

Lest Amateurs Argue Canon Law: A Reply to Patrick Gordon's Brief Against Bp. Thomas Daily

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The inaugural issue of the re-christened *Journal of Catholic Legal Studies*¹ carried a twenty-four page article highly critical of Brooklyn Bishop Thomas Daily's decision to deny ecclesiastical funeral rites to John "the Dapper Don" Gotti, a notorious American Mafia chieftain who succumbed to cancer while serving a life sentence for, among numerous other crimes, murder.² Written by common law attorney Patrick Gordon,³ the article strives to be a canonical and theological critique of the bishop's actions.⁴ According to Gordon, Bp. Daily's decision "[denied] Gotti [a] fundamental right provided to all Catholics" (at 254), that in so acting the bishop "abused his discretion" (*ibid*), and that consequently "the Church not only [hurt] the deceased and his or her

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¹ Formerly *The Catholic Lawyer*, published for fifty years by St. John's University School of Law in New York. See Michael Simons & Susan Stabile, "A New Era for *The Catholic Lawyer*", 44 *Journal of Catholic Legal Studies*, [Introductory Essay, no pagination] (2005).

² Patrick Gordon, "Gotti, Mob Funerals, and the Catholic Church" 44 *Journal of Catholic Legal Studies* 253-276 (2005) [hereafter, Gordon]. The type of article written by Gordon is known in American legal circles as a "Note" but I will call it an article for simplicity. The fact that Bp. Daily denied ecclesiastical funeral rites to John Gotti is not in question. See Catholic News Service/United States Conference of Catholic Bishops, *Origins* 32:7 (27 June 2002) p. 98. Gotti was allowed to be buried in a Catholic cemetery, and subsequent prayers for the repose of his soul, including Mass, were not prohibited by the bishop.

³ Gordon has bachelor and law degrees from prestigious American universities and presently serves as a clerk to a US federal appellate court judge (Gordon, 253) which post marks him as a young lawyer of considerable talent.

⁴ There seems little doubt that in structuring his arguments as he did, Gordon believed he was challenging the bishop on his own turf, as it were, that is, in the light of canonical and theological requirements to which Bp. Daily should have been most attentive. Of the 168 footnotes in Gordon's article, some 90 of them (53%) cite to one or more canonical or theological sources. This measure of Gordon's efforts to build his arguments on canonical and theological sources climbs to over 75% when one discounts some 50 footnotes (mostly to newspapers and magazines) that tediously narrate Gotti's criminal career and the media flap over Bp. Daily's funeral decision – as if there were any question about these matters – and goes higher still when logistical footnotes and still more citations to Gotti's criminal court cases are excluded.

family, but also ultimately defeat[ed] its own aim of allowing the community to express empathy [sic] for the dead" (at 261). The bishop's decision, says Gordon "was of extreme significance" (*ibid*), and amounted to the "[denial] of a rite fundamental to [Gotti's] existence as a Catholic" (at 263). Gordon continues, "in making his decision Bishop Daily should have been guided by the 'unity of law and theology' that is recognized by the Church" (at 271-272, cit. omm.), implying of course that the bishop was *not* so guided, and that "there seems to be little doubt that John Gotti should have received all the rights intrinsic to his being baptized" (at 276) lest the bishop squander "the ideal opportunity for the Church to display one of its most fundamental tenets, forgiveness" (*ibid*). In brief, says Gordon, "according to the beliefs of the Church... there should have been a much different outcome than that which was reached in the case of John Gotti" (at 255).

Strong words, these, especially if they are true.

But they are not. Indeed, anyone with a background in canon law can see that Gordon's article is a cornucopia of canonical errors and even occasional gaffs. Gordon makes repeated mistakes in handling even the most rudimentary canonical sources and, because he wrongly utilizes techniques of legal interpretation that are sound in the common law system but which are gravely flawed in the canonical, he utterly misconstrues the plain text of the primary canon in question.⁵ Unfortunately, what would be quickly apparent to readers with training in canon law will not necessarily be recognized by persons without. Given, therefore, the severity of the criticism that Gordon has visited upon a bishop who, I suggest, was acting squarely within the scope of his authority, and because that criticism rests on demonstrably shabby canonical analysis, this reply is in order.

At the outset, we should be clear that bishops are not above criticism, nor is canon law the exclusive domain of canonists.⁶ But it is mandatory that those who

⁵ Per a notice in the frontispiece of each issue, the views expressed in *The Journal of Catholic Legal Studies* are solely the responsibility of their authors. Over the years, *Catholic Lawyer/Journal of Catholic Legal Studies* has published several credible articles and notes dealing with canon law, but one wonders whether the editors had access to a canonical referee in deciding whether to publish Gordon's article. With some reluctance, I will limit my reply to refutation of Gordon's canonical arguments against Bp. Daily's action, though I suggest that Gordon's use of many theological sources is also quite confused and wanting.

⁶ One could hardly hold canon law to be off-limits to non-canonists in light of the grand sweep of canonical history or, less dramatically, in the face of norms that expressly authorize non-degreed personnel to serve as, for example, canonical advocates if they have nevertheless attained canonical expertise. See *CODEX IURIS CANONICI AUCTORITATE IOANNIS PAULI PP. II PROMULGATUS*, (Liberia Editrice Vaticana, 1983) [hereafter, 1983 CIC] 1483: "Procurator et advocatus esse debent aetate maiores et bonae famae; advocatus debet praeterea esse catholicus, nisi Episcopus dioecesanus aliter permittat, et doctor in iure canonico, vel alioquin vere peritus et ab eodem Episcopo approbatus." *English trans.*: "The procurator and advocate must have attained the age of majority and be of good reputation; moreover, the advocate must be a Catholic unless the diocesan bishop permits otherwise, a doctor in canon law or otherwise truly expert, and approved by the same bishop." All English translations of

would criticize bishops do so appropriately, and that those who would apply canonical arguments for their positions do so with some show of competence.⁷

A) **Mishandling of basic canonical sources**

In canon law as in common law, competent legal argumentation requires the accurate citation of relevant sources. What first year student of the common law has not been warned about the serious consequences that would befall counsel who mislead a court with bad citations? But citation standards are hardly less stringent for practitioners of canon law than they are for common lawyers. In regard, however, to the accuracy and the relevancy of his canonical citations, Gordon's article fails to pass elementary review. I offer several examples.

Example 1. Gordon writes (at 254) "The decision to deny Gotti this fundamental right provided to all Catholics was handed down by Brooklyn Bishop Thomas Daily." Two footnotes are offered in support of this sentence, one after the word "right", the second after the name "Daily".

Gordon's footnote for the word "right" reads as follows: "See Pedro Lombardía, *The Fundamental Rights of the Faithful*, 48 *FUTURE CANON L.* 81, 86 (1969) ('[Catholics have] a right to the spiritual riches of the Church and to all necessary aids to salvation, such as sacraments...')." What is wrong with this? First, there is no such series called "The Future of Canon Law", as Gordon's citation form implies, let alone 48 issues of it by 1969. There is, instead, a well-known series called *Concilium*, influential in canonical and theological circles, and founded by, among others, the present Pope Benedict XVI. The 48th number of *Concilium*, being dedicated to canonical topics, was sub-titled "The Future of Canon Law" but the name of the journal did not change. *Concilium*, then, was obviously what Gordon meant to cite, though people unfamiliar with theo-canonical literature would spend considerable time trying to track down a journal using a name that does not exist. Second, and more substantively, the passage Gordon actually quotes does not sustain the burden he lays on it, for nothing in it even addresses, let alone guarantees, ecclesiastical funeral rites, let alone same to mobsters. Instead, Lombardía's text plainly talks about "aids to salva-

the 1983 Code of Canon Law will be taken from Canon Law Society of America, *CODE OF CANON LAW, LATIN-ENGLISH EDITION, NEW ENGLISH TRANSLATION*, (Canon Law Society of America, 1999).

⁷ 1983 CIC 212 § 3 - Pro scientia, competentia et praestantia quibus pollent, ipsis ius est, immo et aliquando officium, ut sententiam suam de hisquae ad bonum Ecclesiae pertinent sacris Pastoribus manifestent eamque, salva fidei morumque integritate ac reverentia erga Pastores, attentisque communi utilitate et personarum dignitate, ceteris christifidelibus notam faciant. *English trans:* "According to the knowledge, competence, and prestige which they possess [the Christian faithful] have the right and even at times the duty to manifest to the sacred pastors their opinion on matters which pertain to the good of the Church and to make their opinion known to the rest of the Christian faithful, without prejudice to the integrity of faith and morals, with reverence toward their pastors, and attentive to the common advantage and the dignity of persons."

tion" and "sacraments", and who is so ill-informed as to argue that Church funerals are aids to one's salvation or are sacraments?⁸

Gordon's second footnote for this sentence (that, after the name "Daily") reads thus: "See KARL RAHNER, S.J., BISHOPS: THEIR STATUS AND FUNCTION 23 (Edward Quinn trans., 1964) ('[T]he college of bishops with the pope as its head possess the supreme plenitude of authority in the Church...')." Plainly, such a source tells the reader absolutely nothing about the appropriateness of what Bp. Daily did in regard to John Gotti's funeral. This source simply talks instead, in the broadest of terms, about the relationship between popes and the college of bishops. There are, of course, thousands of scholarly passages that outline the authority of the episcopal college worldwide, but what has that to do with Gordon's assertions about the question of mob funerals? Nothing.

Example 2. Gordon writes (at 254), "While, according to the Code of Canon Law, Bishop Daily has the authority to deny an individual such a rite, denial is reserved for extreme circumstances." The footnote for this sentence reads as follows: "CODEX IURIS CANONICI c.2, § 1984 (Canon Law Society of America trans. 1998) (1983) [hereinafter CIC-1983]." This citation is a shambles.

First, Canon 2 of the 1983 Code makes no provisions whatsoever about the authority of bishops over ecclesiastical funeral rites.⁹ Ironically, in fact, 1983 CIC 2 states the basic rule that the Code of Canon Law is *not* the place one usually turns to for guidance on liturgical questions. What Gordon thinks the relevance of this canon is to his argument against denying ecclesiastical funeral rites escapes me. Second, there simply is no "§ 1984" in the Code of Canon Law, and no such citation is known among canonists. Nor is 1984, say, the year the revised Code was promulgat-

⁸ It is settled Catholic teaching the fate of one's soul is determined immediately according to its spiritual condition at the time of death (CATECHISM OF THE CATHOLIC CHURCH, 2d ed., 1997) [hereafter, CCC] nos. 1021-1022) and not by the kind of funeral one receives. Moreover, funerals are not one of the seven sacraments of the Church (CCC 1113). See also fn. 52, below. As an aside (and notwithstanding that the point is still irrelevant to his main argument), one wonders why Gordon reaches back to a private essay from the 1960s in order to establish the point he *thought* he was making (pamely, that the faithful have a right to the sacraments and other aids to salvation) when that very point, sound as far as it goes, is quite firmly set forth in nothing less than codified Church law. Was Gordon unaware that 1983 CIC 213 declares "Ius est christifidelibus ut ex spiritualibus Ecclesiae bonis, praesertim ex verbo Dei et sacramentis, adiumenta a sacris Pastoribus accipiant" *English trans.*: "The Christian faithful have the right to receive assistance from the sacred pastors out of the spiritual goods of the Church, especially the word of God and the sacraments."? Gordon's proclivity to ground assertions of fundamental ecclesiastical rights in unofficial, sometimes even trivial, sources will be seen again. See fn. 16, below.

⁹ 1983 CIC 2 - Codex plerumque non definit ritus, qui in actionibus liturgicis celebrandis sunt servandi; quare leges liturgicae hucusque vigentes vim suam retinent, nisi earum aliqua Codicis canonibus sit contraria. *English trans.*: "For the most part the Code does not define the rites which must be observed in celebrating liturgical actions. Therefore, liturgical laws in force until now retain their force unless one of them is contrary to the canons of the Code."

ed or the year it took effect. One cannot guess, then, what the reference “§ 1984” is supposed to mean. Third, because the text of the canon in question was (albeit surprisingly) not quoted by Gordon, there is no need to identify a specific translation but, *if* a Canon Law Society of America translation of the 1983 Code *were* being cited here,¹⁰ the year of publication would have been either 1983 (though that translation is outdated now) or 1999 (the American translation currently in print), but not “1998” (which was, at most, the year the revised American translation, foreword, and index happen to have been copyrighted, but not the year any of these materials were published). So many errors in citing the most fundamental text in canon law leaves little room for confidence that more complex canonical sources will be handled correctly. In fact, Gordon’s incompetent use of canonical sources extends, as we shall see, to his treatment of pre-1983 Code materials as well.

Example 3. Gordon writes (at 262), “Under the 1917 Code of Canon Law, the denial of ecclesiastical burials was embodied in Canon 1268.” His footnote reads: “CODEX IURIS CANONICI c.1268 (Canon Law Society of America trans., 1917) [hereinafter, CIC-1917].” Again, where to start? First, the twice-referenced Pio-Benedictine Canon 1268 has absolutely nothing to do with ecclesiastical funerals. 1917 CIC 1268 deals exclusively with reservation of the Eucharist in churches and oratories.¹¹ Gordon’s citation is therefore meaningless.¹² Second, no Canon Law Society of America trans-

¹⁰ Gordon himself is confused about what translation he is using elsewhere in his article. See fn. 27.

¹¹ CODEX IURIS CANONICI PII X PONTIFICIS MAXIMI IUSSU DIGESTUS BENEDICTI PAPAE XV AUCTORITATE PROMULGATUS (Typographi Pontificii, 1918) [hereafter, 1917 CIC], 1268 - § 1. Sanctissima Eucharistia continuo seu habitualiter custodiri nequit, nisi in uno tantum eiusdem ecclesiae altari. § 2. Custodiatur in praecellentissimo ac nobilissimo ecclesiae loco ac proinde regulariter in altari maiore, nisi aliud venerationi et cultui tanti sacramenti commodius et decentius videatur, servato praescripto legum liturgicarum quod ad ultimos dies hebdomadae maioris attinet. § 3. Sed in ecclesiis cathedralibus, collegiatis aut conventualibus in quibus ad altare maius chorales functiones persolvendae sunt, ne ecclesiasticis officiis impedimentum afferatur, opportunum est ut sanctissima Eucharistia regulariter non custodiatur in altari maiore, sed in alio sacello seu altari. § 4. Curent ecclesiarum rectores ut altare in quo sanctissimum Sacramentum asservatur sit prae omnibus aliis ornatum, ita ut suo apparatu magis moveat fidelium pietatem ac devotionem. *English trans.:* § 1. The most holy Eucharist cannot be kept continually or habitually, except on only one altar of the church. § 2. It shall be kept in the most excellent and the most noble place of the church and therefore regularly on the major altar unless it seems that the veneration and cult of such a sacrament is more convenient and decent elsewhere, observing the prescriptions of liturgical law that pertain to the final days of the great week. § 3. But in cathedral churches or in collegial or conventual ones in which choral functions are conducted at the main altar, lest ecclesiastical offices be impeded, it is opportune that the most holy Eucharist not regularly be kept at the major altar but in another chapel or altar. § 4. Let rectors of churches take care that the altar in which the most holy Sacrament is reserved be decorated above all the others so that by this appearance the faithful are moved to greater piety and devotion. (Translation mine.)

¹² Indeed, so are the next three footnotes (11, 12, and 13), all of which refer back to this one. If one were inclined to do a little sleuthing, though, a clue to unraveling Gordon’s botched use of Pio-Benedictine canonical sources in this area might be found in his later use of the work of American Franciscan canonist Stanislaus Woywod (Gordon, p. 263 in fn. 72). Woywod discusses Pio-Benedictine

lation of the 1917 Code was produced at any time.¹³ One is at a loss to know what Gordon is trying to accomplish by purporting to cite to one.

Some of Gordon's errors, while still technical in scope, are more substantive in content. Consider the following and note that these are again the kinds of errors that shake a reader's confidence in Gordon's ability to guide one through canonical data.

Example 4. Gordon writes (at 262), "The history of Canon 1184 can be traced all the way back to the Council of Trent." A canonist, however, could determine in a few seconds that Canon 1184 of the 1983 Code rests on *fontes* showing a legal history going back at least to the time of Gratian who wrote in the 12th century, not to Trent which was convened in the 16th.¹⁴ And, investing a few more minutes in looking at *fontes* themselves, one sees that Gratian himself was drawing on still older sources, meaning that Gordon's guess about when ecclesiastical burial deprivation legislation emerged is off by centuries.¹⁵ Finally, of the more than 50 sources that Cdl. Gasparri identified as *fontes* for 1917 CIC 1240 § 1 (the real precursor to 1983 CIC 1184) only *one* of them is to the Council of Trent, and some 20 others pre-date Trent. Gordon's claim that the origin of Canon 1184 lies in Tridentine legislation is quite unsustainable.

These instances could be multiplied,¹⁶ but the foregoing should be sufficient to

funeral deprivation issues in, as it happens, section 1268 of his famous PRACTICAL COMMENTARY ON THE CODE OF CANON LAW. Could Gordon have mistaken paragraph markers in Woywod's treatise for canon numbers in Pio-Benedictine law? His footnotes 69, 70, and 71 would seem to bear this out. While on the topic of Woywod, one may note Gordon's failure to recognize (at 263, fns. 72 and 73) that Woywod's commentary actually exists in two volumes (here, printed in a single binding), and that Gordon's citation should have been to the second of those volumes, and not to the apparent first. I do not know how someone could be more than an inch into the pages of a hardback book and not wonder why he was only on page 53 thereof.

¹³ "During its sixty-five-year enforcement period, the 2,414 canons of the 1917 Code were never translated from the original Latin and published as an entire work." Edward Peters, curator, THE 1917 PIO-BENEDICTINE CODE OF CANON LAW IN ENGLISH TRANSLATION WITH EXTENSIVE SCHOLARLY RESOURCES (Ignatius Press, 2001) at xxiv, and I discuss Woywod's paraphrase of the Pio-Benedictine Code, which Gordon used, at xxiv-xxv. The lack of a comprehensive English translation of the 1917 Code, by the Canon Law Society of America or by any one else, was, of course, one of the reasons why I decided to do one in the late 1990s.

¹⁴ See generally Anders Winroth, THE MAKING OF GRATIAN'S *DECRETUM* (Cambridge, 2000) p. 144. Gordon's claim that the history of Canon 1184 "dates all the way back to the Council Trent" sounds as odd to canonists as an author's assertion that, say, "the history of Spain dates all the way back to the discovery of the New World", would sound to historians.

¹⁵ For a reliable historical overview in English of ecclesiastical burial deprivation legislation prior to Gratian, see Charles Kerin, THE PRIVATION OF CHRISTIAN BURIAL, Studies in Canon Law no. 136 (Catholic University of America, 1941), [hereafter, Kerin, PRIVATION] pp. 1-28.

¹⁶ As a lighter example, a canonist cannot but smile when reading Gordon's only citation in support of his claim (at 261) that "Church funeral services are not a privilege, but rather a fundamental right, granted to members of the Church." Behind this assertion of a "fundamental right" lies what, according to Gordon? The Code of Canon Law? The documents of Vatican II? A passage from Sacred Scripture? No, instead, local guidelines for funerals posted on a diocesan website! (See Gordon, 261, fn. 56, with ref. to the Diocese of Spokane WA, whose webpage, however, contrary

demonstrate that Gordon is at a loss to present and discuss even the most basic texts and sources used in modern canonistics. His slovenly citations cause him to forfeit any benign predispositions (to say nothing of the reasonable expectation of basic competence) that readers should be able to accord scholars publishing in peer-reviewed journals, and they certainly disqualify him from mounting credible canonical critiques of the decisions of Catholic bishops.

B) Reading canonical texts with common law glasses

Canonists trying to give Gordon's article a fair reading will be put off by many things they find therein, including some minor matters such as misspelling the word "canon" twice as "cannon" (at 254, fn. 9, and at 266) and seeing the influential Ladislav Orsy's name misspelled twice as "Ory" (at 272, fn. 140 and 142).¹⁷ They will not know what Gordon means by "Ecclesiastic Mass" (at 254) for it is a term unknown in canonical or theological circles. But these reactions will be as nothing compared to that experienced when they encounter Gordon's preposterous, even insulting, claim (at 272) that "canon law is riddled with exceptions".

I have encountered this attitude among common lawyers before but, being trained in the common law system myself, I think I understand what leads some of them so wrongly to his conclusion. Canonical legislation does not read like common law legislation for some very important reasons and common lawyers who would venture into canonical waters need to understand this before setting out. It is certainly not my intention to defend the felicity of every expression used in the Code of Canon Law¹⁸ but, if one aspect of the difference between canon law and common law needs

to Gordon's indication, does *not* describe funerals as a "fundamental" right of the faithful.) One wonders, would a common law attorney asserting before a court the existence of a fundamental legal right dare present as demonstration of such right only an article from, say, the *Spokane Times*? To offer in support of an allegedly "fundamental" canonical right a citation to a diocesan website says little for Gordon's appreciation of the relative weight of canonical sources, or about the care with which he apparently believes that the Catholic Church sets out her enunciations of the rights of the faithful.

This is perhaps the best place to mention that, while I have not disputed Gordon's repeated assertion that funeral rites are a "fundamental right" of the faithful, if only because the refusal of such rites is admittedly a pastorally weighty matter, nevertheless, we should note that ecclesiastical funeral rites are *not* listed among those rights reckoned by canonists as being "fundamental" by virtue of their inclusion in either of two crucial titles of the 1983 Code, namely, "The Obligations and Rights of All the Christian Faithful" (1983 CIC 208-223) or "The Obligation and Rights of the Lay Christian Faithful" (1983 CIC 224-231). See instead 1983 CIC 1176 § 1.

¹⁷ Analogously, imagine a business lawyer's consternation at seeing repeated references in a law journal to, say, the "Uniform Commercial Code", or a legal scholar's pique at seeing Lawrence Tribe's name twice misspelled "Trib". See also "*in pericular* [sic] *mortis*" (at 266). Every author has experienced what G. K. Chesterton once described as "the martyrdom of misprints", but these kinds of errors (as opposed to some others, such as the empty collapsed brackets at 254) seem to be authorial, and not editorial, in origin.

¹⁸ Canon law engages in a constant re-examination of its terminology. For a sense of the scope such

to be clearly understood, it is this: *Common law is a system of judicial supremacy; canon law is a system of legislative supremacy.* Grasp that, and one has the essence of the thing. Of the 1,752 numbered provisions that make up the 1983 Code of Canon Law, one of them (in fact, one section in one of them) quietly sets forth this vitally important difference between the ways these two great legal systems (common law, dating back nearly 1,000 years, and canon law, which is nearly a millennium older) function.

Every legal system worthy of the name faces a question: who has the final authority to determine what a given law means? In a common law nation, the judiciary has the last word on the interpretation to be accorded a specific legal provision (a power distinguishable from the legislature's, or even the people's, power to change the text of the law itself.) But, in a "Roman" or civil law system, the legislator himself generally has the power of "authentically interpreting" legal texts. Neither the judicial supremacy approach nor the legislative supremacy approach is right or wrong and, I suggest, neither is particularly better than the other at doing what legal systems have to do, namely, developing norms of conduct that can be understood by and applied within their respective societies. Both systems have long and worthy records in upholding the rule of law. But they obviously operate in very different ways, and lawyers well-trained in one tradition are at serious risk of mishandling the provisions of the other unless they understand and accept the difference, in rather the same way that drivers who are used to driving on the right side of the road are highly accident-prone when they go a country that drives on the left. It says nothing about their basic skills behind the wheel, but it says much for the problems encountered when trying to cope with a "foreign" way of doing things. Modern canon law draws much more heavily from the classical Roman or civil legal tradition, and not from the Anglo-American common law tradition and as a consequence many canonical interpretive principles differ from those to which common law attorneys are accustomed.

That canon law is a system of legislative supremacy is clear from the terms of 1983 CIC 16 § 1 which reads as follows: "The legislator authentically interprets laws as does the one to whom the same legislator has entrusted the power of authentically interpreting."¹⁹ Let us consider the implications of this unobtrusive and easy-to-overlook phrase. We begin by contracting canon law's "legislative supremacy" with the common law's "judicial supremacy".

projects can achieve, see Pio Ciprotti, *OSSERVAZIONI SUL TESTO DE "CODICIS IURIS CANONICI"* (Typis Polyglottis Vaticanis, 1944).

¹⁹ 1983 CIC 16 § 1 - *Leges authentice interpretatur legislator et is cui potestas authentice interpretandi fuerit ab eodem commissa.*

At another time, I would like to develop an idea that I can only suggest here, namely, that the concept of legislative supremacy is a hallmark of canon law not simply because it was found among the principles of Roman law upon which canon law has drawn so heavily for over a thousand years, but also because such a principle is demanded by the ecclesiology of the Church, being able to trace its lineage, I believe, even to the Petrine Commission recorded in Matthew 16: 17-19.

Say a legislator in a common law nation wants to achieve a certain policy result and sets about drafting a law (bill) that would achieve said goal.²⁰ In drafting the text, however, perhaps unconscious of his motives (so ingrained is this thinking), he would draft the bill in such a way that, besides of course trying to produce norms for conduct that are understandable by the population affected, he also anticipates as far as possible the objections, loopholes, affirmative defenses, and so on, that could be raised against his goals (law) because he knows that, once his bill becomes law, the courts, and not the legislature, will have the final authority to decide what the law means. Clearly, if a legislator in a common law nation wants to achieve a specific result, he is highly motivated to draft the law with a great deal of detail and precision, for once it leaves his chamber, he will not be able to control how it is interpreted. Lawyers trained in a common law system become used to reading laws that look a certain way, and consequently, though unconsciously, they assume that all good laws should look the way they are used to seeing their laws look.

The situation facing a legislator in a system of legislative supremacy, however, is very different. Desirous of bringing about a norm for conduct in a "civil law" society, the legislator drafts a provision and enacts it. But in so doing, again probably without conscious advertence to his thinking, he knows he need not spend nearly as much time trying to anticipate potential interpretive difficulties in his law because, he knows, all such questions will eventually be referred to him (or a delegate²¹) for settlement. Granted, such law as he draft still has to be clear enough to enable subjects to know what is expected of them, but much of the tediousness of drafting bills against speculative objections and in anticipation of unusual contingencies are diminished in a system of legislative, as opposed to judicial, supremacy. As a result, "civil laws" often have a different look or feel to them.²²

All of which brings us back to some of the hidden dangers awaiting common lawyers who try to approach canon law as if it were common law. American common lawyers are educated to use libraries containing dozens, scores, sometimes *hundreds* of

²⁰ To the objection that modern "law-making" is passing into the hands of administrative agencies, I would respond that, first, every analogy limps, but more to the point, in the process of law-making, administrative agencies are conducting themselves as would traditional legislators, at least to a degree sufficient for this example.

²¹ Obviously, in a system of legislative supremacy, the legislator cannot address every interpretation question that can arise under his laws, and, in canon law, a mechanism for delegating responsibility for "authentic interpretation" has been established (namely, the Pontifical Council for the Interpretation of Legislative Texts, per John Paul II, ap. con. *Pastor Bonus*, 28 June 1988, arts.154-158), a discussion of which process, however, is beyond the scope of this article.

²² Space does not permit addressing the additional juridic complications arising from, to take just one of many examples, the Church's need to legislate on theological and pastoral matters, which complications are another contributor to the confusion that many common lawyers (whose legal systems do not have to deal with such matters) experience when reading canon law.

volumes of *legislation* for each state, to say nothing of federal enactments. This very bulk of material is motivated, at least in part, by the need of legislators in a system of judicial supremacy to draft laws that could withstand scrutiny by an independent judiciary. In turn, of course, the role of the judiciary in common law systems is such that it, too, contributes *thousands* of volumes to our law libraries.

Therefore, when common lawyers look at canon law, they do not confront a vast expanse of legislative enactments,²³ and many of the canons they do see contains phrases such as “unless otherwise apparent” or “unless the ordinary decides otherwise,” or “in so far as possible.”²⁴ To the canonically-untrained eyes of the common lawyer such as Gordon, these phrases can look like incessant exceptions, or like vacillations, or as if they belong to a legal system unsure of its authority and unwilling to take a firm stand for this or that policy. But such perceptions are very wrong. They arise from not understanding the enormous interpretative implications of the legislative supremacy asserted in 1983 CIC 16 § 1.

Driving home this point on legislative supremacy, 1983 CIC 16 § 3 states: “An interpretation [of law] in the form of a judicial sentence or of an administrative act in a particular matter, however, does not have the force of law and only binds the persons whom and affects the matters for which it was given.”²⁵ Again one can see that, in a few words, canon law demands of common lawyers who would understand and use it a complete rethinking on their part of such fundamental Anglo-American

²³ Nor, given the subordinate role the judiciary plays in a system of legislative supremacy, do they see a vast collection of court cases interpreting canonical legislation. All the opinions published by the Roman Rota (the Catholic Church’s highest judicial court, per 1983 CIC 1405 § 3) in the 20th century would fill but a couple dozen shelf-feet of space and almost no diocesan or metropolitan tribunal cases are published, at least not in the sense in which that term is used by common lawyers. For an excellent overview of the limited role of judicial precedent in canon law, see Norman Doe, “Canonical Doctrines of Judicial Precedent: A Comparative Study,” *The Jurist* 54 (1994) 205-215, esp. pp. 206-210.

²⁴ There are too many examples of this language to make citing a few worthwhile, though one can find two such expressions in 1983 CIC 1483, quoted in fn. 6, above. More generally, see Xaverius Ochoa, *INDEX VERBORUM AC LOCUTIONUM CODICIS IURIS CANONICI*, 2nd ed., (Commentarium pro Religiosis, 1985) and, for Pio-Benedictine equivalents, see Acturus Laver, *INDEX VERBORUM CODICIS IURIS CANONICI* (Typis Polyglottis Vaticanis, 1941), both *passim*. I would add, that even these kinds of qualifying phrases in canons do not include the complex governance issues raised by the canonical (ultimately, classical Roman) notion of “dispensation” (1983 CIC 85-93), a concept that can make the heads of common lawyers swim, until, that is, they are reminded of the common law’s own complex traditions of, for example, “equity”.

²⁵ 1983 CIC 16 § 3 - Interpretatio autem per modum sententiae iudicialis aut actus administrativi in re peculiari, vim legis non habet et ligat tantum personas atque afficit res pro quibus data est. Note, too, the insufficiency of administrative acts to establish a “precedent” binding on others. This renders bootless Gordon’s attempts (at 273-276) to criticize Bp. Daily for refusing a one gangster’s funeral when, apparently, at least some other bishops seemed to have granted such funerals to other mobsters. The perception of inconsistency in ecclesiastical administration is a legitimate concern, but it cannot be analyzed, let alone corrected, using Gordon’s approach.

jurisprudential concepts as *stare decisis* and "judicial precedent." While canon law, most assuredly, has a variety of ways of accommodating the values that underlie such judicial institutions, it has no more patience for experts from other legal traditions tearing through its venerable and quite coherent provisions than would drivers on the one side of the road have patience for a foreigner who keeps veering into their lanes out of ignorance and ingrained habit.

Given Gordon's demonstrated inability to handle basic canonical sources and citations, and having no reason to think that he is aware of important canonical interpretative principles such as legislative supremacy, there should be little surprise when we see that, in attempting to interpret Canon 1184 against Bp. Daily, Gordon's argument fails. We now turn to that analysis.

C) **Misapplication of the law itself**

Gordon correctly recognizes that the uprightness of Bp. Daily's decision to withhold ecclesiastical funeral rites from John Gotti rests primarily on the interpretation to be accorded to Canon 1184 of the 1983 Code.²⁶ That crucial provision reads as follows:

1983 CIC 1184 § 1. - Unless they gave some signs of repentance before death, the following must be deprived of ecclesiastical funerals:

- 1° notorious apostates, heretics, and schismatics;
- 2° those who chose the cremation of their bodies for reasons contrary to Christian faith;
- 3° other manifest sinners who cannot be granted ecclesiastical funerals without public scandal of the faithful.

§ 2. If any doubt occurs, the local ordinary is to be consulted, and his judgment must be followed.²⁷

²⁶ I believe Gordon recognizes the centrality of 1983 CIC 1184 to this matter because he treats of it, albeit in mistaken manner, so extensively in his article. Nevertheless, what he actually says (at 255) is that Canon 1184 was "render[ed] inapplicable" in the case of John Gotti. He cannot possibly mean that, though, for indisputably John Gotti was a "manifest sinner" in the sense the phrase is used in Canon 1184 (a point Gordon concedes at, for example, 263). I think instead that what Gordon was infelicitously trying to say was that, in his view, Gotti satisfied the requirement within Canon 1184 § 1 ("unless they gave some sign of repentance before death") by which the prohibition against funeral rites for manifest sinners set out in Canon 1184 § 1, 3° could be lifted.

²⁷ 1983 CIC 1184 - § 1. Exequiis ecclesiasticis privandi sunt, nisi ante mortem aliqua dederint paenitentiae signa: 1° notorii apostatae, haeretici et schismatici; 2° qui proprii corporis cremationem elegerint ob rationes fidei christianae adversas; 3° alii peccatores manifesti, quibus exequiae ecclesiasticae non sine publico fidelium scandalo concedi possunt. § 2. Occurrente aliquo dubio, consulatur loci Ordinarius, cuius iudicio standum est.

Incidentally, when Gordon finally does quote a translation of Canon 1184 (at 262), he does not, contrary to his express claim (at 262, fn. 64), quote the Canon Law Society of America translation

But if opposing counsel agree as to what the controlling law in a dispute is, and if they stipulate as to the facts in a dispute,²⁸ how can they arrive at opposite conclusions as to the result to be reached on such law and facts? The most likely way, and the one I think explains the difference between Gordon and me, is for counsel to disagree as to how the law (that both admit is controlling) is to be interpreted. Gordon, I will demonstrate, does not understand how canonists correctly arrive at understandings of (allegedly) controverted provisions in canon law, and as result, he reaches a conclusion exactly the opposite of the one he should have reached on the facts he presents, whereupon he uses his erroneous conclusion as the basis for chastising Bp. Daily for a grave violation of John Gotti's canonical rights.

Canon 17 of the 1983 Code of Canon Law sits atop nearly two millennia of experience within the Church in laying down, revising, and interpreting her own laws. In the briefest of terms, Canon 17 outlines the process by which the Church expects those who would debate and apply her laws to arrive at cogent interpretations of such norms.

1983 CIC 17 - Ecclesiastical law must be understood in accord with the proper meaning of the words considered in the text and context. If the meaning remains doubtful and obscure, recourse must be made to parallel places, if there are such, to the purposes and circumstances of the law, and to the mind of the legislator.²⁹

It is self-evident that the process for canonical interpretation that is outlined in Canon 17 is prescriptive (*intellegendae sunt*) and not merely an interesting suggestion.³⁰ Moreover, if the proper meaning of the words in question is clear from text and context, there is no great need to proceed to the other mechanisms for discernment (parallel places, purpose and circumstances of the law, and the mind of the legislator). I shall argue that the proper meaning of the words of Canon 1184 is clear in text and context (indeed, that this is precisely where Gordon makes his crucial mis-

(either the 1983 or 1999 version), but instead the translation provided by the Canon Law Society of Great Britain and Ireland! Gordon's failure ever to cite the *editio typica* of the canon and his mistaking the British translation for the American is but more evidence that he lacks awareness of things that are common knowledge among canonists, here, (1) that there is only one official text of canon law, in Latin, on which interpretation issues turn, and (2) that vernacular translations vary slightly over time and within the same or similar language groups.

²⁸ I have no knowledge of any facts in the John Gotti matter beyond those asserted by Gordon, which facts I accept as accurate.

²⁹ 1983 CIC 17 - *Leges ecclesiasticae intellegendae sunt secundum propriam verborum significationem in textu et contextu consideratam; quae si dubia et obscura manserit, ad locos parallelos, si qui sint, ad legis finem ac circumstantias et ad mentem legislatoris est recurrendum.*

³⁰ "The rules of this canon, as well as those of canon 18 and 19, apply to *everyone* interpreting canon law - church officials, *scholars*, and practitioners of canon law." J. Huels, [Commentary on Canon 17], in J. Beal, et al., eds., *NEW COMMENTARY ON THE CODE OF CANON LAW* (Paulist, 2000) [hereafter, *CLSA NEW COMM.*] p. 73. My emphasis.

take), but, for purposes of illustration, I shall also offer a few thoughts on how the analysis of Canon 1184 might have been carried further in light of Canon 17 by someone with the scholarly competence to do so.

The English translation of the opening³¹ clause of Canon 1184 § 1 states "Unless they gave some signs of repentance before death..." The grammatical subject of this clause is "they" (referring to manifest sinners, which all agree John Gotti was), the verb is a transitive "gave", and the direct object of this transitive verb is "signs", with the noun "repentance", object of the preposition "of", describing what kind of signs must be given, namely, "signs of repentance." Now, I submit that there is nothing grammatically unclear about this simple structure at all nor about what the law directs here. One could, at most, debate what counts as "signs" of repentance, or perhaps what attitudes should be reckoned as "repentance", but not *that* the law looks for "signs" of something to be given. Thus, rephrased for pedagogy, the test for Gotti's eligibility for ecclesiastical funeral rites reads as follows:

(Did) **Gotti** **give** **signs** (of repentance)?

But, inexplicably, and fatally for his position, Gordon perverts this simple structure into something the law does not say, and proceeds to build his case on the distortion. Directly discussing Canon 1184, and only two pages into his article, Gordon writes:

Specifically, according to Canon 1184, an individual may be deprived of "ecclesiastical funerals" [sic] if said person is a "manifest sinner" and a funeral Mass cannot be granted without "public scandal" of the faithful. Still, deprivation can only occur *if the person has not repented* prior to death. Indeed, the funeral of John Gotti might have brought about "public scandal", therefore providing grounds for depriving [sic] a Mass; however, it seems highly unlikely that in all his time in prison *John Gotti did not repent*.³² (My emphasis.)

Look carefully at what Gordon has done in the two phrases I have italicized: He has changed the criterion for determining whether manifest sinner John Gotti may have a funeral Mass from "did Gotti give signs (of repentance?)" to "did Gotti repent?" The transitive verb "gave" is replaced by the intransitive verb "repent". The direct object "signs" disappears, and the word "repentance," formally the object of a prepo-

³¹ In the official Latin text of the canon, the clause "nisi ante mortem aliqua dederint paenitentiae signae" appears second in the sentence, but in all respects it is accurately reflected by the English translations analyzed above.

³² Gordon, at 254-255, with citations and stray empty brackets omitted.

sition, Gordon has changed to the verb "repent". Where canon law, anxious as always to avoid invasion of the internal forum wherever possible,³³ looks for external, observable signs of repentance before making a decision (here, about funeral rites for manifest sinners) that have repercussions in the external forum, Gordon substitutes an internal forum criterion, repentance, as the key to making a decision that will operate in the external forum. Then he reiterates the new formulation in the next sentence, and goes on to use his new text in place what the law actually says for the rest of his article.³⁴ If Gordon had correctly read the law the way it is written in Canon 1184, and if he had conducted a canonically cogent inquiry into what the law as written means within the Church's canonical tradition, he would not have been able to launch his attack on the decision of Bp. Daily.

In suggesting, now, what a canonical inquiry into the meaning of Canon 1184 (as it is written) would look like, we should recall what was said in section (B) about the difference between common law and canon law and, at the risk of some oversimplification, explain our approach this way: *Scholarly commentaries are to canonistics what court cases are to the common law.* Where the common law turns to court decisions to elucidate the meaning of laws, canon law looks to scholarly writings to illumine the purview of its provisions. One must appreciate, then, that Gordon's failure to use so much as a single canonical commentary in support of his interpretation of Canon 1184 is akin to an appellate lawyer's fashioning a constitutional argument without reference to even one Supreme Court case dealing with the provision in question. Were the failure to come to grips with scholarly opinion on Canon 1184 the only omission in Gordon's analysis, it would be enough to render his article virtually worthless to canonists and, for that matter, the ecclesiastical decision-makers that one suspects Gordon wanted to influence. In any case, let us undertake, even if briefly, the kind of inquiry that Gordon could have, indeed should have, performed before deciding Bp. Daily had acted so inappropriately.

³³ See Revision Principle no. 2 in "Preface to the Latin Edition [of the 1983 Code of Canon Law]" English translation available in CODE OF CANON LAW, LATIN-ENGLISH EDITION, NEW ENGLISH TRANSLATION (CLSA, 1999) p. xxxvi: "There is to be a coordination between the external forum and the internal forum, which is proper to the Church and has been operative for centuries, so as to preclude conflict between the two." See briefly, Richard Cunningham, "The Principles Guiding the Revision of the Code of Canon Law," *The Jurist* 30 (1970) 447-455, at 448.

³⁴ Mistakenly thinking that "repentance" is the question before ecclesiastical administrators in Canon 1184 cases, instead of recognizing that the law correctly demands "signs" of repentance, Gordon beats the drum for finding Gotti's repentance incessantly: For example, he writes "[C]ertain Church practices... assist in creating a presumption that Gotti did repent... John Gotti died after a long battle with cancer, making him well aware of his fate, and giving him two years to contemplate his mistakes [!] and to ask for God's forgiveness." (255, cit. omm.). Or again: "Granted, he led a life of sin, but John Gotti spent the last year of his life in a federal prison hospital, fairly cognizant of the fact that he would die there. The various canonical provisions for assisting a person in danger of death... arguably create of presumption that John Gotti repented on his death bed." (271, cit. omm.).

The most prominent American pan-textual commentary on modern canon law, for example, says this about when a manifest sinner might be accorded ecclesiastical funeral rites:

The sign of repentance should in some way indicate that the person wanted to be reconciled to God and the Church, such as summoning a priest at the time of death, making an act of perfect contrition, or stating a desire to die in the state of grace. It is not sufficient that the person merely make an act that indicates belief in God, since even heretics, schismatics and many apostates believe in God. If the deceased had manifested a sign of repentance, this should be made known if it would preclude scandal.³⁵

Nor can it be argued that American canonists take an unduly harsh view of gangster funerals and urge their bishops to a stricter line than do their canonical counterparts in other nations. The EXEGETICAL COMMENTARY ON THE CODE OF CANON LAW, adapted to North American use but arising from Spain, observes:

The deprivation of funerals responds, on the one hand, to the observance of the will of those baptized who do not wish to remain in communion with the Church, if it is so expressed by them in words or clear attitudes, and, on the other, the doctrinal and disciplinary consistency of the Church. [¶] Any manifestation of repentance is also heeded and respected up to the last moment of life... a sign of repentance is understood to be a request for sacramental confession, asking God for forgiveness in an express manner, or other attitudes of religious respect, such as insisting on the Christian formation of their children, etc. In the case of gravely ill persons, the testimony of any reliable witness to those signs will be regarded as sufficient...³⁶

³⁵ John Huels, CLSA NEW COMM., p. 1412 (cit omm.). Huels' opinion is consistent with two communications from the Congregation for the Doctrine of the Faith issued in 1973, relaxing the stringency of several Pio-Benedictine strictures against ecclesiastical burial of the unworthy, but in both cases still requiring, among other things, the manifestation of some signs of repentance (making no mention of "presumptions" of repentance in this regard) before allowing the ecclesiastical burial of manifest grave sinners. See SCDF, letter *Complures Conferentiae Episcopales*, 29 May 1973, CANON LAW DIGEST, vol. VIII (1973-1977) pp. 862-863; and SCDF, decree *Patres Sacrae Congregationis*, 20 Sep. 1973, ACTA APOSTOLICAE SEDIS 65: 500 (1973), *English trans.*, CANON LAW DIGEST, vol. VIII (1973-1977) p. 864.

³⁶ José Luis Santos, [Commentary on Canon 1184], in A. Marzoa, et al, eds., EXEGETICAL COMMENTARY ON THE CODE OF CANON LAW, in 5 vols., (Wilson & Lafleur, 2004) vol. III/2, 1699-1702, at 1700.

Or again, the Salamanca commentary states:

Those [manifest sinners] are no longer considered 'unworthy' who, before death, give some sign of repentance. Moreover, this clause should receive a benign interpretation. A sign of repentance could be not only calling for a confessor, asking publicly for the forgiveness of God, or kissing a crucifix, etc., and could also be gleaned, despite one's otherwise irregular situation, by giving clear signs of adhesion to the Church, for example, by collaborating in its works, sending children to catechism, or participating themselves in ecclesiastical initiatives whenever possible.³⁷

Notice that each of these authors calls for a *manifestation* of repentance, not an assumption or presumption of anything in the internal forum. Each of them, I suggest, is commenting on the law as it is written, and not as some might imagine it to be.

It is easy to demonstrate, moreover, that commentators on the Pio-Benedictine precursor to 1983 CIC 1184, namely 1917 CIC 1240, were of like mind. The (Swiss-born) American canonist Dom Augustine, for example, wrote: "'Signs of repentance' would be kissing the crucifix, acts of devotion, oral prayers, etc. But these signs, especially in the case of public sinners, *must be known and divulged to the bystanders and the faithful*. If this has been done, ecclesiastical burial may be given..."³⁸ There is no

³⁷ "Todos estos dejan de ser 'indignos' si antes de la muerte hubieran dado alguna señal de arrepentimiento. También esta cláusula recibe una interpretación benigna. Señal de arrepentimiento se considera non sólo llamar a un confesor, pedir perdón a Dios públicamente, besar un crucifijo, etc., sino también haber manifestado, pese a su situación irregular, signos claros de su adhesión a la Iglesia, v. gr., colaborando en sus obras, enviando a sus hijos al catecismo, participando ellos mismos en iniciativas eclesiales en la forma que les era posible." J. Manzanares, [Commentary on Canon 1184], in L. Echeverría, ed., CÓDIGO DE DERECHO CANÓNICO: EDICIÓN BILINGÜE COMENTADA, 5th ed., (Biblioteca de Autores Christianos, 1985) pp. 573-574, at 574. My translation. See also, M. Olmos Ortega, [Commentary on Canon 1184], in A. Benlloch Poveda, ed., CÓDIGO DE DERECHO CANÓNICO: EDICIÓN BILINGÜE, FUENTES Y COMMENTARIOS DE TODOS LOS CÁNONES, 8th ed., (Edicep, 1994) p. 536. A respected Italian commentary published by the Urbanianum makes the same point, albeit briefly. See G. Sirna, [Commentary on Canon 1184], in P. Pinto, ed., COMMENTO AL CODICE DI DIRITTO CANONICO (Urbaniana, 1985) at p. 688. See also the French commentator, Roger Paraliéu, GUIDE PRACTIQUE DU CODE DE DROIT CANONIQUE: NOTES PASTORALES (Tardy, 1985) at 343.

³⁸ Dom Augustine (Charles Bachofen), A COMMENTARY ON THE NEW CODE OF CANON LAW in 8 vols., Vol. VI, p. 157 (1921), my emphasis. See also T. Lincoln and A. Ellis, CANON LAW: A TEXT AND COMMENTARY, 4th ed. (Bruce, 1963/1966) at pp. 690-691, noting that the sign must be "positive" and adding as an example of a sign of repentance "an expressed desire not to die without the sacraments." Abbo-Hannon recall that the "sign of repentance" must be divulged so as to prevent scandal at the burial of a public grave sinner. This would not be possible to do if there were no sign to divulge, of course. See John Abbo & Jerome Hannon, THE SACRED CANONS, 2 vols., vol. II, (Herder, 1952) p. 496. Similarly, Italian canonist Udalricus Beste, INTRODUCTIO IN CODICEM (5th ed., 1961) at p. 662, states: "Haec clausula restrictiva sedulo notanda est. Signa poenitentiae habentur, si moribundus sacerdotem advocaverit, nomen Iesu devote invocaverit, actum contritionis elicuerit, crucifixum osculatus fuerit, etc."

suggestion whatsoever by Dom Augustine that time spent in jail allegedly contemplating death counts as a "sign of repentance" sufficient to restore a manifest grave sinner's right to ecclesiastical funeral rites.

French canonist Robert Naz, writing in the highly regarded *DICIONNAIRE DE DROIT CANONIQUE*, agrees: "One may win a reprieve from the deprivation of ecclesiastical funeral on condition of having given before death various signs of repentance. One may find such signs in the fact that the culpable party asked for a priest before dying, recited an act of contrition before witnesses, kissed a crucifix, or performed an equivalent public action (cit. omm.)"³⁹

Hungarian canon lawyer Stephanus Sipos takes an even wider view, but he clearly maintains the necessity of a manifestation of repentance:

All of those listed [as unworthy] become eligible [for ecclesiastical funeral] if, before death, they have given some sign of repentance (for example, asking for confession, beseeching God to forgive their sins or simply calling upon God or the Blessed Virgin Mary or the Saints, kissing a crucifix or sacred image, and so on; even a single witness suffices who can testify to these signs.)⁴⁰

Rather than multiplying citations to Pio-Benedictine authors who show no doubt that some kind of positive, external sign of repentance must be exhibited before Church officials could authorize an ecclesiastical funeral for a manifest grave sinner, it might suffice to call upon the work of American canonist Charles Kerin, whose 1941 canonical dissertation dealt extensively with issues surrounding deprivation of Christian burial, and who treats explicitly of ecclesiastical funeral rites in the case of organized crime participants. Kerin wrote:

³⁹ "On peut être relevé de la privation de sépulture ecclésiastique, à condition d'avoir donné avant la mort quelques signes de pénitence. On trouve ces signes dans le fait que le coupable a demandé un prêtre avant de mourir, récité un acte de contrition devant témoins, baisé le crucifix, ou fait en public un acte équivalent (cit. omm.)" R. Naz, "Funérailles. Refus de la Sépulture Ecclésiastique" in *DICIONNAIRE DE DROIT CANONIQUE*, in 7 vols., (Librairie Letouzey et Ané, 1935-1965), vol. V, col. 930 (1957). My translation.

⁴⁰ "Omnes autem hi enumerati digni fiunt, si ante mortem aliqua signa poenitentiae dederint (e. gr. confessarium petierunt, veniam peccatorum a Deo postulaverunt aut simpliciter Deum invocaverunt vel B.M. Virginem aut Sanctos, si crucifixum aliamve iconem deosculati sunt etc; vel unus testis sufficit, qui referat de huiusmodi signis.)" Stephanus Sipos, *ENCHIRIDION IURIS CANONICI*, 6th ed. rev. by L. Gálos (Orbis Catholicus-Herder, 1954) [hereafter, Sipos, *ENCHIRIDION*] at pp. 575-576. My translation. Also trying to find as much room for leniency within the law as possible is the American canonist H. Ayrinhac, *ADMINISTRATIVE LEGISLATION IN THE NEW CODE OF CANON LAW* (Longmans, 1930), who writes at p. 87: "The present law excludes [manifest grave sinners from ecclesiastical funeral rites] unless before death they showed if not clear and certain, at least probable, signs of repentance by, for example, sending for a priest, kissing the Crucifix, [or] expressing regret..."

Gangsters, in the modern sense, quite easily fit into the category of public and manifest delinquents in that their sins are usually murder, robbery, theft and the like. If, by chance, one or another of them should be a notorious sinner but not a notorious delinquent in the canonical sense, the great probability of grave scandal in granting Christian burial would annul his possibly theoretical right to it... Few of the faithful are scandalized when a notorious sinner is given the essentials of Christian burial *if they know he has repented*.⁴¹

There is, then, no reasonable question as to what the words of Canon 1184 say and no question as to what canonical opinion, as near as I can determine it, understands them to mean. There would be no reason, then, to continue the interpretation inquiry further under ordinary circumstances. But for the benefit of readers who might wish to have some sense as to what kind of issues could be explored in a deeper inquiry in accord with Canon 17, I will offer just a few thoughts on two of the other elements of canonical research, namely, "parallel places" and "mind of the legislator."

First, Canon 17 directs what is known as "recourse to parallel places" for guidance on obscure provisions of law. In large part based on common sense, it seems reasonable that occurrences of the same or similar words in other places⁴² might shed light on what those words or phrases mean in disputed passages. If, then, Gordon had wanted to follow the prescription of Canon 17 in his analysis of Canon 1184, could he have found "parallel places" wherein concepts such as "manifest sinners" and "sign of repentance" were used? The answer is Yes.

For example, the notion of "manifest grave sin" figures prominently in Canon 915 by which canon such persons are deprived of the Eucharist.⁴³ The canonical tra-

⁴¹ Kerin, PRIVATION, p. 226, emphasis added. See also Charles Kerin, "Canon Law of Christian Burial" NEW CATHOLIC ENCYCLOPEDIA, 17 vols., vol. II, pp. 896-897, at 897 (1967), and C. Kerin, "The Burial of Public Sinners" *The Jurist* 9 (1949) 306-315, esp. p. 312.

⁴² The Pio-Benedictine Code provision in this matter, Canon 18, restricted "parallel places" eligible for such examination to those found with the 1917 Code itself. See 1917 CIC 18 - *Leges ecclesiasticae intelligendae sunt secundum propriam verborum significationem in textu et contextu consideratam; quae si dubia et obscura manserit, ad locos Codicis parallelos, si qui sint, ad legis finem ac circumstantias et ad mentem legislatoris est recurrendum*. My emphasis. The 1983 Code, by dropping this restriction, has obviously broadened the number of places where such inquires can be conducted. See Augustine Mendonça, [Commentary on Canon 17] in G. Sheehy et al, eds. CANON LAW: LETTER AND SPIRIT [prepared by the Canon Law Society of Great Britain and Ireland] (Liturgical Press, 1995) p. 17.

⁴³ Can. 915 - *Ad sacram communionem ne admittantur excommunicati et interdicti post irrogationem vel declarationem poenae aliique in manifesto gravi peccato obstinate perseverantes*. *English trans.*: "Those who have been excommunicated or interdicted after the imposition or declaration of the penalty and others obstinately persevering in manifest grave sin are not to be admitted to holy communion."

dition behind Canon 915 and the commentaries on it, not to mention recent examples of its application in regard to certain Catholic pro-abortion politicians, could have been of interest to those assessing John Gotti's situation, an interest augmented, to some degree, by the fact that Canon 915 is located in the same book of the Code where Canon 1184 is found, namely, Book IV: The Sanctifying Office of the Church. Or, again, the question of "signs of repentance" might have been illuminated by an exploration of Canons 1347 and 1358, whereby "contumacy" and, more specifically, the retraction thereof, are important issues in the application of ecclesiastical sanctions.⁴⁴ Both of these canons, and the canonical tradition they encapsulate, have been the object of careful commentary and might have rewarded scholarly attention from those inquiring as to who were "manifest graves sinners" or what might count as a "sign of repentance". But none of these possibilities were touched on by Gordon.

Second, Canon 17 calls for inquiry into the "mind of the legislator" for help in the interpretation of certain disputed passages. Again, while this is a vast field in canonistics, a few words are in order.

One of the most recent methods of inquiry into the "*mens legislatoris*" in canon law is, ironically, one with which the common law tradition has much familiarity, namely, the study of legislative histories. For historical reasons that are beyond the scope of this article, inquiry into legislative history as a method for establishing the "mind of the legislator" played little role in pre-codified canon law (i.e., before the Pio-Benedictine Code) and only appeared in post-conciliar canonistics with the release of preliminary drafts of canons that might or might not have eventually appeared in what became the 1983 Code of Canon Law. This process, again one quite beyond the scope of this article,⁴⁵ has been becoming a part of the canon lawyer's repertoire

⁴⁴ Can. 1347 - § 1. Censura irrogari valide nequit, nisi antea reus semel saltem monitus sit ut a contumacia recedat, dato congruo ad resipiscentiam tempore. § 2. A contumacia recessisse dicendus est reus, quem delicti vere paenituerit, quique praeterea congruam damnorum et scandali reparationem dederit vel saltem serio promiserit. *English trans.*: "§ 1. A censure cannot be imposed validly unless the offender has been warned at least once beforehand to withdraw from contumacy and has been given a suitable time for repentance. § 2. An offender who has truly repented of the delict and has also made suitable reparation for damages and scandal or at least has seriously promised to do so must be considered to have withdrawn from contumacy."

Can. 1358 - § 1. Remissio censurae dari non potest nisi delinquenti qui a contumacia, ad normam can. 1347, § 2, recesserit; recedenti autem denegari nequit. § 2. Qui censuram remittit, potest ad normam can. 1348 providere vel etiam paenitentiam imponere. *English trans.*: "§ 1. Remission of a censure cannot be granted unless the offender has withdrawn from contumacy according to the norm of can. 1347 § 2; it cannot be denied, however, to a person who withdraws from contumacy. § 2. The person who remits a censure can make provision according to the norm of can. 1348 or can even impose a penance."

⁴⁵ See, e.g., my general description of it in the "General Introduction" to Edward Peters, *INCREMENTA IN PROGRESSU 1983 CODICIS IURIS CANONICI: A LEGISLATIVE HISTORY OF THE 1983 CODE OF CANON LAW* (Wilson & Lafleur, 2005) [hereafter, Peters, *INCREMENTA*] pp. xi-xv, or F. d'Ostilio, *LA STORIA DEL NUOVO CODICE DI DIRITTO CANONICO: REVISIONE, PROMULGAZIONE, PRESENTAZIONE* (Libreria Editrice Vaticana, 1983).

of interpretive techniques for a generation and, as will come as no surprise to common lawyers, it can offer very valuable insights into the thinking that went into the thousands of provisions that make up the 1983 Code. I mention all of this not simply because it is an area of special interest to me (for which one could hardly fault Gordon's not sharing) but also – notwithstanding that an inquiry into the mind of the legislator is unnecessary in cases where, as I have demonstrated in regard to Canon 1184, the law is already clear – because the legislative history of Canon 1184 adds, as it happens, a certain emphasis to a proper understanding of the canon, an emphasis that cuts strongly against the interpretation claimed by Gordon in his criticism of Bp. Daily's action. It arises thus.

As we know, 1983 CIC 1184 § 2 reads as follows: "If any doubt [about the application of § 1] occurs, the local ordinary is to be consulted, and his judgment must be followed." All agree that this is what happened in the John Gotti's case, that Bp. Daily was the local ordinary to be consulted, and that his judgment in this case was followed. But the legislative history of 1983 CIC 1184 § 2, an apparently unremarkable provision in its promulgated form, is interesting still.

The penultimate draft of 1983 CIC 1184 § 2 was identical to the promulgated form: "If any doubt occurs, the local ordinary is to be consulted, and his judgment must be followed."⁴⁶ The 1980 Schema version of the norm read identically, "If any doubt occurs, the local ordinary is to be consulted, and his judgment must be followed."⁴⁷

But the *prima versio* of 1983 CIC 1184 § 2, namely, Canon 40 § 2 of the *Schema de Locis et temporibus*, read significantly differently: "If any doubt occurs, the local ordinary is to be consulted, and his judgment must be followed; if doubt remains, funeral rites should be granted, albeit in such a way that scandal is prevented."⁴⁸ Had this original phrasing remained in place and eventually been promulgated as part of 1983 CIC 1184 § 2, ecclesiastical officials debating the liceity of ecclesiastical funeral rites for manifest sinners such as John Gotti would have been under a stricter stan-

⁴⁶ Pontificia Commissio Codici Iuris Canonici Recognoscendo, CODEX IURIS CANONICI: SCHEMA NOVISSIMUM IUXTA PLACITA PATRUM COMMISSIONIS EMENDATUM ATQUE SUMMO PONTIFICI PRAESENTATUM (Typis Polyglottis Vaticanis, 1982) 1184 § 2 - Occurrente aliquo dubio, consulatur loci Ordinarius, cuius iudicio standum est.

⁴⁷ Pontificia Commissio Codici Iuris Canonici Recognoscendo, SCHEMA CODICIS IURIS CANONICI IUXTA ANIMADVERSIONES S.R.E. CARDINALIUM, EPISCOPORUM CONFERENTIARUM, DICASTERIORUM CURIAE ROMANAE, UNIVERSITATEM FACULTATUMQUE ECCLESIASTICARUM NECNON SUPERIORUM INSTITUTORUM VITAE CONSECRATAE RECOGNITUM (Libreria Editrice Vaticana, 1980) 1135 § 2 - Occurrente aliquo dubio, consulatur loci Ordinarius, cuius iudicio standum est.

⁴⁸ Pontificia Commissio Codici Iuris Canonici Recognoscendo, SCHEMA CANONUM LIBRI IV DE ECCLESIAE MUNERE SANCTIFICANDI, PARS II, DE LOCIS ET TEMPORIBUS SACRIS DEQUE CULTU DIVINO, (Typis Polyglottis Vaticanis, 1977) 40 § 2 - Occurrente aliquo dubio, consulatur loci Ordinarius, cuius iudicio standum est; permanente autem dubio, concedatur ritus exequialis, ita tamen ut removeatur scandalum.

dard, one that expressly called for the resolution of persistent doubts about same to be resolved in favor of authorizing the funeral rites. But *this clause was removed* from the proposed law before promulgation and with it disappeared the concomitant obligation on the part of ecclesiastical officials to eliminate any possible doubts about the correctness of their refusing ecclesiastical funeral rites to persons such as John Gotti before so refusing.

Perhaps the clause was removed simply because it required the local ordinary to verify a step he had presumably already taken in considering a controversial request for ecclesiastical funeral rites in the first place.⁴⁹ What is important to note for our purposes is that a phrase which *could* have been used as an argument against the decision that Bp. Daily made in regard in to John Gotti was removed from canon law before promulgation (twenty years before the Gotti case came up), suggesting that this stricter standard for evaluating Bp. Daily's action was not intended by the legislator and that Gordon is unfairly applying it against Bp. Daily as if such a norm were in place after all. At a minimum, my highlighting of the complexity of the research that could be developed from just two words (*mens legislatoris*) in 1983 CIC 17 by those with an interest in understanding 1983 CIC 1184 should suffice to show that Gordon's article does not begin to measure up to the standards expected of any who would apply canon law in their arguments for or against episcopal actions.

Finally, we should note that Gordon did not, in fact, offer any evidence that positive signs of Gotti's alleged repentance were present. Indeed, he admits that "prison officials would not say whether John Gotti had received last rites."⁵⁰ One need not be a canon lawyer to recognize the facetiousness of trying to parlay a complete *lack* of evidence on a crucial point into evidence of that very point! Neither can Gordon produce a canon or recognized custom that creates a "presumption" that something like "time spent in prison while dying" is itself a sign of repentance, nor does Gordon, even if he personally believed that such an express sign was offered, have a reliable witness of same.⁵¹

⁴⁹ Regarding the reasons for this particular change in the provision between the *prima versio* and the 1980 Schema (there were others that do not concern us here) *coetus* reports are silent. See Pontificia Commissio Codicis Iuris Canonici Recognoscendo, *Communicationes* 12 (1980) 355-357.

⁵⁰ Gordon, at 271, fn. 136, and related text. See also Gordon, at 255, fn. 14, wherein one reads "...federal officials were silent as to whether or not Gotti received Last Rites or had met with a Catholic chaplain while in prison." Gordon weakly posits at 267: "Since Gotti had been in the midst of dying for a two-year period, *any* Catholic priest could have administered Penance to him during that time." Original emphasis. One may simply ask, So what?

⁵¹ On the sufficiency of even a single witness in this matter, see, for example, Heriberto Jone, *COMMENTARIUM IN CODICEM IURIS CANONICI* in 3 vols., (Officina Libraria F. Schönigh, 1950-1955), vol. II, p. 435 (1954), and Sipos, *ENCHIRIDION*, at 576. Accepting the word of single witness on a disputed point, while not unheard of in canon law (1983 CIC 1573, ameliorating the strictness of 1917 CIC 1791 § 1), is still regarded as a something of concession made in certain cases for a greater good.

Concluding remarks

To find within gangster Gotti's slow death by cancer evidence of his repentance from sin is the product of wishful thinking. It fails to distinguish between what one can sincerely hope and pray for and what one can canonically conclude has actually happened. Gordon offers no evidence of such repentance on John Gotti's part with which Bp. Daily could have licitly lifted a funeral request for the gangster over the prohibitory hurdle established in 1983 CIC 1184 § 1.⁵² Gordon's lengthy canonical criticism of Bp. Daily's decision in regard to John Gotti is wholly without foundation.

As I stated near the outset of this article, canon law itself acknowledges that bishops ("sacred pastors" in 1983 CIC 213) are not above criticism, and I hope I am among the last who would discourage scholars of the common law tradition from becoming interested in, and even contributing to, the canonical sciences of the Catholic Church. But I also believe that today's bishops, successors to the Apostles (CCC 77), have enough to do without having to defend their decisions from shoddy attacks that purport to be based on their own laws, and that canon law, like common law, is no place for amateurs.

⁵² Consider also here the words of Charles Kerin in discussing the denial of ecclesiastical funeral rites:

I should like to interject a comforting remark at this stage. It should not be forgotten that [even] an error in this matter of denying Christian burial has none of the consequences that [c]ould arise from a refusal to grant the sacraments. This law is purely of the external forum, and the external state of the soul is in no way determined by it. Where the reception of the sacraments may mean the difference between salvation and damnation, Christian burial cannot decide the eternal status of a soul which is already before God, and beyond the power of the Church either to save or to condemn." Charles Kerin, "Christian Burial Problems" *The Jurist* 15 (1955) 252-282, at 262.

Obviously these words do not excuse a lackadaisical manner in assessing one's right to ecclesiastical funeral rites (and all the evidence offered by Gordon suggests that Bp. Daily was completely correct in his decision) but Kerin's words do place in context the fear of some that upon Christian burial lies an individual's eternal fate. See also fn. 8, above.