

COMMENT

BUT INSTEAD EXPOSE THEM: PUBLIC ACCESS TO CRIMINAL TRIALS IN U.S. LAW AND CANON LAW

PAUL M. MATENAER*

Public access to criminal trials is an indispensable attribute of the Anglo-American legal system. The “rule of publicity” has been the rule in England from time immemorial and was a fundamental attribute of the judicial systems of the early American colonies. The Supreme Court has concluded that “a presumption of openness inheres in the very nature of a criminal trial under our system of government,” and the First and Sixth Amendments safeguard the public nature of criminal trials.

Yet, as essential as publicity is to the American legal system, secrecy is to the Catholic Church’s legal system: canon law. Amidst calls for greater transparency and accountability in the Church, recent developments in canon law have only taken small steps to lift the pall of secrecy. Meanwhile, U.S. Catholics have discovered many reasons to distrust their leaders, stemming from sexual and financial misconduct and cover-up. While some canonical scholars have recognized the benefit of employing secular models of transparency, none has endeavored to provide a method of incorporation or to suggest concrete changes.

This Comment begins that conversation by comparing public access in criminal trials under U.S. law and canon law and by examining whether canon law can successfully incorporate any elements of American law. Due to fundamental differences in the two legal systems, many elements cannot be incorporated, but the core values promoted by the American legal system’s public access doctrine are values inherent in good governance in general. This Comment applies these values to criminal trials in canon law and provides three concrete proposals that uphold the fundamental values of good governance and accomplish the express purposes of the Church’s penal system. Rather than hide its criminal trials in secret, the Church should instead expose them.

Introduction.....	893
I. Overview of Canon Law	896
A. An Introduction to Canon Law	896
1. A Brief History of Canon Law.....	896

* J.C.L., 2012, Saint Paul University; J.D. Candidate, University of Wisconsin Law School, 2022. I am grateful to everyone who provided me with feedback, ideas, and advice—including fellow students, professors, members, and editors of the *Wisconsin Law Review*. I am also grateful to Timothy Cavanaugh, colleague and canon lawyer, who provided informal feedback for years while I considered this topic. Lastly, I am grateful to William Daniel, professor of canon law at the Catholic University of America, for his leadership in canonical scholarship and for his counsel and assistance with this Comment.

	2. Canon Law as a Legal System	898
B.	Criminal Law in the Catholic Church.....	899
	1. The Church's Coercive Power	899
	2. Crimes in Canon Law	900
	3. Penalties in Canon Law	901
C.	Criminal Trials in Canon Law	902
	1. Preliminary Investigation.....	902
	2. Extrajudicial Penal Process.....	903
	3. Judicial Penal Process	904
II.	Public Access to Criminal Trials in the United States	905
	A. The Sixth Amendment Right of the Defendant to a Public Trial	906
	B. The First Amendment Right of Public Access to Criminal Trials.....	907
	1. The New-Old Right of Public Access.....	907
	2. Pretest to Determine Whether the Right Attaches	908
	3. Four-Part Test to Determine Whether Closure Is Justified.....	910
	4. Open Question Regarding Judicial Documents	911
	C. Values Protected by Public Access to Criminal Trials	912
	1. Factfinding: Key Witnesses and Honest Witnesses	912
	2. Legal Education of the Public.....	913
	3. Community Catharsis and Prevention of Vengeance....	913
	4. Confidence in the Judicial System	914
III.	Secrecy in Criminal Trials in Canon Law.....	915
	A. Secrecy in the Preliminary Investigation	915
	B. Secrecy in the Extrajudicial Process	916
	C. Secrecy in the Judicial Process	917
	D. Recent Developments on the Path Toward Greater Transparency.....	918
IV.	Greater Public Access in Canon Law: Three Concrete Proposals	922
	A. Fundamental Canons: Canon 220 and Canon 1341	923
	1. The Rights to a Good Reputation and to Privacy (c.220).....	923
	2. The Threefold Purpose of a Canonical Criminal Trial (c.1341)	924
	B. Incorporating Elements of U.S. Law into the Practice of Canon Law	926
	C. Three Concrete Proposals	927
	1. Grant Public Access to the Decree Concluding the Preliminary Investigation.....	927
	2. Grant Public Access to the <i>Libellus</i> of the Promoter of Justice	928
	3. Grant Public Access to the Final Decision.....	929

4. Addressing Scandal and Exercising Discretion in Publication	929
Conclusion	930

INTRODUCTION

Take no part in the unfruitful works of darkness, but instead expose them. For it is a shame even to speak of the things that they do in secret; but when anything is exposed by the light it becomes visible, for anything that becomes visible is light.¹

Imagine John Doe. A Catholic priest sexually abused John when John was in middle school. Ashamed of what happened, John never told anyone and tried to forget it. After high school, he moved away and built a new life. He graduated from college, started a career, got married, and had children. Eventually, John returned to the area where he grew up. Despite the abuse, he remained a Catholic, attended Mass on Sundays with his family, put money in the collection basket, and volunteered at his children's school. Then, one Sunday, John hears that a new priest has been appointed to his parish: John's abuser. Just hearing his name again sickens John. That night he and his wife discuss what to do. Although he does not want to go to the police, John is determined that his abuser should not be a priest and that justice must be done. John finally summons enough courage to report the abuse to the diocesan bishop and the diocesan sexual abuse investigator, explicitly detailing the nature, location, and dates of the abuse. The investigator tells John that his statement will be critical evidence in the priest's trial in canon law, the Catholic Church's legal system. While holding a canonical trial, the bishop temporarily removes the priest from ministry. John hopes that justice will be done.

However, as the months drag on, John hears rumors about the priest's stature: his popularity in the diocese, his close friendship with the bishop, and his fundraising acumen. After a year of silence, the diocese issues a three-sentence press release indicating that the priest will return to ministry, as he was found not guilty in the canonical trial. John is dumbfounded and disgusted. First, he was never given any updates on the trial as it progressed; and second, the curt press release did not provide any information about the decision's reasoning. Did the judges determine that John lacked credibility? Did other witnesses deny John's story? Did the bishop intervene for his friend? Was either corruption or blackmail involved? John calls the bishop and demands answers, but the bishop assures John that they did everything by the book and that John's allegation was thoroughly investigated. When John asks more pointed

1. *Ephesians* 5:11–13 (Revised Standard).

questions, the bishop explains that in canon law John has no right to know what occurred during the trial, who testified, what evidence was brought, or even the reasons for the final decision. In fact, the bishop has locked the judges' decision in the secret archives.

The secrecy in this hypothetical might shock U.S. citizens who are familiar with public criminal trials. The presumptive public access to criminal trials is an indispensable attribute of the Anglo-American legal system: the "rule of publicity" has been the rule in England from time immemorial and was a fundamental attribute of the judicial systems of the early American colonies.² As the Supreme Court concluded, "a presumption of openness inheres in the very nature of a criminal trial under our system of justice."³ Furthermore, two constitutional amendments safeguard the public nature of criminal trials. The Sixth Amendment protects a defendant's right to a public trial,⁴ and the First Amendment provides a right of public access to criminal trials.⁵ Although neither right is absolute, the public nature of criminal trials is a fundamental element of American justice.

As essential as publicity is to the American legal system, secrecy is to canon law. Out of concerns to avoid scandal and maintain privacy,⁶ the current Code of Canon Law prohibits third parties from being present during the trial⁷ and binds tribunal personnel to secrecy.⁸ Amidst calls for greater transparency and accountability in the Church, recent developments in canon law have taken only small steps to lift the pall of secrecy.⁹ Of all the attributes of canonical trials, secrecy seemingly remains preeminent.¹⁰ Meanwhile, U.S. Catholics have discovered reasons to distrust their leaders, stemming from sexual and financial misconduct

2. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564–69 (1980).

3. *Id.* at 573.

4. U.S. CONST. amend. VI.

5. U.S. CONST. amend. I; see *Richmond Newspapers, Inc.*, 448 U.S. at 580.

6. See discussion *infra* Section IV.A.

7. 1983 CODE c.1559.

8. 1983 CODE c.1455, §1.

9. See discussion *infra* Section III.D.

10. See discussion *infra* Sections III.A–C. Additionally, many tribunals will go to great lengths to maintain the secrecy of their proceedings and willingly trample on the canonical rights of parties to do so. See, e.g., William L. Daniel, *Ongoing Difficulties in the Judicial Praxis of American Tribunals in Causes of the Nullity of Marriage*, 74 JURIST 215, 238–42 (2014).

and cover-up.¹¹ Surveys confirm that trust is waning.¹² American Catholics are demanding greater transparency from the Church hierarchy, and many have lost trust in the Church's administration of justice.¹³ Recently, William Daniel—a canon law professor at the Catholic University of America—raised the question of employing secular models and standards of transparency in the Church.¹⁴ In his article, Daniel concludes that while the Church should only employ secular standards of transparency cautiously, there may be some benefit to such incorporation, even in canonical criminal trials.¹⁵ However, neither Daniel nor others has endeavored to provide a method of incorporation or to suggest concrete changes.¹⁶

11. See generally Matt Hadro, *McCarrick Report at Odds with Cardinal Wuerl's Claims of Ignorance*, CATH. NEWS AGENCY (Nov. 13, 2020, 4:22 PM), <https://www.catholicnewsagency.com/news/mccarrick-report-at-odds-with-cardinal-wuerls-claims-of-ignorance-87388m> [<https://perma.cc/AC5Q-6BW6>]; JD Flynn, *Wuerl Denies Prior Denials Denied Knowledge of McCarrick Seminarian Abuse*, CATH. NEWS AGENCY (Jan. 14, 2019, 10:45 AM), <https://www.catholicnewsagency.com/news/wuerl-denies-prior-denials-denied-knowledge-of-mccarrick-seminarian-abuse-76353> [<https://perma.cc/6EXZ-96QR>]; JD Flynn & Jonah McKeown, *Minnesota Bishop Kept Admitted Child Abuser in Ministry, Did Not Investigate Allegation of Abuse*, CATH. NEWS AGENCY (Nov. 5, 2019, 2:04 PM), <https://www.catholicnewsagency.com/news/minnesota-bishop-kept-admitted-child-abuser-in-ministry-did-not-report-allegations-of-abuse-70734> [<https://perma.cc/8ALN-FC5A>]; 'No Excuse, No Adequate Explanation': Lori Releases Findings of Bishop Bransfield Investigation, CATH. NEWS AGENCY (June 5, 2019, 1:20 PM), <https://www.catholicnewsagency.com/news/no-excuse-no-adequate-explanation-lori-releases-findings-of-bishop-bransfield-investigation-39836> [<https://perma.cc/JY7J-QKXL>].

12. *U.S. Catholics Losing Trust in Clergy, Survey Finds*, CATH. NEWS AGENCY (Jan. 11, 2019, 1:00 PM), <https://www.catholicnewsagency.com/news/us-catholics-losing-trust-in-clergy-survey-finds-49485> [<https://perma.cc/6QBB-8ZE7>].

13. Ed Condon, *Analysis: Vatican Calls for Trust, Catholics Wait for Transparency*, CATH. NEWS AGENCY (July 5, 2019, 7:00 AM), <https://www.catholicnewsagency.com/news/analysis-vatican-calls-for-trust-catholics-wait-for-transparency-79006> [<https://perma.cc/L5BL-S8NA>].

14. William L. Daniel, "Accountability" and the Juridical Responsibility of the Public Ecclesiastical Administration, 30 IUS ECCLESIAE 33, 53–54 (2018).

15. *Id.* at 54.

16. *Id.* ("For example, while a parish has a right to know that its pastor has been suspended from ministry and perhaps a basic rationale for that decision, the details of his case should be handled seriously but with care. He remains a priest, and the dignified treatment of him also within the public interest of the Church, which treasures the holy priesthood of Jesus Christ. The gravity of his situation thus demands that he be disciplined appropriately in view of the public good; and perhaps that is the just extent of the administration's public transparency, even if the degree of transparency might be greater in regard to those immediately affected by his behavior, when they are able to receive sensitive information with the Church's own discretion."). Another canonical scholar, Susan Mulheron, presenting to the Canon Law Society of America in 2018, courageously called for better tools in addressing the sexual abuse of adults in the Church, the abuse of clerical authority, and accountability for bishops. Susan Mulheron, Seminar, *Canonical Considerations in Response to Scandal in the Church*, 80 CANON L. SOC'Y AM. PROC. 297,

This Comment attempts to begin that conversation by comparing public access in criminal trials under U.S. law and canon law and by examining whether canon law can successfully incorporate any elements of U.S. law. This Comment has four parts. Because the reader is likely unfamiliar with canon law, Part I provides a broad overview of canon law and the canonical penal system. Part II examines public access to criminal trials in the United States. Part III examines secrecy in criminal trials in canon law. Part IV addresses obstacles to incorporating elements of American criminal law into canon law and suggests that a starting point would be a recognition that fundamental values found in U.S. criminal law are values inherent in good governance. Part IV concludes by providing three concrete proposals for greater public access, which would uphold the fundamental values of good governance articulated in U.S. law and further the express purposes of criminal trials in canon law.

I. OVERVIEW OF CANON LAW

Canon law is the legal system of the Catholic Church throughout the world. Although it resembles the Anglo-American common law system, it differs in significant ways. Section A introduces the canonical legal system and provides an explanation of its sources, purpose, and jurisdiction. Section B explains the Church's penal law, canonical crimes, and the penalties utilized in canon law. Section C provides a bird's-eye view of criminal processes in canon law.

A. An Introduction to Canon Law

As a legal system, canon law predates the United States' founding by over fifteen hundred years and remains in force today. For most of that time, it existed as a collection of norms, provisions, precepts, and anathemas. Currently, it is a codified legal system that orders the internal governance of the Catholic Church and its members.

1. A BRIEF HISTORY OF CANON LAW

Although it is impossible here to scratch the surface of canon law's rich and varied history, a brief overview will help orient the reader. The history of canon law spans two millennia, beginning with the commands of Jesus of Nazareth, running through the decrees of Gratian, and continuing to the present day with Pope Francis's recent changes to

314 (2018). However, although Mulheron acknowledges the "sad reality" that previously-proposed solutions have gone unheard, she stops short of providing concrete solutions. *Id.* at 317–18.

ecclesiastical legislation.¹⁷ Jesus unabashedly provided his followers with norms for an upright life, even at times contrasting his own laws with those in the Hebrew Scriptures.¹⁸ Already in the first century, the Church had numerous laws regarding sacred ministers, widows, the responsibilities of a Christian spouse to his or her non-believing spouse, community meals, and circumcision, all of which appear in the Christian Scriptures.¹⁹ After the Edict of Milan in the fourth century, Christians in the Roman Empire were allowed to openly practice their faith without fear of persecution, and a more complex organization of ecclesiastical laws developed through the promulgation of norms by local synods, ecumenical councils, and popes.²⁰ During the medieval period, jurists systematized these laws; most notable among these collections were Gratian's Decrees compiled in the twelfth century and the thirteenth century Decretals of Gregory IX.²¹ The collection of laws and norms grew with each pope and ecumenical council. Over time, this growing body of law became cumbersome, and during the codification movement in Europe in the early twentieth century, the Catholic Church codified its own law.²² For the first time in its history, the Church had a code of laws, commonly referred to as the "1917 Code" on account of its year of promulgation. In 1983, Pope John Paul II promulgated a full revision of the Code, abrogating the prior Code.²³ The 1983 Code is the current general law of the Catholic Church, but it has been updated and revised by recent popes.²⁴

17. For a concise history, see JOHN J. COUGHLIN, *CANON LAW: A COMPARATIVE STUDY WITH ANGLO-AMERICAN LEGAL THEORY* 21–35 (2011).

18. For example, in Matthew's Gospel, Jesus says, "You have heard that it was said, 'You shall love your neighbor and hate your enemy.' But I say to you, love your enemies and pray for those who persecute you." *Matthew* 5:43–44 (Revised Standard). After delivering the Sermon on the Mount, the crowds who heard these words were shocked by his teaching because of the law-giving authority he claimed for himself. *Matthew* 7:28–29 (Revised Standard).

19. See BRIAN EDWIN FERME, *INTRODUCTION TO THE HISTORY OF THE SOURCES OF CANON LAW: THE ANCIENT LAW UP TO THE DECRETUM OF GRATIAN* 15 (William J. King trans., 2007).

20. JOSEPH T. MARTÍN DE AGAR, *A HANDBOOK ON CANON LAW* 9 (2d ed. 2007).

21. *Id.* at 10–11.

22. COUGHLIN, *supra* note 17, at 35.

23. Canon 6 of the new Code expressly provided for the abrogation of the 1917 Code, among other laws that may have remained in effect. 1983 CODE c.6, § 1, 1°. In 1990, a code of canons was promulgated for the Eastern Churches *sui iuris*, which are smaller groups of Catholics who belong to the Catholic Church. For simplicity's sake, this Comment compares only the 1983 Code of Canon Law to U.S. law because it binds Latin, or Western, Catholics.

24. See, e.g., JOHN PAUL II, *APOSTOLIC LETTER MOTU PROPRIO AD TUENDAM FIDEM BY WHICH CERTAIN NORMS ARE INSERTED INTO THE CODE OF CANON LAW AND THE CODE OF CANONS OF THE EASTERN CHURCHES* (1998); BENEDICT XVI, *APOSTOLIC LETTER MOTU PROPRIO OMNIUM IN MENTEM ON SEVERAL AMENDMENTS TO THE CODE OF CANON LAW* (2009); FRANCIS, *APOSTOLIC LETTER MOTU PROPRIO MITIS IUDEX DOMINUS IESUS BY*

2. CANON LAW AS A LEGAL SYSTEM

Like any legal system, the purpose of canon law is to create order in society. Specifically, its purpose is to order the ecclesial society so that the organic development of charity, grace, and faith in the Church and in individual members is more easily accomplished.²⁵ Because it attempts to put the Church's theological doctrine into practice, canon law acts as "a bridge between immutable theological truths and practical action."²⁶ Canon law is based on three primary sources: (1) the divine law that can be known by reason alone, called the natural moral law; (2) the divine law that is revealed by God and known through faith; and (3) human law, sometimes called merely ecclesiastical law.²⁷ The first two sources act like the Constitution of the United States in the sense that no individual canonical norm could ever contradict the natural moral law or doctrines of the faith and would be invalid to the extent that it is contrary to those sources. However, merely ecclesiastical law gives canon law its positive character because these norms are of human origin and can be changed without any harm to immutable theological doctrines.²⁸ Because the divine law does not expressly resolve every conflict, the Church sought to "formulate, develop, interpret, and apply the divine law, taking the particular circumstances into account" in creating its own legal system.²⁹

Because of canon law's human aspect, it resembles the American legal system but is still different in many fundamental ways. For example, the 1983 Code distinguishes three familiar powers of governance: legislative, executive, and judicial.³⁰ However, that *distinction* of governing powers in canon law does not mean the *separation* of powers.³¹ Unlike the American legal system's separation of governmental powers, canon law concentrates all three powers of governance largely in the hands of the pope and the bishops.³² Moreover, canon law is not a common law

WHICH THE CANONS OF THE CODE OF CANON LAW PERTAINING TO CASES REGARDING THE NULLITY OF MARRIAGE ARE REFORMED (2015).

25. JOHN PAUL II, APOSTOLIC CONSTITUTION *SACRAE DISCIPLINAE LEGES* FOR THE PROMULGATION OF THE NEW CODE OF CANON LAW 4 (1983).

26. COUGHLIN, *supra* note 17, at 19.

27. See MARTÍN DE AGAR, *supra* note 20, at 23–28; Daniel, *supra* note 14, at 40.

28. COUGHLIN, *supra* note 17, at 185. For example, canon 401 requires a diocesan bishop to submit his letter of resignation to the pope on the bishop's seventy-fifth birthday. 1983 CODE c.401, § 1. An analogous distinction is implicit in the criminal law's notions of *malum in se* and *malum prohibitum*. Compare *Malum In Se*, BLACK'S LAW DICTIONARY (9th ed. 2009), with *Malum Prohibitum*, BLACK'S LAW DICTIONARY (9th ed. 2009).

29. MARTÍN DE AGAR, *supra* note 20, at 7.

30. 1983 CODE c.135, § 1.

31. MARTÍN DE AGAR, *supra* note 20, at 70.

32. 1983 CODE c.331, (describing the pope's power as "supreme, full, immediate, and universal"); *id.* c.391, § 2 (entrusting legislative, executive, and judicial

system, meaning in practice that the decisions of its tribunals do not contain precedential value.³³ Rather, it is a legal system in which the judge applies the law to each conflict that arises and does not necessarily worry about “its implications for the development of the law.”³⁴ Lastly, jurisdiction and membership in canon law differ greatly from U.S. law. Canon law claims jurisdiction over a society that transcends national boundaries, including approximately one billion people in nearly three thousand dioceses.³⁵ One obtains membership in the Catholic Church by baptism or reception,³⁶ and merely ecclesiastical laws generally only bind Catholics who have reached seven years of age and possess the sufficient use of reason.³⁷ Because the Catholic Church is a voluntary society, canon law binds only those wishing to participate in ecclesial life. This fact has far-reaching effects on the Church’s criminal law and its application.

B. Criminal Law in the Catholic Church

Like any legal system, canon law includes some means to persuade its members to obey its norms. However, unlike many legal systems, canon law does not create or employ law enforcement officers to impose the kinds of penalties one would expect from the state. Rather, when a Catholic commits a canonical crime, the only penalty that can be enforced is the deprivation of some ecclesial good, as opposed, for example, to the deprivation of one’s liberty.

1. THE CHURCH’S COERCIVE POWER

The Church claims the “innate and proper right to coerce offending members” with penalties.³⁸ The Church’s history of imposing penalties is very complex due to the unique relation of church and state in the past. At times the Church called upon secular powers to enforce its own discipline, and at times the Church’s own authorities implemented distinctly civil

power over a diocese to the diocesan bishop). For brevity’s sake, this Comment does not discuss other organs of government both at the universal and the local level (e.g., councils, synods, vicars, etc.).

33. 1983 CODE c.16, § 3; COUGHLIN, *supra* note 17, at 189.

34. COUGHLIN, *supra* note 17, at 189.

35. See *What Is a Diocese?*, ROMAN CATH. DIOCESE OF ORANGE, <https://www.rcbo.org/community-story/what-is-a-diocese/> [https://perma.cc/B48A-WYEL] (last visited Sept. 13, 2021).

36. See 1983 CODE cc.11, 96. Reception into the Catholic Church is a juridic act that incorporates someone who was baptized in a non-Catholic church or ecclesial community (e.g., if someone baptized in the Lutheran faith later wanted to convert, that person would not be rebaptized but would be received into the Catholic Church through a rite of reception).

37. 1983 CODE c.11.

38. 1983 CODE c.1311.

discipline.³⁹ Because such proximate church-state relations are relics of a bygone era, the Church has now structured its criminal law primarily according to theological considerations.⁴⁰ The threefold purpose of the Church's current penal system is to repair scandal, to restore justice, and to reform the offender.⁴¹ Furthermore, because the Church does not stop anyone from leaving it, does not force anyone to remain in it, and lacks anything akin to a police force, the norms of canon law have force only to the extent that a person wishes to participate in the life of the Church and exercise the rights, obligations, and privileges of the ecclesial society.⁴²

2. CRIMES IN CANON LAW

A criminal offense in canon law is called a "delict."⁴³ A delict is "an external and morally imputable violation of a law to which a canonical sanction . . . is attached."⁴⁴ Although one may be tempted to equate the notion of "sin" with "delict," these concepts are not identical. While Catholic theology would hold both to be immoral, not every sin is a delict because there are many actions that are sins according to Catholic doctrine but that the 1983 Code does not penalize.⁴⁵ For example, Catholic theology considers adultery to be a sin, but it is not a delict in canon law.⁴⁶ Delicts are those specific external actions⁴⁷ for which the legislator has decided to attach a penalty. Some delicts can be committed by anyone in the Church: heresy, desecration of the Eucharist, physical violence against the pope, profanation of a sacred object, and simony, for example.⁴⁸ However, many delicts can be committed only by clerics: illegitimate consecration of a bishop, sexual solicitation of a penitent in the context of confession, and

39. Thomas J. Green, *Sanctions in the Church [cc. 1311–1399]*, in *NEW COMMENTARY ON THE CODE OF CANON LAW 1529, 1529–30* (John P. Beal, James A. Coriden & Thomas J. Green eds., 2000).

40. *Id.*

41. 1983 CODE c.1341. *See also* discussion *infra* Section IV.A.2.

42. *See* Velasio De Paolis, *Penal Sanctions, Penal Remedies and Penances in Canon Law*, in *THE PENAL PROCESS AND THE PROTECTION OF RIGHTS IN CANON LAW 145, 168 n.19* (Patricia M. Dugan ed., 2005).

43. COUGHLIN, *supra* note 17, at 52.

44. 1917 CODE c.2195, § 1, *translated in* EDWARD N. PETERS, *THE 1917 PIO-BENEDICTINE CODE OF CANON LAW: IN ENGLISH TRANSLATION WITH EXTENSIVE SCHOLARLY APPARATUS 695* (2001); *see also* De Paolis, *supra* note 42, at 153 (explaining that although the 1983 Code no longer defines the term, the 1917 Code's definition is still applicable).

45. Green, *supra* note 39, at 1529–30.

46. CATECHISM OF THE CATHOLIC CHURCH 572 (Ignatius Press ed., U.S. Cath. Conf., Inc. trans., 1994).

47. To commit a delict, some observable, external action must occur. Thus, a greedy thought could not be a delict.

48. 1983 CODE c.1364, § 1; *id.* cc.1367, 1374, 1376, 1380; *id.* c.1370, § 1.

sexual abuse of a minor, for example.⁴⁹ In short, a delict is simply a crime in canon law.

3. PENALTIES IN CANON LAW

In canon law, a penalty is a privation of some ecclesiastical good, whether temporal or spiritual.⁵⁰ Although the 1983 Code does not provide a definition, the 1917 Code defined a penalty as “the privation of some good [and is] inflicted by the legitimate authority for the correction of a delinquent or the punishment of a delict.”⁵¹ Penalties include, for example, denial of access to the sacraments or removal from some office in the Church (e.g., pastor, chancellor, etc.).⁵² In general, there are two types of canonical penalties: censures and expiatory penalties.⁵³ Censures are medicinal penalties whose goal is to bring about awareness of wrongdoing in the heart of the offender and to reconcile that person with the community.⁵⁴ If the offender repents and is willing to make suitable reparations, the censure must be lifted.⁵⁵ Contrary to popular misconception, excommunication is an example of a medicinal penalty, and consequently (1) excommunication does not remove an offender altogether from the Church but merely penalizes the offender, and (2) the excommunication *must* be lifted when the offender repents.⁵⁶ Expiatory penalties, on the other hand, do not seek primarily to reform the offender but rather seek to restore order in the community, repair scandal, and deter others from violating canon law.⁵⁷ Unlike censures, expiatory penalties are generally not remitted when the offender repents.⁵⁸ Examples of expiatory penalties include privation from an office and dismissal from the clerical state,⁵⁹ popularly called “laicization.”⁶⁰ Inadvertence, invincible ignorance, error, necessity, fear, and threat of violence are absolute defenses to penalties, whether medicinal or expiatory, and penalties may

49. 1983 CODE cc.1382, 1387; *id.* c.1395, § 2.

50. MARTÍN DE AGAR, *supra* note 20, at 257.

51. 1917 CODE c.2215, *translated in* EDWARD N. PETERS, *THE 1917 PIO-BENEDICTINE CODE OF CANON LAW: IN ENGLISH TRANSLATION WITH EXTENSIVE SCHOLARLY APPARATUS* 702 (2001).

52. De Paolis, *supra* note 42, at 156; e.g., 1983 CODE c.1331, § 1, 2°; *id.* c.1336, § 1, 2°.

53. *See* De Paolis, *supra* note 42, at 157.

54. *See id.*; accord Green, *supra* note 39, at 1530.

55. 1983 CODE c.1358, § 1.

56. 1983 CODE c.1331.

57. Green, *supra* note 39, at 1530.

58. *Id.*

59. 1983 CODE c.1336, § 1, 2–5°.

60. *See* Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1833 n.166.

not be imposed on anyone without the use of reason or under sixteen years of age.⁶¹ Although in theory most Catholics are subject to penalties for the commission of a delict, in practice penalties are generally imposed only upon clerics and other leaders in the Church.⁶²

C. Criminal Trials in Canon Law

In canon law, trials—also called processes—are used to pursue or vindicate rights, to declare juridic facts, and to impose penalties for delicts.⁶³ Criminal trials, commonly called “penal processes,” are used to determine whether a delict has been committed and, if so, whether to impose a penalty.⁶⁴ There are two types of penal process: the judicial penal process and the extrajudicial penal process. The judicial penal process is the preferred and ordinary trial used by the Catholic Church to determine juridic facts and contains many of the basic elements of a trial in any legal system. The extrajudicial penal process is an abbreviated criminal trial that can be used only for a just cause. However, before either of these trials is used, typically the bishop orders a preliminary investigation, which first gathers more information about the alleged delict.

1. PRELIMINARY INVESTIGATION

The enforcement of the Church’s penal law typically begins with the preliminary investigation.⁶⁵ When a bishop receives notice of the commission of a delict that has at least a semblance of truth, he is to initiate an investigation—conducted by a person appointed by the bishop for this task—to gather more facts about the alleged offense.⁶⁶ The preliminary investigation normally involves interviews and the collection of

61. 1983 CODE cc.1321–22.

62. Green, *supra* note 39, at 1530.

63. 1983 CODE c.1400, § 1.

64. JOHN A. RENKEN, *THE PENAL LAW OF THE ROMAN CATHOLIC CHURCH: COMMENTARY ON CANONS 1311–1399 AND 1717–1731 AND OTHER SOURCES OF PENAL LAW* 385 (2015). The 1983 Code of Canon Law uses the term *processus poenalis* or “penal process” to refer to a criminal trial in canon law. *See id.* 385 n.1. This Comment will use the terms interchangeably.

65. Technically, the preliminary investigation is not a part of the penal process itself but a preparatory step, which may precede either of the two types of penal processes. Thomas J. Green, *The Penal Process [cc. 1717–1731]*, in *NEW COMMENTARY ON THE CODE OF CANON LAW* 1806, 1807 (John P. Beal, James A. Coriden & Thomas J. Green eds., 2000).

66. 1983 CODE c.1717, § 1. This canon provides that the “ordinary” holds the executive power necessary to begin a preliminary investigation. *Id.* The title of “ordinary” is much broader than just bishops; it includes apostolic administrators, vicars general, episcopal vicars, and major superiors of clerical religious institutes of pontifical right. 1983 CODE c.134, § 1. This Comment focuses solely on diocesan bishops.

documentary evidence.⁶⁷ Once sufficient evidence is collected, the bishop must answer three questions in the form of a decree: (1) whether a penal process can be initiated; (2) whether a penal process should be initiated; and (3) what type of penal process should be used.⁶⁸ The first question turns on whether the offender is subject to the criminal law of the Church and whether the statute of limitations has already run.⁶⁹ The second question requires the bishop to consider whether imposing a penalty will foster the threefold purpose of penalties in the Church.⁷⁰ The third question depends on the nature of the delict, the evidence available, and other circumstances.⁷¹ While the decision of the bishop in the preliminary investigation can be challenged through administrative recourse to the relevant dicastery in Rome, the bishop's discretion is substantial.⁷² If the preliminary investigation puts the basic facts of the case largely beyond dispute or the offender confesses, then an extrajudicial penal process may be more suitable, as it does not involve many of the truth-sifting elements of a full judicial penal process, as explained below.

2. EXTRAJUDICIAL PENAL PROCESS

The extrajudicial penal process, often called the administrative penal process,⁷³ proceeds in three simple steps. First, the bishop informs the accused of the allegation and the evidence, and the bishop allows the accused to provide a defense.⁷⁴ Second, the bishop meets with two assessors—typically canon lawyers—to evaluate the evidence.⁷⁵ Third, the bishop issues a written decree determining whether the delict is proven, what penalty is given, and the reasons for his decision.⁷⁶ In providing the supporting reasons for the decision, the bishop should concisely explain the relevant penal law and the pertinent facts that led him to apply the specific penalty.⁷⁷ Although the accused can seek administrative recourse against the bishop's decision, the bishop's discretion is remains

67. See 1983 CODE c.1717, § 3.

68. 1983 CODE c.1718, § 1.

69. For graver delicts, however, the statute of limitations, called prescription in canon law, can be dispensed by the Congregation for the Doctrine of the Faith, allowing offenders to be punished decades after the commission of the delict. CONGREGATION FOR THE DOCTRINE OF THE FAITH, *NORMAE DE GRAVIORIBUS DELICTIS*, art. 7 (2010).

70. See *supra* note 41 and accompanying text.

71. See *infra* Section III.A.

72. See 1983 CODE cc.1732–39.

73. Green, *supra* note 65, at 1810.

74. 1983 CODE c.1720, 1°.

75. 1983 CODE c.1720, 2°; accord *Assessors*, NEW ADVENT, <https://www.newadvent.org/cathen/01799b.htm> [<https://perma.cc/36JV-8SCC>] (last visited Sept. 14, 2020).

76. 1983 CODE c.1720, 3°; see also *id.* cc.1342–50 (referenced in c.1720, 3°).

77. Green, *supra* note 65, at 1811.

substantial.⁷⁸ The extrajudicial penal process does not contain many elements typically associated with trials (e.g., witness testimony, oral arguments, etc.) that assist in the factfinding process. Consequently, canon law favors a full judicial process over an extrajudicial one and prevents the imposition of more serious, perpetual penalties (e.g., dismissal from the clerical state) by an extrajudicial process because it lacks many legal protections contained in the judicial penal process.⁷⁹ However, it is the bishop alone who decides which process to use.⁸⁰

3. JUDICIAL PENAL PROCESS

The judicial penal process is the ordinary criminal trial in canon law and unfolds in six steps, which are roughly similar to the basic elements of a criminal trial in the United States. First, the promoter of justice, acting as the prosecutor at the bishop's mandate, presents a *libellus* (petition) of accusation to the judge based on information gathered in the preliminary investigation.⁸¹ Second, the judge cites the accused to trial, notifying the accused of the trial and attaching the *libellus* of accusation.⁸² Third, the judge hears the promoter of justice and the accused regarding the *contestatio litis* (joinder of the issue), which defines the case's central question.⁸³ In penal trials, the joinder of the issue may be phrased as follows: whether the accused is guilty of X delict and, if so, whether the accused is to be punished with Y penalty.⁸⁴ Fourth, the judge gathers evidence, either in the form of documents or depositions.⁸⁵ Fifth, the accused and the promoter of justice have the opportunity to present concluding arguments.⁸⁶ Sixth, the judges in the case—typically, there are at least three⁸⁷—meet to discuss the proofs in the case and vote to determine whether the delict has been proven and, if so, what penalty to impose.⁸⁸ Because this is a judicial process, appeal is made to the appellate tribunal.⁸⁹

78. 1983 CODE cc.1732–39.

79. 1983 CODE c.1342, §§ 1–2; Green, *supra* note 39, at 1559–60.

80. 1983 CODE c.1718.

81. 1983 CODE c.1721, § 1. In criminal trials, the promoter of justice “is bound by office to provide for the public good” and acts as the prosecutor in the trial. 1983 CODE c.1430.

82. 1983 CODE cc.1507–08.

83. 1983 CODE c.1513, § 1.

84. *See, e.g., Coram Huber*, July 9, 2004: *Decisiones seu Sententiae* 96:475, 476.

85. *See* 1983 CODE cc.1539–86.

86. 1983 CODE cc.1601–06.

87. *See* 1983 CODE c.1425.

88. 1983 CODE cc.1607–18.

89. 1983 CODE cc.1628–34.

However, many elements of the judicial penal process differ from those of a criminal trial in the United States. First, and perhaps most notably, the trial is conducted almost entirely through written documents, and the parties of the canonical trial rarely are present at the same time.⁹⁰ The judges convey the decision to the parties through a written definitive sentence sent in the mail.⁹¹ Likewise, the parties typically make written, not oral, concluding arguments.⁹² Although the judge deposes witnesses in person, the law prohibits the accused from being present, and witness testimony is recorded.⁹³ Because the accused is not present during the deposition of witnesses, the judge allows the accused to view evidence only after it has been collected, which is accomplished via inspection of the evidence at the tribunal offices, though the judge can give a copy to the accused's advocate.⁹⁴ There is no right to directly cross-examine or to confront the alleged victim face-to-face.⁹⁵

Unlike criminal trials in U.S. law, the judicial penal process is inquisitorial, not adversarial.⁹⁶ In the canonical process, the judge alone poses all questions to the witness.⁹⁷ There is no examination or cross-examination by advocates.⁹⁸ While the promoter of justice and the advocate of the accused have the right to propose questions to the judge, only the judge questions the deponent.⁹⁹ Thus, the very structure of the criminal trial in canon law lends itself toward greater secrecy as opposed to the inherent openness and publicity of criminal trials in the United States.

II. PUBLIC ACCESS TO CRIMINAL TRIALS IN THE UNITED STATES

The Constitution ensures the public nature of criminal trials in the United States. The Sixth Amendment expressly provides the criminal defendant a qualified right to a public trial. The First Amendment implicitly provides the public a qualified right of access to criminal trials. The Sixth Amendment right is given to the defendant in a criminal trial,

90. In a penal trial, the only time that the accused and the promoter of justice are in the room at the same time is during the deposition of the accused. *See infra* Section III.B.

91. 1983 CODE cc.1610, 1615.

92. 1983 CODE c.1602. This canon does provide for the possibility of an in-person debate, but this is exceptional and extremely rare in practice. *Id.*; *see also* Craig A. Cox, *The Contentious Trial [cc. 1501–1670]*, in *NEW COMMENTARY ON THE CODE OF CANON LAW 1655, 1714* (John P. Beal, James A. Coriden & Thomas J. Green eds., 2000).

93. 1983 CODE cc.1559, 1567–69.

94. 1983 CODE c.1598.

95. *See* COUGHLIN, *supra* note 17, at 55.

96. *Id.*

97. *Id.*; 1983 CODE c.1561.

98. COUGHLIN, *supra* note 17, at 55.

99. 1983 CODE c.1561.

and the First Amendment right is given to the public in a criminal trial. Because this Comment focuses on the right of public access and not the rights of defendants, the Sixth Amendment will only be briefly outlined.¹⁰⁰ This Part explains the tests the U.S. Supreme Court applies in determining whether a closure order is justified and the values protected by these constitutional rights. Section A briefly outlines a defendant's Sixth Amendment rights. Section B analyzes the First Amendment right of public access recognized by the Court and discusses the open question surrounding the right of public access to judicial documents. Section C discusses the values promoted by public access to criminal trials.

A. *The Sixth Amendment Right of the Defendant to a Public Trial*

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”¹⁰¹ This constitutional right has its roots in the English common law system, though its exact origin is unknown.¹⁰² Interestingly, especially for the purposes of this Comment, the Anglo-American distrust of secrecy in criminal trials may have arisen, at least in part, from an aversion to the practices of the Spanish Inquisition.¹⁰³ The seminal case upholding a defendant's right to a public trial is *In re Oliver*.¹⁰⁴ In *Oliver*, the U.S. Supreme Court, citing the history of this constitutional protection and the important values it protects, held that a one-man grand-jury investigation that became a secret trial violated Oliver's Sixth Amendment right.¹⁰⁵ Later, in *Waller v. Georgia*,¹⁰⁶ the Court extended the Sixth Amendment right beyond criminal trials to include suppression hearings.¹⁰⁷ And in *Presley v. Georgia*,¹⁰⁸ the Court extended the Sixth Amendment right even further to include the questioning of prospective jurors in voir dire.¹⁰⁹

100. This Comment does not discuss public access to juvenile cases, which would not have any analogical value to canon law because canonical penalties cannot be imposed on anyone under sixteen years of age. 1983 CODE c.1324, § 1, 4°. Nor does this Comment discuss public access to civil trials. However, “[m]ost lower courts hold that the qualified First Amendment access right attaches to civil trials.” Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739, 1759 n.123 (2006).

101. U.S. CONST. amend. VI.

102. *In re Oliver*, 333 U.S. 257, 266 (1948).

103. Max Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 388–89 (1932); *In re Oliver*, 333 U.S. at 268.

104. *See In re Oliver*, 333 U.S. at 278.

105. *Id.* at 272.

106. 467 U.S. 39 (1984).

107. *Id.* at 47.

108. 558 U.S. 209 (2010).

109. *Id.* at 213.

B. The First Amendment Right of Public Access to Criminal Trials

Although the Sixth Amendment right is explicitly provided in the text of the amendment itself, the First Amendment right of public access to criminal trials is not. The First Amendment provides in full that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹¹⁰ The text says nothing at all about trials. Nevertheless, despite the absence of an explicit constitutional authorization, the Supreme Court has found an implied First Amendment right to public access to criminal trials. In the landmark case of *Richmond Newspapers, Inc. v. Virginia*,¹¹¹ the Court recognized this First Amendment right.¹¹² Later decisions developed a “pretest” to determine whether this right attached to a particular type of trial or hearing and developed a four-part test to determine whether a closure order was justified.¹¹³ However, there remains an open question regarding public access to judicial documents, and lower courts have split on the issue.¹¹⁴

1. THE NEW-OLD RIGHT OF PUBLIC ACCESS

In 1980, the Supreme Court first recognized a First Amendment right of public access to criminal trials in a 7-1 plurality decision.¹¹⁵ In *Richmond*, the defendant was on trial for a fourth time after a previous juror caused a mistrial by reading about the defendant’s case in the newspaper.¹¹⁶ Before the fourth trial began, defense counsel asked that the trial be closed to the public; with the prosecution making no objection, the trial court ordered the closure.¹¹⁷ However, the newspaper brought a First Amendment claim against the closure order all the way to the Supreme Court, which acknowledged it as a case of first impression.¹¹⁸ In the plurality opinion written by Chief Justice Burger, the Court began its analysis with a lengthy history lesson. It noted that free public access to trials “appears to have been the rule in England from time immemorial,”¹¹⁹ observed that public access was a stable feature of criminal trials in the

110. U.S. CONST. amend. I.

111. 448 U.S. 555 (1980).

112. *Id.* at 555.

113. *See infra* Section II.B.3.

114. *See Levine, supra* note 100, at 1757.

115. *Richmond Newspapers*, 448 U.S. at 555.

116. *Id.* at 559.

117. *Id.* at 560.

118. *Id.* at 564.

119. *Id.* at 564–69 (quoting EDWARD JENKS, *THE BOOK OF ENGLISH LAW* 73–74 (6th ed. 1967)).

early American colonies,¹²⁰ and concluded that public access is “an indispensable attribute of the Anglo-American trial.”¹²¹ After taking stock of the many values protected by public access—which are discussed below—the Court determined that “a presumption of openness inheres in the very nature of a criminal trial under our system of justice”¹²² and held that the right to attend criminal trials is “implicit in the guarantees of the First Amendment” on account of its protection of the other named freedoms (e.g., speech and press).¹²³

2. PRETEST TO DETERMINE WHETHER THE RIGHT ATTACHES

Having recognized a First Amendment right of public access to criminal trials, the Court almost immediately had to decide to which parts of the criminal trial this right attached. Consequently, the Court developed the “experience and logic” pretest, sometimes called the “history and function” pretest, to answer this question. Although a discerning reader can find this test in *Richmond Newspapers*, the Court never explicitly identified it as such until its decision in *Globe Newspaper Co. v. Superior Court*,¹²⁴ in which the Court stated that “the institutional value of the open criminal trial is recognized in both logic and experience.”¹²⁵ The test was later given greater clarity and specificity in *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*.¹²⁶ In *Press-Enterprise II*, the Court clarified that it analyzes (1) “whether the place and process have historically been open to the press and general public”; and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.”¹²⁷ In other words, the Court determines whether the hearing in question has historically been open to the public and whether that openness is reasonable and furthers certain values in the American legal system. Because the Court has never confronted a situation in which only one prong has been met, it remains an open question as to whether or not the right of public access attaches only when both prongs are met or whether only one would suffice.¹²⁸

In addition to finding that criminal trials meet the pretest, the Court has held that the right of public access also attaches to voir dire and to probable cause hearings. In *Press-Enterprise Co. v. Superior Court*

120. *Richmond Newspapers*, 448 U.S. at 567.

121. *Id.* at 569.

122. *Id.* at 573.

123. *Id.* at 580.

124. 457 U.S. 596 (1982).

125. *Id.* at 606.

126. 478 U.S. 1 (1986).

127. *Id.* at 8.

128. Levine, *supra* note 100, at 1752.

(*Press-Enterprise I*),¹²⁹ the Court held that the right attaches to voir dire.¹³⁰ In *Press-Enterprise I*, the defendant was charged with the rape and murder of a teenage girl.¹³¹ Before voir dire, *Press-Enterprise* moved that voir dire be open to the public and the press; but the State was opposed, arguing that given the sensitive nature of the case, if voir dire were open, the prospective jurors “would lack the candor necessary to assure a fair trial.”¹³² The trial court allowed the press to attend the “general voir dire,” which lasted six weeks, but the trial court allowed counsel to conduct a portion of voir dire—three days in total—in private.¹³³ Afterwards, the newspaper requested that the court release a complete transcript, but the trial court denied the motion because “some personal problems were discussed which could be somewhat sensitive.”¹³⁴ After the defendant was convicted and sentenced to death, the newspaper again applied for release of the voir dire transcript, but the judge again denied, explaining that the jurors had been questioned in private regarding their own past experiences, which should not be made public.¹³⁵ *Press-Enterprise* appealed to the California Court of Appeals and then to the California Supreme Court, which both denied the newspaper’s request.¹³⁶ However, the U.S. Supreme Court reversed the lower court decisions, finding evidence of public jury selection as early as the Norman Conquest and upholding the value of such public hearings.¹³⁷ The Court acknowledged the competing interests in the case, namely the right of the defendant to a fair trial and the right of privacy of prospective jurors, but it held that the right of public access attaches to voir dire and that a total suppression of the transcript violated the newspaper’s First Amendment rights.¹³⁸ In other words, the Court held that the right of public access trumped any privacy rights the prospective jurors might have in being questioned about their own past trauma.

In *Press-Enterprise II*, the Court recognized the First Amendment right of public access to probable cause hearings.¹³⁹ In that case, the defendant was charged with twelve counts of murder for administering lethal doses of lidocaine while working as a nurse.¹⁴⁰ The defendant moved to exclude the public from the probable cause hearing to protect his right to a fair and impartial trial, and the magistrate ordered the closure because

129. 464 U.S. 501 (1984).

130. *Id.* at 511.

131. *Id.* at 503.

132. *Id.*

133. *Id.*

134. *Id.* at 503–04.

135. *Id.*

136. *Id.* at 504–05.

137. *Id.* at 506, 508–10.

138. *Id.* at 513.

139. *Press-Enterprise II*, 478 U.S. 1, 15 (1986).

140. *Id.* at 3.

of the case's national publicity and fear that the media might report only one side of the story.¹⁴¹ At the conclusion of the probable cause hearing, Press-Enterprise asked that the transcript be released, but the magistrate refused and sealed the record.¹⁴² On appeal, the California Supreme Court held that there is no First Amendment right of access to preliminary hearings.¹⁴³ However, the U.S. Supreme Court applied the pretest, found that both prongs were satisfied, and held that the First Amendment right of public access applies to at least some preliminary hearings, such as probable cause hearings.¹⁴⁴ The Court noted that if the magistrate in a probable cause hearing determines that probable cause exists, such a finding leads to a guilty plea in a majority of cases, and consequently the probable cause hearing "is often the final and most important step in the criminal proceeding."¹⁴⁵

In summary, the U.S. Supreme Court, having applied the experience and logic pretest, has found that the First Amendment right of public access attaches to criminal trials, voir dire, and even probable cause hearings. However, this is not the end of the analysis, for the Court next considers whether a specific closure order is justified in light of the particular facts of the case. In order to make that determination, the Court applies a four-part, strict scrutiny test.

3. FOUR-PART TEST TO DETERMINE WHETHER CLOSURE IS JUSTIFIED

Having found that a First Amendment right of public access attaches to a trial or hearing, the Court next employs a four-part, strict scrutiny test on a case-by-case basis in order to determine whether the presumption of openness is overcome by a compelling interest.¹⁴⁶ The presumption of openness is overcome when (1) there is an overriding interest (e.g., right to a fair trial) that closure will preserve; (2) the closure is narrowly tailored to serve that interest; (3) the court has considered reasonable alternatives; and (4) the court has articulated specific findings in order to facilitate appellate review.¹⁴⁷ This four-part test was formulated by the Court in *Globe Newspaper* and further developed in *Press-Enterprise I*.

In *Globe Newspaper*, the defendant was charged with the forcible rape of three girls who were still minors at the time of the trial.¹⁴⁸ The

141. *Id.* at 3–4.

142. *Id.* at 4–5.

143. *Id.* at 5.

144. *Id.* at 13.

145. *Id.* at 12.

146. Levine, *supra* note 100, at 1740; *Press-Enterprise I*, 464 U.S. 501, 510 (1984).

147. *Press-Enterprise I*, 464 U.S. at 510.

148. *Globe Newspaper Co. v. Sup. Ct.*, 457 U.S. 596, 598 (1982).

newspaper attempted to gain access to the rape trial, but the judge closed the courtroom, relying on a Massachusetts statute that mandated closure for specified sexual offenses during the testimony of a victim under eighteen years of age.¹⁴⁹ On appeal, the State stressed that the statute furthered important state interests in protecting minor victims of sex crimes from further trauma and embarrassment and in encouraging such victims to testify.¹⁵⁰ The U.S. Supreme Court, while acknowledging the importance of these interests, nevertheless held that they did not justify a mandatory closure order.¹⁵¹ As to the interest in protecting the victims from further trauma, the Court held that the trial court ought to determine this on a case-by-case basis, weighing such factors as age, maturity, and nature of the crime.¹⁵² As to the interest in encouraging victims to come forward, the Court found the claim to be “open to serious question as a matter of logic and common sense,” for the press will still have access to the transcript and cannot be prevented from publicizing the substance of the victim’s testimony or their identity.¹⁵³ Therefore, the Court found that the Massachusetts statute failed the first and second elements of the four-part test.¹⁵⁴

In *Press-Enterprise I*, in which the press was excluded from voir dire in order to protect the privacy of potential jurors, the Court held that the closure order failed the third and fourth elements of the test inasmuch as the trial court failed to consider reasonable alternatives and failed to articulate findings “with the requisite specificity.”¹⁵⁵ Thus, if the Court has found that the First Amendment right of public access attaches, then it will apply a four-part test to determine whether the presumption of openness is overcome in a specific case. Only when all four elements of that test are met is the closure order justified.

4. OPEN QUESTION REGARDING JUDICIAL DOCUMENTS

Although the Court has provided a clear pretest to determine whether the First Amendment right of public access attaches to a proceeding and a clear four-part test to determine on a case-by-case basis whether a closure order is justified, there remains some confusion as to whether the right of public access attaches to judicial documents related to proceedings, such as search warrants and plea agreements.¹⁵⁶ The confusion has stemmed in

149. *Id.*

150. *Id.* at 607.

151. *Id.* at 607–08.

152. *Id.* at 608.

153. *Id.* at 610.

154. *Id.* at 607–10.

155. *Press-Enterprise I*, 464 U.S. 501, 513 (1984).

156. Levine, *supra* note 100, at 1757.

part from the Court's decision in *Press-Enterprise II*, which "jumped between the hearing itself and the hearing transcript" when applying the pretest.¹⁵⁷ Lower courts have adopted three different approaches.¹⁵⁸ The first approach applies a relaxed closure test, holding access to documents as a common-law right rather than a constitutional one.¹⁵⁹ A second approach applies the pretest to the proceeding and holds that if the right attaches to the proceeding, then it attaches to the document in question.¹⁶⁰ The third approach applies the pretest directly to the document to determine whether the right attaches.¹⁶¹ Therefore, even though the Court's public access doctrine is clear regarding access to the courtroom itself, whether this right attaches to certain judicial documents related to proceedings is still uncertain.

C. Values Protected by Public Access to Criminal Trials

The Sixth Amendment right of a defendant to a public trial and the First Amendment right of public access to criminal trials protect four values in the American legal system: (1) improved factfinding; (2) legal education of the public; (3) community catharsis and prevention of vengeance; and (4) confidence in the judicial system. The Court has not expressly organized these values into a definitive list, but they are dominant themes found in the Court's reasoning. Although a system of public trials is not a panacea and will not root out all problems, it has some distinct advantages that a system of secrecy lacks. Because of the stark contrast between the presumption of openness found in the Anglo-American legal system and the fundamental secrecy that characterizes canon law, it is worthwhile to examine each of these values in order to better understand the underlying motivations for public access and compare these values with those undergirding the canonical legal system.

1. FACTFINDING: KEY WITNESSES AND HONEST WITNESSES

Public criminal trials aid the court in its factfinding duty by assisting in finding key witnesses and in ensuring honesty. Although the fact of a public trial alone cannot ensure that the key witnesses will make themselves known to the court, publicity at least provides some aid in delivering key witnesses who may have been unknown to the principal

157. *Id.*

158. *Id.* at 1760.

159. *Id.* at 1760–61. This approach is less common than the other two. *Id.* at 1763.

160. *Id.* This approach is used by the Second Circuit. *Id.*

161. *Id.* This approach is used by the Third, Seventh, and Ninth Circuits. *Id.* The Sixth Circuit combines the second and third approaches. *Id.* at 1764.

parties and who may voluntarily come forward.¹⁶² Secondly, public access to a criminal trial allows for public scrutiny, which helps ensure the truthfulness of witness testimony.¹⁶³ A witness who may be willing to commit perjury in a secret trial will be less likely to do so in a public trial, where the testimony may be tested and challenged.¹⁶⁴ Public access to criminal trials accomplishes both aspects of factfinding inasmuch as it “enhances the quality and safeguards the integrity of the factfinding process.”¹⁶⁵

2. LEGAL EDUCATION OF THE PUBLIC

Public access to criminal trials also provides a free education to the public concerning civic issues (e.g., the mechanics of the judiciary) and also fundamental principles of equity (e.g., the right to a fair trial and the presumption of innocence). This “educative effect” benefits all members of society.¹⁶⁶ This education is available to those who are physically present in the courtroom, as well as the broader public on account of the media’s right of public access. The Court in *Richmond* recognized the growing importance of media presence because citizens increasingly acquire knowledge through the media.¹⁶⁷

3. COMMUNITY CATHARSIS AND PREVENTION OF VENGEANCE

Public access to criminal trials allows the community harmed by the offense to experience a catharsis that prevents vigilante vengeance. A criminal offense creates an “imbalance” in society, causing a loss of a feeling of security and a desire to punish.¹⁶⁸ The community experiences a “fundamental, natural yearning to see justice done.”¹⁶⁹ When the crime

162. *In re Oliver*, 333 U.S. 257, 270 n.4 (1948).

163. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596 (1980) (Brennan, J., concurring) (“Publicizing trial proceedings aids accurate factfinding.”).

164. 15 WILLIAM BLACKSTONE, COMMENTARIES *366 (“[O]pen examination of witnesses, viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination . . . where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal.”).

165. *Globe Newspaper Co. v. Sup. Ct.*, 457 U.S. 596, 606 (1982).

166. *Richmond Newspapers*, 448 U.S. at 572 (quoting 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1834, at 438 (James H. Chadbourne rev. 1976)) (“Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.”).

167. *Richmond Newspapers*, 448 U.S. at 572–73.

168. *Id.* at 571 (quoting Gerhard O. W. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 6 (1961)).

169. *Id.* at 571.

is especially violent or heinous, citizens understandably feel anger, outrage, and rancor, but these emotions are relieved when the public sees the criminal justice system working to restore justice and hold offenders accountable.¹⁷⁰ This “therapeutic value” of public trials provides a “community catharsis” that cannot be accomplished by secret trials.¹⁷¹ Consequently, public criminal trials provide a suitable “outlet” and serve an important preventative purpose.¹⁷² Without catharsis, bitterness may turn into vengeance, and either the victim or members of the community may resort to “some form of vengeful ‘self-help.’”¹⁷³ Public access to criminal trials prevents further violence by providing a safety valve for the natural feelings of anger and hostility.

4. CONFIDENCE IN THE JUDICIAL SYSTEM

Lastly, public criminal trials bolster confidence in the judicial system in two ways. First, they serve as a check on the elected officials in that system, preventing the abuse of power or the use of the system as an instrument of persecution. Second, by allowing citizens to witness the criminal justice system in action, public trials allow society to trust that justice is being administered. “[C]ontemporaneous review” is a necessary check on the possible corruption of the judicial system.¹⁷⁴ It is a means of ensuring that government actors, namely judges and prosecutors, carry out their duties responsibly.¹⁷⁵ Is it not enough, though, that there are other checks in the system, such as the ability to appeal? The Court in *Oliver* replied that without public access, “all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.”¹⁷⁶

Furthermore, the right of public access maintains public confidence in and respect for the judicial system. The Court has recognized that whereas “[c]losed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for the law,” public access fosters trust.¹⁷⁷ This is not to say that public access will ensure the correct outcome in every case. The U.S. Supreme Court has noted that while “[p]eople in an

170. *Press-Enterprise I*, 464 U.S. 501, 509 (1984).

171. *Richmond Newspapers*, 448 U.S. at 570–71.

172. *Id.* at 571.

173. *Id.*

174. *In re Oliver*, 333 U.S. 257, 270 (1948).

175. *Waller v. Georgia*, 467 U.S. 39, 46 (1984).

176. *In re Oliver*, 333 U.S. at 271 (quoting 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

177. *Richmond Newspapers*, 448 U.S. at 594 (Brennan, J., concurring).

open society do not demand infallibility from their institutions . . . it is difficult for them to accept what they are prohibited from observing.”¹⁷⁸ Does this mean only those citizens who actually sit and watch criminal trials have greater confidence and trust in the judicial system? No. The very fact that the trial is open to the public and that anyone is able to attend provides a general confidence that procedural and substantive justice will be administered and that “deviations will become known.”¹⁷⁹

III. SECRECY IN CRIMINAL TRIALS IN CANON LAW

Unlike the American legal system, which ensures the publicity of criminal trials through constitutional amendments, the canonical system contains no such provisions. Although citizens of the ecclesiastical society have the canonical right to vindicate and defend their rights in the Church’s tribunals and the right to be judged with equity, canon law provides neither a right to a public trial nor the right of public access to trials.¹⁸⁰ Whereas there is a presumption of openness to criminal trials to the public in U.S. law, there is a presumption of secrecy in canon law. This secrecy, which pervades the various steps and types of trials in canon law, is the subject of this Part.¹⁸¹ Section A examines secrecy in the preliminary investigation. Sections B and C discuss secrecy in extrajudicial processes and judicial processes respectively. Section D highlights recent developments in the Church, which, although helpful, accomplish far less than they appear to at first glance.

A. Secrecy in the Preliminary Investigation

The preliminary investigation is conducted in almost total secrecy, with no information given to the public and sometimes little or no information given to the defendant.¹⁸² The purpose of the preliminary investigation is to gather information about the allegation in order to determine whether and what type of penal trial should be used.¹⁸³ Because the allegation may be wholly or partially false, the Code expressly

178. *Id.* at 572.

179. *Press-Enterprise I*, 464 U.S. 501, 508 (1984).

180. 1983 CODE c.221, §§ 1–2.

181. For a discussion of the four categories of secrecy in the Catholic Church, see Ian Waters, *The Law of Secrecy in the Latin Church*, 7 *CANONIST* 75, 76–78 (2015) (distinguishing natural secrecy, promised secrecy, entrusted secrecy, and the secrecy of the sacramental seal of confession). The secrecy discussed here is professional secrecy, a type of entrusted secrecy, that applies to doctors, psychologists, and lawyers. *Id.*

182. Angelo G. Urru, *Considerations on Imposing Penalties in Specific Cases, in THE PENAL PROCESS AND THE PROTECTION OF RIGHTS IN CANNON LAW* 287, 298 (Patricia M. Dugan ed., 2005).

183. 1983 CODE c.1718, §§ 1, 3–4.

provides that “[c]are must be taken so that the good name of anyone is not endangered from this investigation.”¹⁸⁴ Commentators suggest this requires that the investigation be conducted “with the greatest degree of secrecy” in order to avoid publicizing the delict and harming the reputation of the accused.¹⁸⁵ Therefore, even as the investigator is interviewing witnesses and possible victims, there is no requirement whatsoever that the public be informed at all, and even the accused may be unaware that a preliminary investigation is underway.¹⁸⁶ There is no express provision in the Code requiring notification of the defendant regarding the investigation.¹⁸⁷ Upon concluding the preliminary investigation, the bishop issues a decree that determines whether to proceed with a penal process and, if so, whether to use an extrajudicial process or a judicial process.¹⁸⁸ If the bishop determines that there is no longer a semblance of truth to the allegation, or if he determines that, although the allegation still seems true, there is no need for trial because the matter can be handled by fraternal correction or “other means of pastoral solicitude,” the case will not proceed to trial at all.¹⁸⁹ Instead, the bishop places the acts of the investigation in the “secret archive of the curia.”¹⁹⁰ If the bishop decides to proceed with some form of trial, then these documents may be used in that trial.¹⁹¹ However, there is no requirement that the bishop notify the public about the preliminary investigation, either when initiated or when concluded.

B. Secrecy in the Extrajudicial Process

The extrajudicial process is conducted in secrecy from the public, but the defendant must be informed of the trial and be given the right of

184. 1983 CODE c.1717, § 2.

185. Urru, *supra* note 182, 296–97.

186. However, if the accused is a cleric and the bishop decides to immediately exclude him from sacred ministry, then the accused must be cited. 1983 CODE c.1722, § 2.

187. However, the prescripts of canon 50 may be applicable here. Canon 50 requires that “[b]efore issuing a singular decree, an authority is to seek out the necessary information and proofs and, insofar as possible, to hear those whose rights can be injured.” 1983 CODE c.50. The decrees initiating the preliminary investigation and concluding the preliminary investigation are singular decrees, and thus it can be argued that before issuing them the bishop should hear the accused, whose rights can be injured.

188. 1983 CODE c.1718, § 1.

189. 1983 CODE c.1718, § 1, 1°; *id.* c.1341.

190. 1983 CODE c.1719. The secret archive is a “safe or cabinet, completely closed and locked,” which houses documents held in greatest secrecy. 1983 CODE c.489, § 1. “Only the bishop is to have the key to the secret archive.” 1983 CODE c.490, § 1. Other documents to be kept in the secret archives include documents from criminal cases in matters of morals; dispensations from occult impediments; records of marriages celebrated secretly; warnings or rebukes given as penal measures; and private penances given for private transgressions. 1983 CODE c.1082; *id.* c.1133; *id.* c.1339, §§ 1–3; *id.* c.1340, § 2.

191. 1983 CODE c.1719.

defense. The extrajudicial process requires that the bishop notify the accused, inform the accused of the evidence gathered, and provide an opportunity for defense.¹⁹² Thus, the extrajudicial process is somewhat less secretive than the preliminary investigation, which does not explicitly require notifying the defendant at all. After hearing from the defendant, the bishop then weighs the evidence with two assessors of his choice and issues a decree deciding the question of guilt and assigning a penalty if necessary.¹⁹³ Though the Code never expressly indicates where the proceeding's documents are kept, a plain reading of canon 489 suggests these documents would be kept in the secret archives.¹⁹⁴ Although the bishop gives a copy of the final decree to the accused, there is no requirement that the bishop ever notify the public of the final decision. In fact, notably absent from the extrajudicial process is a prosecutor. The entire extrajudicial process could be known only to a handful of persons: the bishop, his two assessors, a notary, and the accused. Consequently, it is possible—and perhaps even likely in practice—that in a situation in which a bishop found that a cleric committed a serious delict and imposed a penalty, neither the victim nor the public would have any knowledge of the process or the penalty.¹⁹⁵

C. Secrecy in the Judicial Process

Judicial penal processes are conducted with nearly as much secrecy. Like extrajudicial processes, the defendant must be cited and given an opportunity to participate.¹⁹⁶ However, in judicial penal processes, canon law requires the participation of the promoter of justice,¹⁹⁷ as well as an advocate for the accused.¹⁹⁸ This expands the number of persons involved in the trial already beyond what was required in the extrajudicial process. However, judicial penal processes decidedly are still not open to the public. The Code expressly provides that only those persons who are

192. 1983 CODE c.1720, 1°.

193. 1983 CODE c.1720, 2–3°. The assessors could be clerics or laypersons. 1983 CODE c.1424.

194. See 1983 CODE c.489, §§ 1–2 (providing that “documents of criminal cases in matters of morals” are to be destroyed when the accused dies or ten years after the sentence has been issued but that a brief summary and the definitive sentence are to be retained in the secret archives).

195. John P. Beal, *Accountability and Transparency According to Canon and International Law: A Human Rights Perspective*, 109 PERIODICA DE RE CANONICA 505, 520 (2020). A penalty may have external ramifications (e.g., sudden transfer from office), but even in this situation, the community may be left wondering whether the transfer was a punishment, promotion, or simply moving the problem from one parish to another.

196. 1983 CODE c.1728, § 1; *id.* c.1507, § 1.

197. 1983 CODE c.1430; *id.* c.1481, § 2; *id.* c.1721, § 1.

198. 1983 CODE c.1723, § 2.

necessary for the process are allowed to be present in court.¹⁹⁹ Furthermore, the judges and tribunal personnel (e.g., the notary, the promoter of justice, etc.) are “bound to observe secrecy,” and the judge can bind witnesses, experts, and *even the parties themselves* to secrecy.²⁰⁰ During the examination of witnesses, the defendant has no right to be present, and the judge may exclude the defendant’s advocate if the judge “has decided that the examination must proceed in secret due to the circumstances of the matters and persons.”²⁰¹ Regarding the “publication of the acts,” which occurs when all of the evidence (e.g., transcripts of depositions, documents, etc.) is collected, the evidence is “published” only to the defendant.²⁰² The defendant is not even given a copy of the evidence and is only permitted to inspect the evidence at the tribunal.²⁰³ At this stage of the process, the judge may require that the defendant and the defendant’s advocate take an oath to observe secrecy, and the judge may prevent the defendant from exercising the right to view the evidence if the defendant refuses to take the oath.²⁰⁴ The concluding arguments ordinarily are conducted in writing and are communicated only to the parties involved.²⁰⁵ The judges deliberate in secret, and the written conclusions of each individual judge are kept secret.²⁰⁶ Consequently, when the final decision is made, only the majority opinion is given, and it is impossible for the parties to know how each judge voted. The judges hand a copy of the definitive sentence directly to the defendant or send it via secure means.²⁰⁷ The public has no right to any information about the final decision, and all the materials related to the judicial penal process are stored in the secret archives.²⁰⁸ In sum, although the judicial trial may include more persons, those who participate are bound to secrecy, and neither the victim nor the public has any right to be informed of any aspect of the trial or even its final outcome.

D. Recent Developments on the Path Toward Greater Transparency

In the early 2000s, the public became aware of the rampant and heinous sexual abuse of minors by clerics that had occurred over the

199. 1983 CODE c.1470.

200. 1983 CODE c.1455, § 1, *id.* c.1455, § 3.

201. 1983 CODE c.1559.

202. 1983 CODE c.1598, § 1.

203. 1983 CODE c.1598, § 1. However, upon request, the judge can give a copy of the acts to the accused’s advocate. *Id.*

204. *See* 1983 CODE c.1455, § 3; *id.* c.1598, § 1.

205. 1983 CODE c.1602–03, § 1–2; *id.* c.1603, §1.

206. 1983 CODE c.1609, § 2.

207. 1983 CODE cc.1614–15. Typically, this is done through registered mail. *See* 1983 CODE cc.1509, 1615; Cox, *supra* note 92, at 1660.

208. *See* 1983 CODE c.489, § 1.

previous decades.²⁰⁹ Since then, the Catholic Church has taken many steps toward ensuring the protection of minors but only a few steps toward greater transparency. Three in particular bear relevance: (1) the Charter for the Protection of Children and Young People of the United States Conference of Catholic Bishops; (2) the current practice by dioceses of publishing lists of credibly accused clerics; and (3) the lifting of the pontifical secret for some cases. While each development is helpful on the path toward greater public access, they are all limited to one specific type of delict (i.e., sexual abuse of minors), and none provides public access to penal processes themselves.

In 2002, the United States Conference of Catholic Bishops issued the Charter for the Protection of Children and Young People, sometimes referred to as the “Dallas Charter,” to address the sexual abuse crisis.²¹⁰ Among other things, the Charter requires the existence of a confidential consultative review board composed of a majority of laypersons to advise the bishop in his assessment of allegations of sexual abuse of minors.²¹¹ In addition, the Charter requires dioceses to comply with state reporting requirements and cooperate with state officials.²¹² Concerning transparency, the Charter provides that dioceses

are to be open and transparent in communicating with the public about sexual abuse of minors by clergy within the confines of respect for the privacy and the reputation of the individuals involved. This is especially so with regard to informing parish and other church communities directly affected by sexual abuse of a minor.²¹³

Unfortunately, in practice this mandate for greater transparency does not provide greater public access to penal processes. Rather, bishops interpret it merely as a requirement to inform the public when a cleric has been credibly accused of sexual abuse of a minor at the outset of the preliminary investigation or when a cleric has been found guilty of sexual abuse of a minor through a judicial or extrajudicial process.²¹⁴ Typically,

209. *Catholic Church Child Sexual Abuse Scandal*, BBC (Feb. 26, 2019), <https://www.bbc.com/news/world-44209971> [<https://perma.cc/98FQ-N3KU>].

210. U.S. CONF. OF CATH. BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE (rev. 2018), [https://www.usccb.org/test/upload/Charter-for-the-Protection-of-Children-and-Young-People-2018-final\(1\).pdf](https://www.usccb.org/test/upload/Charter-for-the-Protection-of-Children-and-Young-People-2018-final(1).pdf) [<https://perma.cc/BWR8-SJVM>]. At the same meeting, the United States Conference of Catholic Bishops also approved *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons*. *Id.*

211. *Id.* at 9–10.

212. *Id.* at 25.

213. *Id.* at 12.

214. Raymond C. O’Brien, *Clergy, Sex and the American Way*, 31 PEPP. L. REV. 363, 439–40 (2004).

this announcement occurs at the conclusion of the preliminary investigation,²¹⁵ which now in the United States involves the consultation of the aforementioned lay review board. Although these measures are an improvement, two problems remain. First, the Charter does not mandate any transparency during the trial and only requires a modicum of it afterward. Dioceses often rely on curt press releases to provide the bare minimum regarding the outcome of the trial.²¹⁶ Second, the Charter only applies when the delict involves the sexual abuse of minors. If some other delict were committed—such as financial malfeasance, sexual solicitation of an adult penitent in the context of confession, the violation of the seal of confession, or even an illicit sexual relationship with a suggestible parishioner under the priest’s pastoral care—no transparency is required.²¹⁷ This can be especially damaging when, as often occurs in parishes, news of the delict spreads quickly throughout the community. Or what if a priest commits a delict by giving a hate-filled sermon or by publishing a racist social media post?²¹⁸ The harm is obviously public, but because the priest did not abuse a minor, there is no provision of canon law that requires a public action.

In the last ten years, American dioceses have published on their websites lists of clerics who have been credibly accused of sexual abuse of a minor.²¹⁹ In some cases, this was a condition of a diocese’s settlement in civil court or a requirement of filing for bankruptcy.²²⁰ However, some dioceses have voluntarily adopted this practice out of social pressure.²²¹ These lists often name the cleric in question, his date of ordination, the parishes where he served, and his current status (e.g., deceased, dismissed

215. *Id.*

216. *See, e.g., James Beck*, ARCHDIOCESE OF MILWAUKEE, <https://www.archmil.org/clergy-abuse-response/restricted-priests/Beck.htm> [https://perma.cc/TDK5-XHV2] (last visited Sept. 17, 2021).

217. U.S. CONF. OF CATH. BISHOPS, *supra* note 210, at 12.

218. Canon 1369 provides that it is a delict to gravely injure good morals in a public show or speech, in published writing, or in other instruments of social communication. 1983 CODE c.1369.

219. *See, e.g., Restricted Priests*, ARCHDIOCESE OF MILWAUKEE, <https://www.archmil.org/clergy-abuse-response/restricted-priests.htm> [https://perma.cc/3LW7-P2V9] (last visited Sept. 17, 2021).

220. *Correction: Reckoning—Where Are They Now Story*, ASSOCIATED PRESS (Nov. 27, 2019), <https://apnews.com/article/wa-state-wire-az-state-wire-mi-state-wire-pa-state-wire-mo-state-wire-197c6234838f420ab693517fb49a215e>; *see, e.g., Rob Schmitz, Priests’ Files to Shed Light on Abuse Scandal in L.A.*, NAT’L PUB. RADIO (July 27, 2007, 6:00 AM), <https://www.npr.org/templates/story/story.php?storyId=12295352> [https://perma.cc/5UVB-E4UP].

221. *See* Brian Pascus, *Providence Diocese Names 50 Priests and Clergy “Credibly Accused” of Sexual Abuse*, CBS NEWS (July 1, 2019, 10:05 AM), <https://www.cbsnews.com/news/catholic-diocese-rhode-island-releases-names-of-50-priests-accused-of-sexual-abuse-today-2019-07-01/> [https://perma.cc/6J2S-3HTL].

from the clerical state, or prohibited from sacred ministry).²²² Notably, bishops seemingly have determined that it is not in conflict with canon law to provide the public, at least in some cases, with notice of an allegation (i.e., a credible accusation of sexual abuse) and notice of a penalty (i.e., dismissal from the clerical state or prohibition from ministry).²²³ Although this is an improvement, it nevertheless suffers from all of the shortcomings already mentioned, namely that dioceses have not provided any public access to the trial itself and only publish details about one type of delict.

In December 2019, Pope Francis lifted the pontifical secret for cases involving the sexual abuse of minors and child pornography.²²⁴ The pontifical secret is a type of secrecy that binds cardinals, bishops, legates of the Holy See, those working in the Roman Curia, and those on whom the observance is imposed; the pontifical secret generally pertains to matters handled by the Secretary of State (e.g., the appointment of bishops and cardinals) and investigations into some serious delicts.²²⁵ While violation of the ordinary requirement of secrecy would result in suspension from office, the violation of the pontifical secret results in the more severe punishment of dismissal from office.²²⁶ Previously all cases involving grave delicts (e.g., heresy, attempted ordination of a woman, and sexual abuse of a minor) remained under the pontifical secret.²²⁷ Recently, Pope Francis removed the pontifical secret from cases involving the sexual

222. For example, the Archdiocese of Milwaukee has a webpage dedicated to this topic, naming forty-eight priests. *Restricted Priests*, *supra* note 219.

223. See NICHOLAS DiMARZIO, POLICY AND PROCEDURES REGARDING SEXUAL ABUSE OF MINORS BY PRIESTS OR DEACONS 1, 7, 10 (2013), <https://dioceseofbrooklyn.org/wp-content/uploads/2011/12/Diocesan-Policy-Sexual-Abuse-of-Minors-2013.pdf> [<https://perma.cc/EUS6-Y3RK>].

224. Hannah Brockhaus, *Pope Francis Lifts Pontifical Secret from Legal Proceedings of Abuse Trials of Clerics*, CATH. NEWS AGENCY (Dec. 17, 2019, 4:12 AM), <https://www.catholicnewsagency.com/news/43108/pope-francis-lifts-pontifical-secret-from-legal-proceedings-of-abuse-trials-of-clerics> [<https://perma.cc/T8MW-52ZF>].

225. 8 JAMES I. O'CONNOR, THE CANON LAW DIGEST 205, 207–08 (1978) (translating Secretariat of State, *Instruction Secreta Continere*, VATICAN (Feb. 4, 1974), https://www.vatican.va/roman_curia/secretariat_state/card-villot/documents/rc_seg-st_19740204_secreta-continere_it.html; see also Patricia M. Dugan, *The Need to Know vs. Confidentiality: Do Pontifical Secret and the Clamoring of the Media Deny Canonical Rights?*, in TOWARDS FUTURE DEVELOPMENTS IN PENAL LAW: U.S. THEORY AND PRACTICE 11, 18–19 (Patricia M. Dugan ed., 2010).

226. Ian Waters, *The Law of Secrecy in the Latin Church*, 7 CANONIST 75, 82 (2016).

227. See JOHN PAUL II, APOSTOLIC LETTER ISSUED 'MOTU PROPRIO': *SACRAMENTORUM SANCTITATIS TUTELA* (Joseph R. Punderson & Charles J. Scicluna trans., 2001); Congregation for the Doctrine of the Faith, *The Norms of the Motu Proprio "Sacramentorum Sanctitatis Tutela"* (2001), VATICAN, https://www.vatican.va/resources/resources_introd-storica_en.html [<https://perma.cc/CB8F-EVPL>] (last visited Sept. 17, 2021).

abuse of minors or child pornography.²²⁸ In that same instruction, Pope Francis also clarified that ordinary confidentiality does not prevent Church officials from fulfilling reporting obligations imposed by civil authorities and that the victim, the person who files the report, and the witnesses are not bound by any obligation of silence.²²⁹ While this is a step in the right direction—one that will hopefully diminish the scourge of sexual abuse of minors and its cover-up—the provisions of this instruction pertain only to a narrow category of delicts and cases. Thus, although the three recent developments toward greater transparency discussed in this Section are helpful, canonical trials still remain under a pall of secrecy.

IV. GREATER PUBLIC ACCESS IN CANON LAW: THREE CONCRETE PROPOSALS

In order to regain trust, expose corruption, and better accomplish the goals of the Church's penal law, bishops should grant greater public access to penal processes. Over the past twenty years, American Catholics have lost trust in the leaders of the Church, specifically in their ability to administer justice and discipline offenders.²³⁰ Yet canonical scholarship in this same period has focused almost solely on the rights of the accused.²³¹ There is little discussion of victims' rights or the public's ability to know whether justice is being administered.²³² Catholics demand greater transparency from the Church hierarchy, but no recent scholarship has suggested concrete ways in which secular models of transparency could

228. FRANCIS, INSTRUCTION ON THE CONFIDENTIALITY OF LEGAL PROCEEDINGS (2019).

229. *See id.*

230. Megan Brennan, *U.S. Catholics' Faith in Clergy Is Shaken*, GALLUP (Jan. 11, 2019), <https://news.gallup.com/poll/245858/catholics-faith-clergy-shaken.aspx> [<https://perma.cc/DR62-CRWH>].

231. The focus on the rights of the accused was not without merit during this time. The protection of the right of defense and the presumption of innocence are foundational to any legitimate legal system and therefore ought to be vigorously defended at any time. Yet diocesan bishops notoriously violated the rights of many accused priests following the Dallas Charter. *See, e.g.*, Geneive Abdo, *Priests' Rights, Policy at Odds*, CHI. TRIB. (Mar. 29, 2004), <https://www.chicagotribune.com/news/ct-xpm-2004-03-29-0403290337-story.html> [<https://perma.cc/GK3W-6T8E>].

232. Beal, *supra* note 195, at 519–20 (arguing that an almost exclusive focus on priest-perpetrators and bishop-enablers has ignored the victim and the community); *see, e.g.*, Victoria Vondenberger, *Balancing Rights: Role of the Promoter of Justice*, in TOWARDS FUTURE DEVELOPMENTS IN PENAL LAW: U.S. THEORY AND PRACTICE 57, 78 (Patricia M. Dugan ed., 2010). Vondenberger casts aside calls for greater transparency about crimes and punishments by stating, “too much transparency can be as harmful as inappropriate secrecy. The Church must avoid trial by media or being manipulated by hostility from so-called victims’ groups which may disguise a modern form of witch hunts.” *Id.* at 78. While the avoidance of trial by media is a worthwhile objective, Vondenberger never even considers the possible benefits of greater public access or the reasons state courts have adopted greater public access.

be incorporated successfully into canon law.²³³ While some larger changes would be helpful—such as providing for greater independence on the part of the promoter of justice in determining whether to bring a penal case or requiring the diocesan bishop to make an express decision on the publicity of an act, a decision that can later be challenged by administrative recourse—these changes would require a change in the Code of Canon Law and could be accomplished only by the pope, who alone has legislative power over all Catholics.²³⁴ Instead, this Part offers three smaller proposals that could be implemented immediately by practitioners of canon law and by diocesan bishops without requiring any changes in the universal law of the Church. Section A begins with an analysis of the two canons that are foundational for any discussion of greater public access to canonical criminal trials. Section B discusses the main obstacles to incorporating elements from the American legal system into the practice of canon law and proposes a solution to those obstacles. Section C concludes with three concrete proposals and an analysis of the ways in which these proposals respect the values of canon law, as well as the values of American law.

A. Fundamental Canons: Canon 220 and Canon 1341

Any discussion regarding greater public access to criminal trials in canon law must take account of the principles set forth in canons 220 and 1341 of the 1983 Code of Canon Law. The former protects the rights to a good reputation and to privacy. The latter provides the threefold purpose of a criminal trial in canon law.

1. THE RIGHTS TO A GOOD REPUTATION AND TO PRIVACY (C.220)

Canon 220 of the 1983 Code provides that “[n]o one is permitted to harm illegitimately the good reputation which a person possesses nor to injure the right of any person to protect his or her own privacy.”²³⁵ Although the Code does not define privacy, commentators suggest it encompasses “the freedom of a person to determine when, how, and to what extent to safeguard or to communicate information within his/her own sphere of intimacy.”²³⁶ The right to privacy would protect, for example, the right of a priest to decide whether to hand over the results of

233. See *supra* Introduction.

234. 1983 CODE c.331.

235. 1983 CODE c.220.

236. See, e.g., Michael Bradley, *The Evolution of the Right to Privacy in the 1983 Code: Canon 220*, 38 *STUDIA CANONICA* 527, 528 (2004); see also Richard J. Barrett, *The Right to Privacy*, 136 *LAW & JUST. – CHRISTIAN L. REV.* 39, 49–51 (1998).

a psychological test to his bishop.²³⁷ It prevents a superior from compelling a disclosure of personal information or matters of one's conscience. Understood this way, the right to privacy is not relevant to the question of public access to criminal trials. However, the right to a good reputation is relevant. Reputation is the "public evaluation of at least two people regarding another person."²³⁸ Defamation is the violation of one's right to a good reputation and occurs by "the communication to several persons, whether in a group or separately, of some determined fact which exposes a person to public contempt or dislike or injures the person's honor or reputation."²³⁹ Unjust injury to one's good reputation is even itself a delict.²⁴⁰ However, canon law prohibits only *illegitimate* reputational harm, and the Church recognizes there are circumstances in which harming one's reputation is necessary.²⁴¹ Legitimate harm to one's reputation is justified for the sake of the common good, for reasons of justice, to prevent future offenses, and to avoid public or private harm.²⁴² Therefore, the truthful revelation of the commission of a crime to the relevant authorities is not and could not be a per se violation of one's right to a good reputation pursuant to canon 220. The Church has expressly recognized in some situations (e.g., a credible allegation of the sexual abuse of a minor) that the revelation of a crime or even the credible allegation of a crime does not illegitimately harm one's right to a good reputation.²⁴³ Thus, the right to a good reputation is not absolute, and at times it yields to other principles of governance, such as the protection of the community.

2. THE THREEFOLD PURPOSE OF A CANONICAL CRIMINAL TRIAL (C.1341)

Canon 1341 of the 1983 Code expressly provides three purposes of the imposition of a penalty through a criminal trial: (1) to repair scandal; (2) to restore justice; and (3) to reform the offender.²⁴⁴ There is a strong preference in canon law to avoid criminal trials, but if there is no other way to accomplish these three purposes, the diocesan bishop is to proceed

237. Bradley, *supra* note 236, at 573.

238. Ronny E. Jenkins, *Defamation of Character in Canonical Doctrine and Jurisprudence*, 36 *STUDIA CANONICA* 419, 423–24 (2002).

239. *Id.* at 426 (translating *Coram* Heiner, June 19, 1911: *Decisiones seu Sententiae* 3:274, 279.) In canon law, even mere detraction (i.e., the revelation of a true but unknown crime or fault) can be defamation. Thus, truth is not a defense against the delict of defamation. *Id.* at 431–32.

240. 1983 CODE c.1390, § 2.

241. Jenkins, *supra* note 238, at 446.

242. *Id.* at 446 n.106.

243. See discussion *supra* Section III.D.

244. 1983 CODE c.1341.

with a criminal trial.²⁴⁵ The first purpose, to repair scandal, is a duty owed to the community.²⁴⁶ The second purpose, to restore justice, is a duty owed to the victim or injured third party; and the third purpose, to reform the offender, is a duty owed obviously to the offender.²⁴⁷ Although canon 1341 does not use the word “deterrence,” it is bound up in the canonical notion of “scandal,” which does not mean shock or surprise but is the action of leading another to commit evil.²⁴⁸ Thus, the goal of deterring others from future commission of crime by bringing an offender to justice through a criminal trial is included in the first purpose, that is, to repair scandal. This is also obvious from the historical origin of this canon, which comes from the decrees of the Council of Trent in the sixteenth century, noting that “if [offenders] refuse to repent, others may be deterred from faults by the salutary example of the punishment imposed.”²⁴⁹ While the threefold purpose of the imposition of penalties by criminal trials must be borne in mind throughout the implementation of the Church’s penal system, the threefold purpose also is of tremendous consequence for the question of public access. And although the third purpose—reforming the offender—could be accomplished through a secret trial, it is simply not possible for a secret trial to fulfill the first and second purposes, which are owed respectively to the community and to victims.²⁵⁰ How can others in the community be deterred from committing a similar crime, and how can justice be restored to a victim, if the trial and the imposition of the penalty are kept secret from them? These purposes can be achieved only if the community is aware of the punishment, and the more serious the crime, the greater the need for public awareness.²⁵¹ Thus, although not explicit in

245. *Id.* See also *Matthew* 18:15–17 (Revised Standard) (“If your brother sins against you, go and tell him his fault, between you and him alone. If he listens to you, you have gained your brother. But if he does not listen, take one or two others along with you, that every word may be confirmed by the evidence of two or three witnesses. If he refuses to listen to them, tell it to the church . . .”).

246. Carlo Gullo, *Reasons for Legal Protection in a Penal Environment*, in *THE PENAL PROCESS AND THE PROTECTION OF RIGHTS IN CANON LAW* 129, 142 (2005).

247. *Id.* at 142–43.

248. CATECHISM OF THE CATHOLIC CHURCH ¶ 2284 (2d ed. 1997); see also Mulheron, *supra* note 16, at 301.

249. Council of Trent, Session 13 (Oct. 11, 1551), *Decree on Reform*, in *DECREES OF THE ECUMENICAL COUNCILS* 693, 699 (Norman P. Tanner ed., 1990).

250. While one may think that any external consequence could fulfill these purposes, without knowledge of a consequence’s reason, scandal cannot be repaired nor justice restored.

251. Dugan, *supra* note 225, at 30–31 (“Deterrence can be achieved also when in punishing a transgressor, other members of that society are exposed to the punishment so that they too may be deterred from committing the offense. It is not enough to simply state somewhere in a diocesan or local newspaper, that a certain priest is no longer in ministry or in priesthood. Without any further explanation, such an announcement is meaningless . . . The more serious or offensive the crime, the more of a need exists for the members of the society in danger to know how the crime was punished.”) (footnote omitted).

canon 1341, the fulfillment of the threefold purpose of the Church's penal law must include some element of publicity while avoiding any illegitimate harm to one's reputation as protected by canon 220.

B. Incorporating Elements of U.S. Law into the Practice of Canon Law

Although many elements of the American legal system's public access doctrine cannot be incorporated, recognizing the fundamental values of U.S. law as values inherent in good governance provides a path forward. A wholesale adoption of the public access doctrine found in the U.S. legal system into canon law would be patently absurd because of important differences in the two legal systems. For example, in the Church, there is no democratic election of bishops, judges, or promoters of justice.²⁵² Nor are there jury trials.²⁵³ Consequently, any element that seeks to hold elected officials accountable to voters or any element pertaining to juries or their prejudice has no place in canon law.

However, the core values promoted by the public access doctrine in U.S. law are values inherent in good governance in general, and their application can be a starting point for greater public access in canon law. Recall that these four values are (1) factfinding; (2) education of the public; (3) community catharsis and prevention of vengeance; and (4) confidence in the judicial system.²⁵⁴ These four values would also be beneficial for the canonical legal system. First, in the same way that publicity of criminal trials in U.S. law helps to provide key witnesses and honest witnesses, greater publicity of criminal trials in canon law would do the same and, therefore, aid in factfinding. Second, greater public access in canon law would also educate the members of the Church, not only on canon law and a just ecclesial order, but also on the teachings of the Church, for canon law is based on Catholic doctrine.²⁵⁵ In this respect, greater public access to canonical criminal trials could even be a tool for evangelization and catechesis. Third, although it may be less likely that members of the Church would resort to violence when offenders are not punished, the ability of the faithful to see justice in the Church may prevent many from leaving the Church or may prevent some victims from resorting

252. 1983 CODE c.1430; *id.* c.377, §§ 1–2; *id.* c.1420, §1.

253. 1983 CODE cc.1401–05.

254. See discussion *supra* Section II.C.

255. See MARTÍN DE AGAR, *supra* note 20, at 23–28. For example, it is a very serious crime for a priest-confessor to violate the sacramental seal by telling others which sins a penitent confessed because Catholics believe that the sacrament of confession is a sacred act through which God himself, through the priest, absolves sins that are confessed. 1983 CODE c.1388, § 1; *id.* c.959. Likewise, a person who throws away or desecrates the Eucharist incurs an automatic excommunication because Catholics believe that the Eucharist is Jesus himself. 1983 CODE c.1367; *id.* c.897.

to civil lawsuits in an effort to seek justice.²⁵⁶ Although the fourth value in the American legal system, confidence in the judicial system, is at least in part connected to the necessity of holding elected officials accountable, it would take on a slightly different meaning in canon law. Greater public access to criminal trials in canon law would prevent corruption by exposing bad actors. It also would help restore trust in the administration of justice in the Church and rehabilitate the Church's public image by allowing the community to see justice being accomplished.²⁵⁷ A restoration of that trust would ultimately aid the Church's shepherds in leading their flocks.

C. Three Concrete Proposals

The concrete application of those values to canonical criminal trials could take many forms. Because canon lawyers and diocesan bishops will hesitate to deviate from the status quo, this Section discusses three moderate proposals that would grant greater public access to canonical criminal trials. These proposals uphold the fundamental values of good governance articulated in U.S. law and accomplish the express purposes of penal processes in canon law. The three proposals are (1) grant public access to the decree concluding the preliminary investigation; (2) grant public access to the *libellus* of the promoter of justice; and (3) grant public access to the final decision in the case. These three proposals are modest. None fully opens the doors of the canonical courtroom to the public, nor would any of them provide the public with the ability to access directly the evidence gathered at trial or read transcripts of depositions. However, these proposals would provide the public with basic information about canonical penal processes and help accomplish the threefold purpose of criminal trials in canon law.

1. GRANT PUBLIC ACCESS TO THE DECREE CONCLUDING THE PRELIMINARY INVESTIGATION

Granting public access to the decree that concludes the preliminary investigation would respect the alleged offender's rights under canon 220, would promote the fundamental values of public access, and would further the purposes of canonical criminal trials. While it may be more likely that an illegitimate violation of one's right to a good reputation could be harmed by publication prior to this point, especially when the allegation is

256. Beal, *supra* note 195, at 522 (acknowledging that publicity can lead to a catharsis).

257. Neville Owen, *The Ideal of Accessible Justice: In Praise of Jurisprudence*, 109 PERIODICA DE RE CANONICA 633, 653 (2020) (noting that publishing jurisprudence "maintains and instills confidence in the integrity and independence of the process").

serious but unfounded,²⁵⁸ the publication of the decree concluding the preliminary investigation would be very beneficial because the decree includes reasons in law and in fact for essential questions about the allegation and the trial to come. If the diocesan bishop concludes that there is a semblance of truth to the allegation, then although the publication may harm one's good reputation, it does not do so "illegitimately" under canon 220. If the allegation is completely unfounded, then the decree does not harm the reputation of the accused at all. The publication of the decree, though, would educate the public on the laws and doctrines of the Church, provide the public with catharsis to see that justice is being done, and strengthen confidence in the Church's judicial system's ability to administer justice. Moreover, the publication would help fulfill the purposes found in canon 1341 inasmuch as it deters others from committing a similar crime by demonstrating that allegations of this crime will be taken seriously.

2. GRANT PUBLIC ACCESS TO THE *LIBELLUS* OF THE PROMOTER OF JUSTICE

Granting public access to the *libellus* of the promoter of justice would respect the alleged offender's rights under canon 220, would promote the fundamental values of public access, and would further the purposes of canonical criminal trials. The publication of the promoter's *libellus* would not illegitimately harm the right of the accused to a good reputation under canon 220 because the diocesan bishop would have already determined that the allegation is founded and that there is a need to pursue a trial in order to repair scandal and restore justice. Publishing the *libellus* of the promoter of justice would educate the members of the Church on the various canonical crimes, as well as the basic elements of those crimes. It also would alert the community to the trial's initiation and encourage witnesses to come forward to give testimony.²⁵⁹ Similar to the publication of the decree concluding the preliminary investigation, publishing the *libellus* would provide catharsis by allowing the community to see the public good upheld in the prosecution of the delict and would bolster trust in the Church's administration of justice. Lastly, granting public access to the *libellus* would repair scandal by showing that delicts will be prosecuted, and it also would help restore justice to an injured third party

258. See Vondenberger, *supra* note 232, at 68. It is unclear what the appropriate civil analogy would be. Is the canonical preliminary investigation more like a police investigation, a grand jury proceeding, or a probable cause hearing? In truth, a canonical preliminary investigation is similar to all three, and consequently it is more difficult to determine whether the decree initiating the preliminary investigation or even the various acts of the preliminary investigation ought to be open to the public.

259. This also will place a healthy public pressure on the tribunal to complete the process swiftly.

because it shows the promoter of justice acting for the common good to prosecute the offense.

3. GRANT PUBLIC ACCESS TO THE FINAL DECISION

Granting public access to the final decision—whether the decree at the end of an extrajudicial process or the definitive sentence at the end of a judicial process—would respect the alleged offender’s rights under canon 220, would promote the fundamental values of public access, and would further the purposes of canonical criminal trials. Of all three proposals, granting public access to the final decision would be of the greatest benefit. If the final decision finds the accused guilty of the crime, then publication does not illegitimately harm the accused’s right in canon 220 because he or she was found to have committed the crime. On the other hand, if the final decision finds the accused not guilty, then publication vindicates the right to a good reputation, which may have been damaged through a false allegation. Furthermore, granting public access to the final decision provides the greatest amount of catharsis by finally punishing the offender for the commission of the delict. It restores confidence in the Church’s judicial system by demonstrating that a proportionate penalty was imposed and that no corruption occurred. Or, in the case of a not guilty verdict, the publication can prevent vengeance by explaining the reasoning for the decision. It can maintain the community’s trust by persuading it that the offender was not proven to have committed the crime. Lastly, the publication of the final decision would repair scandal by demonstrating that delicts will be prosecuted. Imposing proportionate penalties would restore justice to victims. Ultimately, the publication of the decision will demonstrate that the Church is capable of holding its members accountable for crimes.

4. ADDRESSING SCANDAL AND EXERCISING DISCRETION IN PUBLICATION

Before concluding, the author wishes to respond to two likely objections and demonstrate that (1) granting greater public access will not increase scandal; and (2) discretion can be exercised regarding redaction of documents and the method of publication. First, because of the Catholic understanding of scandal, one may wonder whether granting public access to documents that suggest or conclude that a priest or leader in the Church has committed a delict will actually *increase* scandal. Would it not be better if no one knew what had occurred? This line of thinking betrays an overly simplistic notion of scandal. It presumes that only the offender and perhaps the victim know about the delict, when in reality news of such things travels quickly and widely in ecclesial circles. It would be nearly impossible for the bishop to know with certainty the exhaustive list of

persons who were aware of the delict and who had been scandalized. Moreover, this line of thinking also neglects the importance of deterrence in repairing scandal. If the community never hears of the imposition of penalties, the community may think that delicts go unpunished. In order to deter others from committing a delict, the community must see justice administered. The belief that the community will be scandalized to hear that a priest committed a delict betrays a clericalist mindset whereby priests are considered impeccable models of holiness. Properly understood, granting greater public access will not increase scandal but will address the scandal that is already present and is either unknown or unacknowledged by Church leaders.

Second, the bishop can exercise discretion in deciding whether some amount of redaction of the documents is fitting and what method of access would best serve the purposes of the penal law. The facts and circumstances of each case may require a diversity of approaches. Concerning redaction, some modest redaction would be reasonable provided that it did not diminish the efficacy of the publication. For example, redacting the name of a minor victim would be reasonable, but redacting the name of the offender or the delict committed would contradict the very purpose of public access. Concerning the method of publication, there are three main options: (1) in the local diocesan newspaper; (2) on the diocesan website; and (3) in person. The first two options would correspond to the typical ways by which dioceses announce new pastoral assignments and major programs. The third option corresponds to the method by which the evidence in a trial is published to the parties in the case. A diocese that requires an in-person examination of certain court records also could require proof that the person coming to view it is a member of the Church (e.g., proof of baptism or reception into the Church). Of course, justice would require that exceptions be made for victims who are not Catholic. In deciding where and how to publish, canonists and diocesan bishops must keep in mind the goal of greater public access and not defeat the purpose by unduly restricting access.

CONCLUSION

There is a serious need to restore trust in the Church's administration of justice. Although employing secular models and standards of transparency in the Church can be fraught with difficulties, a careful consideration and appreciation of the core values promoted by public access in the American legal system are expedient first steps. The four values of public access are principles of sound governance, and they can be incorporated into the Church's judicial system with some adaptation. Greater public access to canonical criminal trials can further the very purposes of penal processes in canon law by helping to repair scandal, restore justice, and reform the offender. By humbly considering whether

there is some good to be found in secular models—and eschewing an institution-protecting mindset that naïvely assumes the faithful will be scandalized if canonical criminal trials were more public—the Church can better accomplish its own purposes by providing greater public access. The Church should seek to win back the trust of its faithful and should be a model of justice to other legal systems. Greater public access to canonical criminal trials will move the Church’s judicial system further into the light. Rather than hide its criminal trials in secret, the Church should instead expose them.