen* (2d ed.; Göttingen, 1937 to 1939) I, 331—54; II, 260—72.

115. Mentzer, in Dunte, *op. cit.,* pp. 821—23.

116. Secret nuptials are scandalous and are to be discouraged (Dunte, *op. cit.,* p. 848). Only marriages solemnized with the priestly blessing were valid in Denmark and Norway under the Constitutions of Frederick II (Brochmand, *op. cit.,* pp. 1514, 1515). But Caspar Calvoer points out that we do not solemnize anew marriages of couples converted to our communion from paganism and Islam (*Rituale ecclesiasticum,* Jena, 1705, pp. 127, 128). Legal decisions legitimizing issue of a union based only on public betrothal were held to be merely civil in their effect (Deyling, *op. cit.,* pp. 554, 555). If the couple *cannot* secure sacerdotal blessing of their union, this should not trouble their conscience, the Theological Faculty of the University of Wittenberg held (1612) (Dedekennus-Gerhard,

op. cit., III, 298). — The Leipzig Theological Faculty held that a proxy marriage was valid in the light of Genesis 24, but not expedient (Dedekennus-Gerhard, *op. cit.,* III, pp. 856, 857).

117. In cases of necessity, where the groom is suspected of getting ready to flee, or if either party is without good reason reluctant to go through with the ceremony, the ceremony usually takes place before the consistory. In Saxony nobles had the privilege of home ceremonies, and the Prince could extend the privilege to others by dispensation. The same privilege was once a perquisite of doctors and licentiates, but by 1743 it had fallen into desuetude and was deemed to have lapsed. (Deyling, *op. cit.,* pp. 562, 563.)

118. Deyling, *op. cit.,* p. 563.

119. Particular care is enjoined in the case of soldiers; privates and noncommissioned officers could be married only with the express permission of the regimental commander (Deyling, *op. cit.,* pp. 561, 562). The Wittenberg theological faculty criticized (1617) the "frivolous preachers who marry everybody that comes along *(leichtsinnige Prediger, die allerley lauffendes Gesindlein zusammen koppeln),*" but deemed valid the marriages so solemnized (Dedekennus-Gerhard, *op. cit.,* III, 307, 308).

120. Banns were not read for illustrious and noble persons; this concession, at first merely customary, was confirmed in a Royal Electoral rescript to the Leipzig Consistory in 1732 (Deyling, *op. cit.,* pp. 557—59).

121. Gerhard's favorable opinion (*op. cit.,* VII, par. 474, p. 291) on the propriety of a Lutheran pastor's action in solemnizing the secret nuptials of a Roman Catholic cleric *(canonicus),* if there were good hope of his conversion to the true Church and if he were not an embittered foe of the Lutheran religion, is frequently quoted.

122. In 1730 a couple whose nuptials were solemnized by a Roman Catholic priest because they could not lawfully be married in their own Church were punished at Leipzig with 14 days' imprisonment, which could be commuted to three days of work for the Church for each day's imprisonment (Deyling, *op. cit.,* pp. 563, 564). On the other hand, the Stuttgart Consistory conceded (1595) that a Lutheran noble couple could be married by a Roman Catholic priest under certain unusual circumstances and conditions: The family lived in the diocese of Mayence and could obtain no dispensation for the importation of a Lutheran priest; the guests had been invited and the date of the marriage could not conveniently be altered; the Roman Catholic officiant had to agree not to calumniate the true religion in his marriage sermon and to omit all Papistic ceremonies; the couple had to assert that it had left no feasible alternative untried; the Roman Catholic officiant was goodhearted, was himself married, sang Lutheran hymns, and had the general local reputation of being more Lutheran than Roman Catholic (Dedekennus-Gerhard, *op. cit.,* III, 301).

123. Gerhard, *op. cit.,* VII, pars. 432, 433, 441, pp. 254—57, 263, 264; see also par. 46, pp. 35, 36. In their use of sex, Christian couples should be aware of the ravages of original sin in this area also (Chemnitz-Leyser, *op. cit.,* II, 190). In discussing the use of sex, Gerhard repeats the injunctions of 1 Corinthians 7, 1 Thessalonians 4, and 1 Peter 3:8, and applies 1 John 2:27. He quotes the counsels of the Scholastics not to have intercourse with a pregnant or suckling spouse, before solemn feasts (Ex. 19:15), before receiving Holy Communion, in old age (Genesis 18), or in the daytime, but warns that counsels like these must not be allowed to become snares of conscience. He is familiar with the Roman Catholic moral theologians' questionnaires in the confessional. (*Op. cit.,* VII,

pars. 435—41, pp. 258—64; cp. Dunte, *op. cit.,* pp. 838—40.) Dunte holds that it is not wrong for old people to have sex relations nor for a young spouse to have relations with an aged marital partner (*op. cit.,* p. 804).

124. Gerhard, *op. cit.,* VII, par. 438, pp. 260, 261. His argument reflects the medical ignorance of the day, which taught that children conceived at the time of the menstrual flow would be monstrous births and prone to epilepsy and elephantiasis.

125. Koenig, *op. cit.,* pp. 802—07.

126. Gerhard, *op. cit.,* VII, pars. 442, 443, pp. 264—66.

127. Dieterich, in Dunte, *op. cit.,* pp. 842, 843.

128. The Fifth Commandment includes in its condemnation those who hinder conception (Gen. 38:9), who induce abortions, or who kill a foetus in the womb (Ex. 21:22), all who mutilate members of their bodies, and all who consent to, rejoice in, approve, or procure such deeds (Chemnitz-Leyser, *op. cit.,* II, 72, 73; Gerhard, *op. cit.,* III, par. 154, p. 70). The Jena theological faculty, in an opinion written in Latin, *ne castae et piae aures illiteratorum praesertim caelibum eadem offendantur,* describes *coitus interruptus* after the example of Onan as a sin against the First (Ps. 127:4), Fourth (1 Cor. 7:3), Fifth, and Sixth (1 Cor. 6:9) Commandments, graver than fornication and adultery. The assent of the wife to the practice, far from excusing the husband, makes her a partaker of his sin (Dedekennus-Gerhard, *op. cit.,* III, 366). Cp. Crusius, *op. cit.,* II, 1179.

129. Gerhard, *op. cit.,* VII, par. 446, pp. 270, 271. The theological faculty of the University of Jena argues interestingly in an opinion (1668) on marriage with a eunuch: "Intercourse with an individual of whom it is known that because of his physical constitution he cannot beget children is a sin against conscience, for *concubitus* is *per se et natura sua propter generationem prolis* and no other *finis per se intentum* can be given. But if a woman who is capable of bearing children *concumbiret* with a man of whom she knows that he is incapable of begetting children, she does so not *ob eum finem* which nature *intendiret,* and *ipsa lex naturae praescribiret,* but only *ad explendam,* which, because it takes place contrary to the light and law of nature, is clearly a deliberate sin against conscience. . . . If it were to be said that there is still another *per naturam intentus finis cohabitationis coniugalis,* namely, to quench evil desires, in accordance with St. Paul's assertion, 1 Cor. 7:9, 'It is better to marry than to burn,' this is not a *finis per se,* but *per accidens intentus,* and must be *intendiret* in accordance with nature, namely, through such *cohabitation* as is not contrary to the *per se intento fini,* which in the present case does not happen. . . . Here . . . intercourse can have no other *finem* than the extinction of evil desire, and thus the *finis per se accidens* is perverted *in finem per se,* which is contrary to nature." (Dedekennus-Gerhard, *op. cit.,* III, 800.)

130. So the Wittenberg theological faculty in Dunte, *op. cit.,* p. 849; Gerhard, *op. cit.,* III, par. 154, p. 70.

131. *Ibid.,* par. 166, p. 98; Brochmand, *op. cit.,* pp. 1470, 1501.

132. Gerhard, *op. cit.,* VII, par. 42, p. 32; Brochmand, *op. cit.,* p. 1477.

133. *Op. cit.,* IV, 453, 454; Hollaz, *op. cit.,* p. 1383. Dunte makes the chief end that each party help the other to know, honor, and adore God, the Creator, as well as to work and keep house together. The procreation of children is secondary to this first objective; Psalms 127 and 128 show that children are a *special* gift of God. (*Op. cit.,* p. 803.)