

TWO MODELS OF INCEST: CONFLICT AND CONFUSION IN HIGH MEDIEVAL DISCOURSE ON KINSHIP AND MARRIAGE

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Jesus Christ ordered every Christian
Not to marry his kin
You cannot take kin to within the fourth degree
Otherwise it will be buggery.¹

1. Introduction

The lines from *Yde et Olive*, a thirteenth-century *chanson de geste*, clearly refer to the canonical marriage prohibitions as formulated by the Fourth Lateran Council in 1215.² At the same time, however, there are striking differences between the *chanson* and the synodal decrees. While in *Yde et Olive* the prohibited degrees are described as being instituted by Christ himself, and thus as immutable divine legislation, the Lateran Council famously argued that in reducing the prohibited degrees from seven to four

Abbreviations: C. J. = *Codex Justiniani*; CCCM = *Corpus Christianorum, Continuatio Medievalis*; CCSL = *Corpus Christianorum, Series Latina*; PG = *Patrologia Graeca*; PL = *Patrologia Latina*.

1. *Esclarmonde, Clarisse et Florent, Yde et Olive: Drei Fortsetzungen der Chanson von Huon de Bordeaux*, ed. M. Schweigel, *Ausgaben und Abhandlungen aus dem Gebiete der romanischen Philologie* 83 (Marburg: 1889), lines 6448-51: 'Tous crestiens Jesucris commanda / Ca son parage ne se mariast pas / Tu ne le pues avoir dusques en quart, / U autrement bougrenie sera.' The translation is that of Darron Burrows, as quoted in D. Watt, 'Behaving like a man? Incest, lesbian desire, and gender play in *Yde et Olive* and its adaptations', *Comparative Literature* 50 (1998), 265-85, at 268.
2. *Decrees of the Ecumenical Councils*, ed. and trans. N. P. Tanner, 2 vols. (London: 1990), vol. 1, 257-58.

it was simply changing ‘human legislation’ (*statuta humana*), adjusting it to changing needs of society. Violation of these laws was not ‘buggery’, but according to papal practice could be dealt with by dispensation.

These differences point to the well-known paradoxes surrounding medieval marriage prohibitions. On the one hand, transgressing them was to commit incest – one of the most horrible crimes possible, as both secular and clerical authors asserted. On the other hand, so many marriages violated at least one of the numerous prohibitions that one cannot help but think that such marriages were socially acceptable. Likewise, the rhetoric of divine law and God’s wrath stands in stark contrast to the cool negotiations over dispensations of all kinds. For the modern reader at least, it is also puzzling to encounter a legal category that encompassed such diverse elements as father/daughter incest, the abduction of nuns and marriages between third cousins twice removed.

In the present paper, I will address these paradoxes by looking at two very dissimilar branches of the medieval discourse on endogamy and exogamy, and more specifically at different justifications of marriage prohibitions as found in systematic canon law collections of the eleventh and twelfth centuries. At this time, the prohibitions had grown to their most extreme form. Banning, *inter alia*, marriages within the seventh degree according to canonical computation, the law as contained in these collections was excessive compared to any ancient or modern marriage law, and even compared to early medieval canon law or indeed canon law after 1215. The first of two important, but very different traditions relating to marriages among relatives is the view of kin marriage as incest and thus as an abomination, as a violation of divine precept. The other tradition is a discourse on the advantages of exogamy, as articulated perhaps most famously in St Augustine’s *City of God*. Although both traditions can be and have been used to justify the same legislation, I want to stress how strikingly different they were, before looking at the effects produced by the conflation of both traditions in the eleventh and early twelfth centuries. As I want to argue, the systematic collections produced a new reading of the old texts by presenting them in a different way, both changing the law and presenting it as unchangeable. Finally, I want to argue that nonetheless there were contemporary approaches which, using very similar sources, developed models that did not justify the legal *status quo* but rather questioned it.

2. Purity and pollution: incest as an abomination

Let us first concentrate on the heated discourse on incest as an abomination,

which played such a prominent role in medieval marriage law as well as in literary imagination.³ For this branch of the medieval discourse on the marriage prohibitions, the biblical ban on incest is of course of paramount importance. In Leviticus 18, sexual relations with a small number of relatives (including a few in-laws) are condemned as an abomination by God himself. As is repeatedly pointed out, the incest prohibitions mark the difference between the chosen people and the gentiles (Lev. 18:3, 21, 27-28), and indeed incest is linked to blasphemy (Lev. 18:20). At the same time, incest is prohibited in the same context and also in the same language as a number of other sexual offences including sex with a menstruating woman, sodomy and bestiality. The marriage prohibitions as contained in Leviticus are thus incest prohibitions: transgression of this law is clearly a sexual offence, a violation of divine order and a threat to purity.

From a medieval perspective, a second source for the discourse on incest as a abomination was Roman law. While there are of course important differences from the Old Testament prohibitions, let alone from medieval legislation, the relevant legislation was cast in similarly strong language. Incest for the Romans was *nefas*, a violation of divine order.⁴ Although the relevant laws apparently were rarely applied, and kin marriages contracted in good faith were dealt with rather lightly,⁵ the high tone of these laws should not be underestimated. The extension of the term *incestum* to the unchastity of a Vestal is important evidence that such unions were regarded as sacrilege. In this context, it is also important to note that incest was part and parcel of ‘othering’. Just as in Leviticus the prohibited acts are attributed to the Egyptians, there are both Greek and Roman traditions to associate incest with various ‘barbarians’.⁶ Literary sources are likewise indicative of the horror with which sexual unions between close relatives were regarded: Divine punishment or at least a violent death in some form is the usual fate of the perpetrator in incest stories such as that of

3. For the latter, see E. Archibald, *Incest and the Medieval Imagination* (Oxford: 2001). For canon law, see J. A. Brundage, *Law, Sex and Christian Society in Medieval Europe* (Chicago and London: 1987), ch. 5; M. de Jong, ‘An Unsolved Riddle: Early Medieval Incest Legislation’, in I. Wood (ed.), *Franks and Alamanni in the Merovingian Period: An Ethnographic Perspective*. Studies in Historical Archaeoethnology 3 (Woodbridge: 1998), 107-40; M. H. Gelting, ‘Marriage, Peace and the Canonical Incest Prohibitions: Making Sense of an Absurdity?’, in M. Korpiola (ed.), *Nordic Perspectives on Medieval Canon Law*. Publications of Matthias Calonius Society 2 (Helsinki: 1999), 93-124; and most recently K. Ubl, *Inzestverbot und Gesetzgebung: Die Konstruktion eines Verbrechens (300-1100)*. Millennium-Studien 20 (Berlin: 2009).
4. P. Moreau, *Incestus et prohibita nuptiae: Conception romaine de l’inceste et histoire des prohibitions matrimoniales pour cause de parenté dans la Rome antique*. Collection d’études anciennes, Série latine 62 (Paris: 2002), 29-105, esp. 43-52.
5. J. F. Gardner, *Women in Roman Law and Society* (London: 1986), 125-27.
6. Brundage, *Law, Sex and Christian Society*, 14; Moreau, *Incestus*, 88-90.

Apollonius of Tyre, which remained popular throughout the Middle Ages.⁷

Concerning the question of which unions were actually called incest, these authorities differed substantially. Nonetheless, they form a fairly uniform discourse in the sense that it is more about sex than marriage, and that incest is always seen as a violation of divine order, not just human law. It is this language we find in early medieval legislation on the prohibited degrees. From the sixth century onwards, the councils directly refer to Leviticus to justify marriage prohibitions;⁸ the Second Council of Toledo (531 or perhaps 527)⁹ interpreted Leviticus 18:6 ('omnis homo ad proximam sanguinis sui non accedat ut revelet turpitudinem eius') so as to justify extending marriage prohibitions to 'all' kin.¹⁰ More generally, several early medieval councils employed a language of purity and pollution when dealing with the prohibited degrees.¹¹ This is also true for the early medieval penitentials, where sexual contacts between relatives are treated in the context of sexual sins and other polluting acts. In canon law, the term *incestum* was applied not only to unions between relatives (whether by blood or by marriage) but also to other sexual offences, including sex between godparent and godchild and intercourse with consecrated virgins. This all strongly indicates that in these sources, the discourse on marriage prohibitions was actually more about sex than about marriage, and it also highlights the spiritual dimension. Those who transgressed these boundaries were threatened with divine punishment, as both conciliar acts and hagiography show.

One may still legitimately ask how much of this is due to 'genuine fear' of incest or how much of this is 'propaganda'. It is in any case remarkable that the early medieval incest discourse itself is fairly consistent, as both old and new prohibitions are talked about in terms of purity and

7. Archibald, *Incest*; C. Kiening, 'Familienroman und Heilsgeschichte', in K.-H. Spieß (ed.), *Die Familie in der Gesellschaft des Mittelalters*. Vorträge und Forschungen 71 (Ostfildern: 2009), 51-76.
8. R. Weigand, 'Die Ausdehnung der Ehehindernisse der Verwandtschaft', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, kanonistische Abteilung* 111 (1994), 1-17, at 2-3.
9. The dating is difficult. According to the statutes (see http://www.benedictus.mgh.de/quellen/chga/chga_044t.htm) the second council was held in the fifth year of the reign of Amalric (suggesting 531) in the fifth *ager* (suggesting 527).
10. *La colección canónica Hispana*, ed. G. Martínez Díez and F. Rodríguez, 6 in 7 vols., *Monumenta Hispaniae sacra, Series canonica* 1-6 (Madrid: 1966-2002), vol. 4, 352-53. On the content and context of these prohibitions, see Ubl, *Inzestverbot*, 200-08.
11. In addition to de Jong, 'Unsolved Riddle' and Gelting, 'Marriage', see A. G. Remensnyder, 'Pollution, Purity and Peace: An Aspect of Social Reform between the Late Tenth Century and 1076', in T. Head and R. Landes (eds.), *The Peace of God: Social Violence and Religious Response in France around the Year 1000* (Ithaca: 1992), 280-307.

pollution. Even if not expressing ‘genuine fear’, this vocabulary was certainly apt to inspire such fear, and this may not only have helped to win acceptance for the new prohibitions but also have fostered their further expansion. Given the growing disparity among the actual laws, let alone the diversity of the manuscript tradition,¹² the tone of this discourse may well have inspired bishops to act according to the principle ‘better safe than sorry’.

3. ‘The greatest amount of *caritas* for the greatest number of people’: Exogamy and the economy of affection

Compared to this ‘heated’ incest discourse, the second tradition I want to discuss is a strikingly cool line of reasoning on endogamy and exogamy. The best-known example is a passage in Augustine’s *City of God*, but there are both earlier and later authors arguing along the same lines.¹³ John Chrysostom, for one, developed a model very similar to that of Augustine.¹⁴ What these authors have in common is that they talk not so much about sex, but rather analyse matrimony as a means to multiply social bonds. While Augustine links exogamy to *caritas*, his argument is neither based on the Bible nor specifically Christian. Exogamy in this model is superior to endogamy in connecting more people by mutual affection. As Augustine put it, endogamy was avoided,¹⁵

[...] not that one man should combine many relationships in his sole person, but that those relationships should be distributed among individuals, and should bind social life more effectively by involving a greater number of persons in them. Thus, ‘father’ and ‘father-in-law’ are the names of two different relationships; and so the ties of affection (*caritas*) extend to a greater number of persons when each has one man as his father and another as his father-in-law.

12. See Weigand, ‘Ausdehnung der Ehehindernisse’, 2-3, esp. notes 2 and 7, for early examples.
13. M. Verbaarschot, ‘De iuridica natura impedimenti consanguinitatis in theologia et in iure canonico a S. Petro Damiano usque ad Decretales Gregorii IX (ca. 1063-1234)’, *Ephemerides theologicae Lovanienses* 30 (1954), 697-739; Moreau, *Incestus*, 125-27; Ubl, *Inzestverbot*, 56-62.
14. *In epistulam ad Corinthos I homilia XXXIV* (PG 61, 289-91), on which see Verbaarschot, ‘De iuridica natura’, 699.
15. Augustinus, *De civitate Dei libri XXII*, eds. B. Dombart and A. Kalb, 2 vols, CCSL 47/48 (Turnhout: 1955), here *De civitate Dei xv*, 16 (CCSL 48, 476-79); the translation is taken from Augustine, *The City of God against the Pagans*, trans. R. W. Dyson (Cambridge: 1998), 664-65.

The positive effects of exogamous marriage can thus be measured and indeed counted. The fewer relationships united in one person, and the more persons related to each other, the better. As Jeremy Bentham might have said, exogamy serves to produce ‘the greatest amount of *caritas* for the greatest number of people’. The key argument against endogamy is that it is ‘unnecessary’, as spouses related by blood are already connected by mutual affection, and more *caritas*-efficient marriage strategies are available. If incest in this model was a sin, it was so because it was a waste of the scarce good of *caritas*.

A second important aspect of this model, apart from the cool (utilitarian) mode of speaking, is that it is linked to a very wide definition of kinship. Common descent always creates at least some affection that only gradually fades away. Yet crucially, this kinship is not identified with the prohibited degrees. Cousin marriage, Augustine affirms, was recently forbidden,¹⁶ but more distant relatives are nonetheless kin. In other words, the prohibited degrees are much more narrowly defined than kinship, and in any case are subject to change. Indeed, as Augustine argues at some length, the ban on cousin marriages was only based on changing custom (*consuetudo, mos*); he praises both pagans and Christians for developing customs that are morally superior to positive law. Thus, the ban on cousin marriage is based on natural law and custom, but like all human legislation it may well change – as indeed happened at least twice in Augustine’s lifetime.¹⁷

For the medieval reception of this model, it is crucial that a version of it was repeated by Isidore in his *Etymologies*.¹⁸ This version provided an important inspiration for the high medieval canon law on the prohibited degrees and was regularly (if incorrectly) quoted to justify the seventh degree in canonical computation. However, it is also important that Isidore did not use terms like ‘incest’ when discussing the prohibited degrees, and vice-versa.¹⁹ Instead of linking the prohibited degrees to the biblical incest prohibitions, Isidore repeated Augustine when he stated that *propinquitias* among blood relatives ‘fades away’ the more distant the relation is, but is

16. Augustine refers to cousin marriage as banned ‘hoc tempore’; from this and a small number of similar references it has been inferred that Theodosius († 395) issued such a ban in 385. However, cousin marriage was legal again in 405 (C. J. 5, 4, 19). See S. Treggiari, *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (Oxford: 1991), 114.

17. See previous note.

18. Isidore, *Etymologiae* ix, 6: ‘De cognatis et agnatis’ as quoted below (n. 18). All Isidore quotations are from *Isidori Hispalensis episcopi etymologiarum sive originum libri XX*, ed. W. M. Lindsay, 2 vols. (Oxford: 1911) [s.p.].

19. See Isidore, *Etymologiae* v, 26 on the term *incestus*, but with no reference to specific degrees of kinship; the discussion of consanguinity in *Etymologiae* ix, 6, on the other hand, does not even mention incest.

‘called back’ by matrimony.²⁰ Like Augustine, he did not think that relation by blood precludes marriage in all cases, as both his text and the tables of consanguinity confirm.²¹

4. Conflating traditions in the eleventh and twelfth centuries

The difference between these two models seems clear enough. Given the stress on ‘ritual purity’ in recent scholarship on medieval incest legislation, it is worth mentioning that both traditions were well known in the Middle Ages. Evidently, both could be used to justify the ever-expanding incest prohibitions. The point is, however, that for centuries they were normally not combined. Early medieval incest legislation followed the tradition of Roman law in using the language of purity and pollution, and sometimes referred to the biblical incest prohibitions to justify marriage prohibitions. Augustine’s *City of God*, on the other hand, was very widely known but before the eleventh century was never quoted by popes or councils legislating on incest, nor was the chapter quoted above copied into any canon law collection. Some authors, such as Jonas of Orléans († 841), drew on both traditions in their discussion of the prohibited degrees,²² but this seems to have been without much effect on canon law.

This only changed in the eleventh century, perhaps most famously with Peter Damian’s letter on the degrees of kinship, in which he both quoted a definition of kinship very similar to that found in Augustine (and Isidore) and condemned marriage with even very distant relatives as a most horrible crime.²³ While there is some discussion about what Peter Damian actually meant to say, and some of his arguments are clearly flawed,²⁴ it is worth mentioning that his approach of combining Augustine/Isidore with the early medieval incest prohibitions was in tune with mainstream canon

20. Isidore, *Etymologiae* ix, 6: ‘Haec consanguinitas dum se paulatim propaginum ordinibus dirimens usque ad ultimum gradum subtraxerit, et propinquitas esse desierit, eam rursus lex matrimonii vinculo repetit, et quodam modo revocat fugientem.’ Cf. *De civitate Dei* xv, 16 (eds. Dombart and Kalb, CCSL 48, 476): ‘Fuit autem antiquis patribus religiosae curae, ne ipsa propinquitas se paulatim propaginum ordinibus dirimens longius abiret et propinquitas esse desisteret, eam nondum longe positam rursus matrimonii vinculo conligare et quodammodo revocare fugientem.’
21. The tables show more degrees of kinship than the prohibited ones; see H. Schadt, *Die Darstellungen der Arbores consanguinitatis und der Arbores affinitatis: Bildschemata in juristischen Handschriften* (Tübingen: 1982).
22. *De institutione laicali* (PL 106, 121-278, here at 183).
23. Letter 19, ed. *Die Briefe des Petrus Damiani*, ed. K. Reindel, MGH, Briefe der deutschen Kaiserzeit 4, 4 vols. (Munich: 1983-1993), vol. 1, 179-99; cf. letter 102, ed. Reindel, vol. 3, 132.
24. Ubl, *Inzestverbot*, 451-60.

law. More specifically, his approach was manifestly inspired by the collection of Burchard of Worms, of which he must have been one of the first Italian readers;²⁵ and later collections in their choice of material made similar choices to those of Peter Damian.

It is therefore the systematic canon law collections of the eleventh and early twelfth centuries that I now want to turn to. I will mainly concentrate on the *Decretum* of Burchard of Worms from the early eleventh century and the *Panormia* compiled a century later in northern France. Both works were very popular, indeed the most popular systematic canon law collections before Gratian. Apart from their very considerable direct influence, they also provided material for many other collections, and as I will argue, even beyond this the very structure of these collections is an important aspect in understanding ‘the law’ on endogamy and exogamy.

5. Burchard of Worms: incest and innovation

Recent scholarship has highlighted the paramount importance of Burchard of Worms († 1025) in the history of medieval marriage legislation.²⁶ According to Karl Ubl, Burchard compiled his collection as a ‘handbook for the incest campaign of Emperor Henry II’ and more or less single-handedly expanded the prohibited degrees of kinship to the seventh degree in canonical computation.²⁷ Even if one does not subscribe to this interpretation, there can be little doubt that Burchard took a vivid interest in incest legislation. Book seven on incest seems to have been planned at an early stage of the work,²⁸ and it was evidently important to Burchard. In the course of its compilation, he manipulated several proof-texts it contains,²⁹ and in doing so both reduced the contradictions between them and at the

25. J. J. Ryan, *Saint Peter Damiani and His Canonical Sources: A Preliminary Study in the Antecedents of the Gregorian Reform*, Pontifical Institute of Medieval Studies Studies and Texts 2 (Toronto: 1956), 161; D. Jasper, ‘Burchards Dekret in der Sicht der Gregorianer’, in W. Hartmann (ed.), *Bischof Burchard von Worms. Quellen und Abhandlungen zur mittelhochdeutschen Kirchengeschichte* 100 (Mainz: 2000), 167-98, at 169-70.

26. P. Corbet, *Autour de Burchard de Worm: L’église allemande et les interdits de parenté (IX^e–XII^e siècle)*, Ius Commune, Sonderhefte 142 (Frankfurt: 2001); Ubl, *Inzestverbot*, ch. 7.

27. Ubl, *Inzestverbot*, 426-35, at 435.

28. Comparing the earliest manuscripts, Hoffmann and Pokorny found evidence of substantial reworking of almost all books, but the only change to Burchard’s book seven was the addition of the two last canons: H. Hoffmann and R. Pokorny, *Das Dekret des Bischofs Burchard von Worms: Textstufen - Frühe Verbreitung - Vorlagen*, MGH, Hilfsmittel 12 (Munich: 1991), 40-86, esp. 41, 70-71, 73, 81-82.

29. Corbet, *Burchard de Worms*, 89-91.

same time came to a stricter interpretation of the law.³⁰ At the very least, his collection played a very important role in establishing the seventh degree of consanguinity and canonical computation as the legal standard.

How did Burchard deal with the two models of incest discussed above? Much like Peter Damian in the middle of the century, Burchard combined the two traditions, by employing Isidore's version of the Augustinian model and mixing it ingeniously with the early medieval incest prohibitions. More specifically, he quoted Isidore to argue that family affection 'fades away' the more distant the relation by blood becomes, but is 'restored' by matrimony. At the same time, he assembled a wide range of sources that condemn kin marriage as incest. Crucially, however, he also manipulated the tradition on two important points. First, he defined kinship much more widely than Isidore had done;³¹ and secondly, he identified this 'kinship' with the prohibited degrees. In part, Burchard changed the law by manipulating the actual wording of his proof-texts.³² However, I would like to draw attention to another, more subtle way in which Burchard changed the law.³³ My argument here is that the structure of his collection and the arrangement of the canons strongly affected the way his proof-texts worked. This to me seems relevant to understanding more than Burchard alone. While only few compilers of later canon law collections manipulated their texts as directly as Burchard did, my arguments about the arrangement of canons can be applied to many other systematic canon law collections.

The first, but fundamental decision of Burchard was to dedicate a separate book to the prohibited degrees, and to give it the title *De incesta copulatione*.³⁴ The collection of such substantial material under this heading was an innovation,³⁵ and it influences the reading of canons found in this

30. This fits the general trend of Burchard's work; see G. Austin, *Shaping Church Law around the Year 1000: The Decretum of Burchard of Worms*, Church, Faith and Culture in the Middle Ages (Farnham and Burlington: 2009).
31. On this crucial point, see Ubl, *Inzestverbot*, ch. 7. For Burchard's stemma, see Schadt, *Darstellungen*, 109-10 and Corbet, *Burchard de Worms*, 95-98.
32. Corbet, *Burchard de Worms*, 89-95.
33. For an inspiring discussion of the effects produced by different arrangements of proof-texts in pre-Gratian canon law collections, see A. Thier, 'Dynamische Schriftlichkeit: Zur Normbildung in den vorgratianischen Kanonensammlungen', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, kanonistische Abteilung* 124 (2007), 1-33.
34. See L. Fowler-Magerl, *Clavis canonum: Selected Canon Law Collections before 1140: Access with Data Processing*, MGH, Hilfsmittel 21 (Munich: 2005). The *Clavis* database is now available online: <http://www.mgh.de/ext/clavis/>. My thanks to Greta Austin for checking the *editio princeps* and Burchard manuscripts not available to me.
35. The Freising *Collectio duodecim partium*, which is very closely related to Burchard, is the only other collection to have a separate book on 'incest'. Earlier systematic collections do gather canons on incest, and in their rubrics and sub-titles also use terms like '*incestus*', but not in the same way as Burchard did. To take two major collections as an example: in the *Collectio vetus Gallica* seven canons are

book. The very unity of the book suggests that there was something like a uniform crime of incest, and more specifically suggests that the canons condemning incest as an abomination are talking about the same matters as the canons that define kinship as extending to the seventh degree of consanguinity. Burchard thus conflated two traditions that hitherto had been separate. Those early medieval councils that so strongly expressed fear of incest as a source of ritual impurity were referring to incest prohibitions significantly more limited than those Burchard propagated, while his authorities in favour of the very wide definition of kinship were not equally concerned with purity and pollution, if at all.³⁶ In Burchard's book seven, however, the divergent traditions are combined under the heading of 'incest', thus giving the very strong impression that the violation of these excessive prohibitions was indeed a horrible sexual crime.

The second aspect is also related to the systematic character of Burchard's collection. As one would expect from a systematic collection, it does not give any clue to the chronology of the material it presents. In the case of incest legislation, this is an important piece of information. As will be discussed later, the changing nature of this legislation was an important argument in the debates over dispensation from and finally reduction of the prohibitions. The reader of Burchard's *Decretum*, however, while confronted with a large number of authorities mainly asserting the seventh degree, can in no way guess at any historical development of these texts. This impression is partly due to Burchard's suppression of some material and the manipulation of other texts, but again the arrangement itself is crucial in suggesting that the law on incest had never substantially changed. At the same time, Burchard of course omits the original context of his material, which in many cases would have led the reader to very different conclusions from that of the relevant excerpt. For example, if one reads the acts of the Second Council of Toledo in context, it is quite clear that the bishops defined kinship, including the prohibited degrees of kinship, in Roman law terms.³⁷ If reduced to a few lines of condemnation of incestuous unions³⁸ and presented in the midst of authorities banning marriage to the seventh degree of kinship,³⁹ however, this fragment becomes yet another proof-text for a position that would have been utterly incomprehensible to

grouped together under the heading 'De incestis et adulteris et qui uxores suas demittunt', while in the *Dacheriana*, the incest prohibitions are in the first book, *De penitentia*. For these and further examples, see Fowler-Magerl, *Clavis*.

36. Isidore's definition of kinship is taken from Roman inheritance law, and thus quite independent even from Roman marriage law, let alone the medieval incest legislation; see above (n. 18).

37. Ubl, *Inzestverbot*, 200-02.

38. Burchard, *Decretum* vii, 6 (PL 140, 780-81).

39. Burchard, *Decretum* vii, 2 and 10-16 (PL 140, 779-82).

the bishops gathered in Toledo. On the other hand, the quotation from Leviticus 18:6 contained in this short Toledo fragment in itself influences the understanding of the surrounding canons. By alluding to Leviticus before quoting Isidore's rather wide definition of kinship, Burchard also makes Isidore appear to talk about kin marriage as an 'abomination'. Yet as mentioned above, Isidore in his discussion of the prohibited degrees would never have quoted Leviticus, nor have called perpetrators of this laws 'incestuous'. In these cases, the *mise en page* led to a remarkable reciprocal effect on how the proof-texts were most likely understood. The reading of texts from either tradition was substantially shaped by the presence of those from the other tradition, merging both into one model.

In the end, the book title, the suppression of the original context and the re-contextualizing of the authorities may have been as important as the selection of texts; and in my opinion these strategies are more important than Burchard's occasional manipulation of the actual proof-texts and their inscriptions. Important as these manipulations were for defining which unions were affected in practice, the importance of the more subtle changes that led to the re-definition of all endogamy as 'incest' can hardly be overestimated. It was this aspect of Burchard's work that fueled the eleventh-century debates, contributing to the highly sexualized rhetoric of reform.⁴⁰

6. The *Panormia*: a new reading of Augustine

The second canon law collection I want to examine is the famous *Panormia*, compiled around the year 1115 in northern France.⁴¹ To judge by the number of extant manuscripts, it was the single most successful of these collections. Another reason why an analysis of Burchard and the *Panormia* together is likely to give an accurate picture of 'the' canon law in the century before Gratian is that both collections were not only copied, but can be shown to have been used in many contexts. For Burchard's *Decretum*,

40. On this rhetoric, see Remensnyder, 'Pollution'; K. G. Cushing, *Reform and the Papacy in the Eleventh Century: Spirituality and Social Change*, Manchester Medieval Studies (Manchester and New York: 2005), ch. 6; and most recently M. McLaughlin, *Sex, Gender, and Episcopal Authority in an Age of Reform, 1000–1122* (Cambridge: 2010).

41. On the collection, see M. Brett, 'Creeping up on the Panormia', in R. H. Helmholz, P. Mikat, J. Müller and M. Stolleis (eds.), *Grundlagen des Rechts: Festschrift für Peter Landau*. Rechts- und Staatswissenschaftliche Veröffentlichungen der Görres-Gesellschaft N. F. 91 (Paderborn: 2000), 205-70. For the ongoing edition by Brett and Brasington, see <http://project.knowledgeforge.net/ivo/>. On the relation between Ivo of Chartres and the *Panormia*, see C. Rolker, *Canon Law and the Letters of Ivo of Chartres*, Cambridge Studies in Medieval Life and Thought, Fourth Series 76 (Cambridge: 2010), esp. chapters 6-8.

from very early on there is ample evidence that it was particularly valued in the conducting of councils. Bishop Eberhard of Constance († 1046) recorded in his copy that disputes at synods were ‘not easily settled without the authority of this book’,⁴² and around 1100, Sigebert of Gembloux also commented on Burchard as the ultimate authority at synods.⁴³ Both collections were also very frequently employed for the compilation and reworking of new collections well into the twelfth century; the *Panormia* was an important formal source for both recensions of Gratian; and Burchard provided the next generation with about one in two of the *paleae*. In the case of very many pre-Gratian collections, Burchard and the *Panormia* not only provided material, but were important models for the very structure of many of these works.⁴⁴ This also implies that the arguments based on the structure of the two collections studied here does indeed apply to many, perhaps even most collections that were compiled in the century before Gratian.

In the context of the present work, two aspects are important. First, the *Panormia* contained a short section gathering incest prohibitions as part of its seventh book. The book has no proper title, but is introduced by a *capitulatio* that indicates the subject matter of the whole book. As had become relatively common, kin marriages are called ‘incestuous’ here. This does not mean that the *Panormia* compiler was particularly concerned with incest; rather, both the division of material and the wording mainly indicate how widely Burchard’s innovations were accepted by c. 1115. Secondly, the *Panormia* goes beyond Burchard in the conflation of what I have described as the ‘two models of incest’ in the first part of this paper. The overall impression is that it is less concerned with purity and pollution than Burchard had been. The compiler retained only a few of the relevant early medieval proof-texts, the rubrics do not highlight ‘incest’ as much as Burchard had done, and none of the texts refers to Leviticus. At the same time, the famous *City of God* chapter discussed above plays an important role, as an excerpt from it is placed at the head of the most important subsection defining the prohibited degrees. The *Panormia* is one of the first collections to contain this passage, and the first to give it such prominence.⁴⁵ This, however, should not be described as a change from

42. O. Meyer, ‘Überlieferung und Verbreitung des Dekrets des Bischofs Burchard von Worms’, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, kanonistische Abteilung* 24 (1935), 141-83, at 153, n. 2.

43. *De scriptoribus*, cap. 143, *Catalogus Sigeberti Gemblacensis monachi de viris illustribus: Kritische Ausgabe*, ed. R. Witte (Bern: 1974), 91.

44. Fowler-Magerl, *Clavis*; Rolker, *Canon Law*, ch. 2.

45. *Panormia* vii, 52 is taken from Ivo’s *Decretum* viii, 39. As the very precise (and correct) inscription ‘Augustinus in libro de civitate Dei XV’ suggests, Ivo took the text from Augustine, not some florilegium. The *Panormia* compiler was apparently

‘old’ to ‘new’ justifications of the prohibited degrees. Despite the marked difference from Burchard, the *Panormia* conflates both traditions as he had done, and in so doing justifies the very doctrine that Burchard had so elegantly introduced into canon law. Again, it is not so much textual manipulation that is at play here, but rather the art of abbreviating and re-contextualizing ancient proof-texts.

Let us take a closer look. In the original context, it is clear that Augustine is talking about how to make sense of certain passages of the Old Testament, discussing for example the age at which the Old Testament patriarchs had reached puberty. In the passage on the marriages of the children and grandchildren of Adam and Eve, he discusses endogamy and makes some references to his own time, including his disapproval of marriages between first cousins. However, he does not call these unions incestuous, and correctly notes that they were not forbidden by divine law; as for secular law, Augustine mentions that cousin marriages had recently been banned.⁴⁶ In any case, it was custom rather than law that changed first, as pagans avoided the sibling marriage allowed to them and Christians refrained from cousin marriage even when it was allowed. Divine law, human law and custom all changed, and crucially, all three (most of the time) were at variance as to which marriages were acceptable and which not.

To any later reader, these passages could have served as a reminder that marriage prohibitions are a complex issue and that they had changed several times both before and after the time of Augustine. However, all this is true only if one reads the *City of God*. In the *Panormia*, the reader is presented with a slightly different text in a very different context. All references to cousin marriages as (formerly) legal, and also the remarks on changing law and custom are omitted here; even Augustine’s statement that the first men were allowed to marry their sisters is removed. Only the argument why exogamy is favourable for the distribution of *caritas* remains. The new context, as already indicated, is a section on incest. The *City of God* excerpt here is followed by Roman law fragments that condemn incest as a horrible crime.⁴⁷ What these excerpts from Justinian’s *Code* do not tell the reader is that its thundering rhetoric is actually referring to a very narrow set of prohibited degrees. In the original at least, cousin marriage is explicitly allowed; in the version found in the *Panormia*, this stance is subverted by a ‘*non*’ inserted in the relevant passage.⁴⁸ To remove all doubt,

less familiar with the source, as the inscription in all known manuscripts gives the incorrect book number also found in two *Decretum* manuscripts.

46. See above (n. 15).

47. *Panormia* vii, 53, ultimately taken from *Codex Justiniani* (C. J. 1, 10, 1) via Ivo, *Decretum* ix, 1 (see the note following).

48. The ‘*non*’ is already found in the *Panormia*’s formal source (Ivo, *Decretum* ix, 1):

after a short passage from Ambrose on uncle/niece marriages as violating divine law the *Panormia* has the famous letter of Alexander II on the seventh degree of kinship. Most of this material is ‘new’ in the sense that in c. 1115 it was not widely found in canon law collections and had never been combined before. Yet as in Burchard, not the ‘new’ content but the arrangement is crucial, as it suggests that all texts refer to the same crime of ‘incest’. In the form the *Panormia* presents its material, Augustine provides a general argument why endogamy should be avoided and that kinship extends very far; the Roman law adds to the impression that this endogamy is indeed incest; and the decretal gives precise instruction on how to determine exactly which marriages are incestuous.

As in Burchard, the selection, abbreviation and arrangement of canons in the *Panormia* serves to create the impression that the prohibited degrees are supported by a very uniform tradition including biblical incest prohibitions (as alluded to by Ambrose), natural law (as argued by Augustine) and both secular and ecclesiastical law from Roman antiquity to the recent past (Justinian and Alexander II, respectively). As so often,⁴⁹ and not unlike Burchard,⁵⁰ the *Panormia* compiler achieved considerable doctrinal unity of his texts by selecting and re-arranging his material. While neither Augustine nor Justinian would have called cousin marriages ‘incest’, in this context they work very well as authorities supporting the extreme marriage prohibitions of the eleventh and twelfth centuries. Such an argument would have been impossible to make in a chronologically arranged collection of canon law, but in the systematic collections, the very structure of the work could be used to challenge or to affirm the *status quo* of marriage legislation.

As the analysis of Burchard’s *Decretum* and the *Panormia* suggests, pre-Gratian canon law collections went far beyond simply making certain proof-texts fit; it is the absence of the original context, the arrangement of material and not least the choice of the ‘right’ title that could substantially change the law and at the same time very strongly suggest that the law as presented in these collections had never changed. As Augustine remarked on sibling marriage, the custom of turning away from this practice was so strong that eventually it became unimaginable that it once had been

‘Duorum autem fratrum sororumve liberi, vel fratris et sororis iungi non possunt.’ What Ivo’s formal source looked like is not easy to decide. The absence of the ‘non’ from both London, British Library, Add. Ms. 8873, fol. 57v and Paris, Bibliothèque de l’Arsenal, ms. 713, fol. 158r seems to suggest that it was added by Ivo himself; on the other hand, both manuscripts are later copies of material that was available to Ivo, not the manuscripts he worked with. On the collections, see Brett, ‘Creeping up’ and Fowler-Magerl, *Clavis*.

49. Rolker, *Canon Law*, ch. 7.

50. Austin, *Shaping Law*.

allowed.⁵¹ In the case of the systematic canon law collections, however, it is not so much custom but rather the conscious decisions of the compilers that made certain legal traditions invisible, and indeed not only suggested that marriages in the seventh degree were forbidden but made it appear as though they had never been legal.

Of course, this does not mean that arguments based on the changing nature of positive law were impossible to make in the eleventh and twelfth centuries. First of all, canon law was not uniform. Some compilers of canon law collections, such as Ivo of Chartres, made very different choices and did not strive for doctrinal unity.⁵² Other pre-Gratian canonical collections, for example the famous *Collection in 74 Titles*, contained little marriage law and as a consequence had not much to say about endogamy or incest. However, given the striking success of Burchard's *Decretum* and the *Panormia*, both directly and indirectly, it is fair to say that mainstream canon law collections before Gratian presented the reader with a view of the law that defined marriage even to very distant kin, if implicitly, as 'incest'. Development over time, internal contradictions and differences between different kinds of 'incest' was precisely not what the reader would find in these collections.

7. 'Nunc licere, nunc non licere': Theologians and marriage laws

Thus, if we are searching for different interpretations of the tradition, we have to turn away from these systematic collections. As I want to argue in the last part of this paper, the theologians of the late eleventh and early twelfth centuries were the ones who developed the arguments that later (mainly after 1215) would become legal dogma. Much earlier than the compilers of canon law collections, the theologians argued that there were different reasons for different kinds of incest prohibitions, that the prohibited degrees had changed over time, and that different prohibitions were of different quality. This kind of argument can already be found in the writings of Hrabanus Maurus († 856), who insisted that divine law prohibited only a very limited number of relations as incestuous.⁵³ He was

51. *De civitate Dei* xv, 16 (eds. Dombart and Kalb, CCSL 48, 477-78): 'Quod humano genere crescente et multiplicato etiam inter impios deorum multorum falsorumque cultores sic observari cernimus, ut, etiamsi perversis legibus permittantur fraterna coniugia, melior tamen consuetudo ipsam malit exhorre licentiam, et cum sorores accipere in matrimonium primis humani generis temporibus omnino licuerit, sic aversetur, quasi numquam licere potuerit.'

52. Rolker, *Canon Law*, ch. 7.

53. *Expositiones in Leviticum* (PL 108, 245-86).

very clear that any extension was based on human law, if indeed it was ‘law’ and not merely presumptuousness.⁵⁴ In the eleventh and twelfth centuries, this line of argument was taken up again by the theologians. This is most visible in an abundance of treatises and *sententiae* collections dealing with marriage that emerged in the milieu of the cathedral schools of northern France. The attribution of authorship and the dating of this material is complicated; in the context of the present paper, no attempts will be made to address these questions. I will concentrate on a number of relatively well-known texts from around 1100 to the 1130s: the tract *De nuptiis consanguineorum* attributed to Anselm of Canterbury,⁵⁵ the *Sententiae magistri A.*⁵⁶ and the sentences attributed to Peter Abelard.⁵⁷ The largest amount of material is associated with the so-called school of Laon.⁵⁸ The sentences on marriage from this milieu have been thoroughly studied,⁵⁹ including the material gathered in the famous *Liber Pancrisis*⁶⁰ and the marriage tract *In primis hominibus*.⁶¹

54. Ubl, *Inzestverbot*, 308-16.

55. PL 158, 557-60. I have no reason to believe that the attribution to Anselm is correct.

56. The relevant section on marriage is edited by Reinhardt, *Ehelehre*, 167-244; for the full text, see P. H. J. T. Maas, *The Liber sententiarum Magistri A.*, *Middleleeuwse Studies* 11 (Nijmegen: 1995).

57. *Sententie magistri Petri Abelardi*, ed. D. E. Luscombe, CCCM 14 (Turnhout: 2006).

58. V. I. J. Flint, ‘The “School of Laon”: A Reconsideration’, *Recherches de Théologie ancienne et médiévale* 43 (1976), 89-110, remains fundamental.

59. O. Lottin, *Psychologie et morale aux XIIe et XIIIe siècles*, 6 in 8 vols. (Gembloux: 1948-1960); H. Zeimentz, *Ehe nach der Lehre der Frühscholastik: Eine moralgeschichtliche Untersuchung zur Anthropologie und Theologie der Ehe in der Schule Anselms von Laon und Wilhelms von Champeaux, bei Hugo von St. Viktor, Walter von Mortagne und Petrus Lombardus*. *Moraltheologische Studien, Historische Abteilung* 1 (Düsseldorf: 1973); H. J. F. Reinhardt, *Die Ehelehre der Schule des Anselm von Laon: Eine theologie- und kirchenrechtsgeschichtliche Untersuchung zu den Ehetexten der frühen Pariser Schule des 12. Jahrhunderts*. *Beiträge zur Geschichte der Philosophie und Theologie des Mittelalters N.F.* 14 (Münster: 1974). For Bliemetzrieder’s works, see the note following.

60. In addition to the works cited above, see those of F. P. Bliemetzrieder, especially *Anselms von Laon systematische Sentenzen*. *Beiträge zur Geschichte der Philosophie des Mittelalters* 18 (Münster: 1919), ‘Trente-trois pièces inédites de l’œuvre théologique d’Anselme de Laon’, *Recherches de Théologie ancienne et médiévale* 2 (1930), 54-79; and ‘Paul Fournier und das literarische Werk Ivos von Chartres’, *Archiv für katholisches Kirchenrecht* 115 (1935), 53-91 (with incorrect attribution of authorship, 62-66). From the modern literature, see most recently C. Giraud and C. J. Mews, ‘Le *Liber Pancrisis*, un florilège des Pères et des maîtres modernes du XIIe siècle’, *Bulletin du Cange* 64 (2006), 145-91. Giraud’s Ph.D. thesis on the *Liber Pancrisis* was not available to me.

61. The tract is edited by B. Matecki, *Der Traktat In primis hominibus: Eine theologie- und kirchenrechtsgeschichtliche Untersuchung zu einem Ehetext der Schule von Laon aus dem 12. Jahrhundert*. *Adnotationes in Ius Canonicum* 20 (Frankfurt and New York: 2001). While it is conventionally dated to the 1120s, any precise dating would require a new study of the formal sources. Matecki suggested, but in my

A first difference between the theological material and the canon law collections concerns the vocabulary employed. While marriage is a prominent topic, and the prohibitions are regularly discussed, the term ‘incest’ (and related vocabulary) is remarkably absent. In the sentence collection of the so-called school of Laon, for example, the term rarely is used at all, and is applied only to very specific sexual offences.⁶² Most strikingly, none of the very numerous *sententiae* and none of the various marriage tracts from this milieu calls marriages within the prohibited degrees ‘incestuous’. Turning from the vocabulary to the actual content, the difference between *sententiae* and canon law collections is equally manifest. Not surprisingly, the theologians turned more frequently to the Old Testament than contemporary canon law collections did. Yet while the latter quoted Leviticus (if only via the Council of Toledo) mainly to justify the legal *status quo*, the theologians rather stressed the difference between Old Testament and Christian times. Several *sententiae* and marriage tracts made explicitly clear that the prohibitions in Leviticus were limited to the relatives listed there.⁶³ Burchard, by contrast, had quoted Leviticus 18:6 in such a way as to suggest strongly that the general ban on kin marriages had a biblical foundation. For the theologians, it was commonplace to assert that kin marriage (never called ‘incest’) was allowed in Old Testament times but was now forbidden.⁶⁴ Only the Old Testament prohibitions are sometimes called ‘natural’ or ‘natural law’; by contrast, kin marriage according to the *Sententiae Anselmi* was no violation of natural law but of ecclesiastical statutes,⁶⁵ an argument widely disseminated by Honorius Augustodunensis.⁶⁶ The prohibitions going beyond those found in Leviticus were referred to as newly established in Christian times (‘*institutio temporis gratiae*’),⁶⁷ and more specifically as ecclesiastical statutes.⁶⁸ Some authors

opinion did not prove, a use of the *Panormia* and the slightly later *Collection in Ten Parts*.

62. Reinhardt, *Ehelehre*, 115-17.
63. E.g. *De nuptiis consanguineorum*, after having quoted Lev. 18:6 (PL 158, 558): ‘Deinde ex sequenti ordine proximos illos sanguinis, ad quos non sit accedendum nec revelanda eorum turpitudine.’
64. *De nuptiis consanguineorum* (PL 158, 558); *Cum omnia sacramenta* (ed. Bliemetzrieder, *Anselm von Laon*, 141); *In primis hominibus* (ed. Matecki, *Traktat*, 13*); *Liber Pancrisis* (ed. Bliemetzrieder, ‘Paul Fournier’, 76).
65. *Sententiae Anselmi* (ed. Bliemetzrieder, *Anselm von Laon*, 151): ‘Sacerdotium enim non videtur auferre coniugium, cum Greci sacerdotes habeant uxores, sed ecclesie institutio et patrum prohibitio. Non enim esset contra legem nature, sed contra precepta ecclesiastice institutionis. Sed violat legem benivolentie, que tendit ad perfectionem ecclesie, sicut coniugium inter cognatos non est contra legem nature, sed contra precepta institutionis ecclesie.’
66. Honorius Augustodunensis, *Elucidarium* ii, 16 (PL 176, 1146): ‘Discipulus: Est grave peccatum, ducere cognatam? Magister: Secundum naturam, nullum, sed secundum statutum Ecclesiae magnum.’
67. *In primis hominibus* (ed. Matecki, *Traktat*, 13*).

comment that many marriages are truly marriages, but their validity was subject to change ('nunc licere, nunc non licere'), both because of changing laws and because of changing practices of dispensation.⁶⁹ In any case, the difference between Old Testament precept and later legislation is made very clear. Rather than justifying contemporary legislation by biblical parallels, the theologians time and again stressed the difference between them.

A similar observation can be made for the passage from the *City of God* discussed above. Augustine's model, so important for Peter Damian and the *Panormia* compiler, was indeed widely known and discussed among the theologians, too.⁷⁰ However, the latter used it to reach very different conclusions. In particular, they took up Augustine's original argument that already the divine precepts on kin marriage had been subject to change, and that human legislation, whether secular or ecclesiastic, was both different from biblical incest prohibitions and itself changeable. Augustine's model was thus not conflated with the discourse on incest as an abomination, as it was in the canonical collections. Rather, in the theological discussion it is linked to human, not even specifically Christian legislation, and the vocabulary of purity and pollution is lacking. Moreover, in the *sententiae* attributed to Peter Abelard at least, the Augustinian argument is explicitly described as having been adopted by the Church from the Romans.⁷¹ While this (quite correctly) highlights Augustine's role in merging pagan and Christian arguments, it is striking to see that no such connection is made between church law and Old Testament precept. Whether adopting Roman law principles or issuing genuinely new laws, the Church according to the early twelfth-century theologians was making laws that were fundamentally different from the incest prohibitions in Leviticus.

68. *Sententie magistri Petri Abelardi* (ed. Luscombe, CCCM 14, 124): '[...] ecclesia [...] constituit propter propagationem caritatis'; for a full quotation, see below (n. 70).
69. *Liber Pancrisis* (ed. Bliemetzrieder, 'Paul Fournier', 76): 'Confiteri igitur debemus hec omnia esse coniugia, sed secundum diversas ecclesie institutiones nunc licere, nunc non licere.'
70. *De nuptiis consanguineorum* (PL 158, 558); *Liber Pancrisis* (ed. Bliemetzrieder, 'Paul Fournier', 76); *Sententie magistri Petri Abelardi* (ed. Luscombe, CCCM 14, 124). Augustine is quoted verbatim in *In primis hominibus* (ed. Matecki, *Traktat*, 13*).
71. *Sententie magistri Petri Abelardi* (ed. Luscombe, CCCM 14, 124): 'Preceptum etiam erat eis ut unusquisque de tribu sua uxorem duceret, ne tribus commiscerentur et ne transiret possessio unius tribus in possessionem alterius, quia terra per tribus divisa erat. Nunc autem non licet, sed de aliena gente, quod ecclesia (post Christum) constituit propter propagationem caritatis, quod a Romanis ecclesia accepit. Romani enim quando amicitiam cum aliis civitatibus facere volebant, uxores ex eis ad confederationem amicitie ducebant. Similiter ecclesia instituit ut non de sua sed de aliena prosapia uxorem quis ducat, quia non putavit hoc sufficere ad dilatationem caritatis; quia per uxorem quam accipit totam illam progeniem diligit.'

Stressing the differences between biblical prohibitions, patristic reasoning and current legal dogma rather than conflating them, the theologians made quite clear that most marriage prohibitions were ecclesiastical statutes and thus subject to change. While pre-Gratian canonists would certainly have agreed in general, they nonetheless compiled, used and spread collections that at least in the case of incest conveyed a different picture. Collections like Burchard's *Decretum* made it extremely difficult to see that the marriage prohibitions were changing legislation based on variable legal concepts. Much of this was to become common stock among canonists of the late twelfth and early thirteenth century, and Gratian's *Decretum* certainly was an important step in that direction.⁷² However, before Gratian this line of argument is found mainly with theologians. Thinking about the history of salvation, these scholars were aware of the very historicity of canon law that was obscured in the most up-to-date genre of canon law collections of their time.

8. Conclusions: A law that can and cannot change

As the analysis of the 'two models of incest' has shown, in the Middle Ages there were at least two very different ways to talk about ecclesiastical prohibitions of kin marriage. For both, venerable and well-known authorities were available, and the way in which medieval authors followed one or the other (or combined both) was to a considerable degree a matter of choice. This is all the more true as the same texts could be read in very different ways. Quotations from Leviticus in the early Middle Ages served to justify the slowly expanding incest prohibitions, but for the theologians of the early twelfth century they showed how very different biblical and human legislation was. Likewise, for centuries Augustine's reasoning on exogamy was not thought to have much to do with incest, but in the *Panormia* and other twelfth-century collections it served to justify an excessive set of marriage prohibitions. Again, the theologians read and quoted Augustine differently, paying much more attention to his arguments on the changing nature of law and custom. Above all, it is crucial to see that these traditions were normally kept separate before Burchard of Worms chose to combine them in his canon law collection. Only this conflation of both discourses made it possible to justify an unheard-of expansion of marriage prohibitions, and paved the way for later radicals like Peter Damian.

These and other examples help to illuminate the differences between

72. See, above all, C.35, q.1, d.p.c.1: *Decretum magistri Gratiani*, ed. E. L. Friedberg (Leipzig: 1879), cols 1262-63.

early and high medieval canon law, and also those between theological and canon law debates of the early twelfth century. These differences, in my opinion, have relevance beyond understanding the change of dogma or the growing distinction between canon law and theology. Indeed, despite all differences, it is the interaction between these textual traditions that sheds light on the canon law tradition itself as a law ‘that can and cannot change’.⁷³ After all, while canon law and theology grew further apart in the twelfth century, there was also considerable interaction. Not only did theologians study the same authorities and use the same textbooks as the canonists;⁷⁴ it seems also plausible that their debates contributed to the re-examination that ultimately allowed Innocent III to change the ecclesiastical rules on marriage so dramatically in 1215, seemingly without much controversy. At the present state of research, the silence surrounding this decision, which made many ‘incestuous’ unions perfectly acceptable marriages, still calls for a satisfactory explanation. Had the pre-1215 rules relied on a belief that all marriages within the prohibited degrees were incest, even contemplating such a dramatic change would have seemed highly unlikely. While it is clear how campaigns against ‘incest’ would often result in an expansion of the prohibited degrees, a ‘campaign for incest’ seems unimaginable. However, the theologians helped to discuss these issues in calmer terms and at the same time provided solid arguments why marriage prohibitions could indeed change.

While this development cannot be studied in the context of the present article, it is clear enough that the development of canon law ultimately was not restricted by the various efforts to present the laws of marriage as unchangeable. While some compilers clearly presented their material in ways that made certain interpretations more likely than others, they rarely envisioned and certainly never achieved a definite law code. Even the more selective compilers confronted their readers with material that potentially challenged the legal *status quo*, and had only limited control of how their collections were read, used, re-worked and added to by others. Burchard and others in their collections had greatly reduced the divergence of canonical marriage prohibitions, and glossed over the remaining discrepancies. However, while thus reducing the confusion resulting from the long process of expanding marriage prohibitions, the new model also produced a new kind of confusion among readers who looked beyond the collections and

73. The phrase is borrowed from J. T. Noonan, *A Church That Can and Cannot Change: The Development of Catholic Moral Teaching*, Erasmus Institute Books (Notre Dame, IN: 2005).

74. The *Panormia* was among the most important sources for the reception of patristic material among twelfth-century theologians. See C. Munier, *Les sources patristiques du droit de l'église du VIIIe au XIIIe siècle* (Mulhouse: 1957), 27-52.

compared them to other texts – be they the original sources (Leviticus, Augustine) or some other canon law collection. Without too much effort, any twelfth-century scholar could quickly find canons from various centuries banning quite different degrees, divergent justifications for these prohibitions, very different trees of consanguinity, and several ways of calculating the prohibited degrees. He would certainly find many authorities supporting the current legislation, but also many others who did not; with some luck, he could even find canon law collections that included texts allowing the marriage of first cousins.⁷⁵

Whatever the intentions of this or that compiler may have been, they all passed on traditions much richer and more complex than any ‘tendency’ established by modern scholarship. Conflict and confusion surrounding the medieval law on marriage posed and continues to pose problems to any reader of this material; yet it is precisely this confusion that is indicative of the dynamic traditions of canon law.

75. See above (n. 47) on the twelfth-century manuscripts London, BL, Add. Ms. 8873 and Paris, Arsenal 713.