

Confidential Confessions: How Lawyers, Clergy, and Psychologists Counsel the Guilty

Rev. Donald Cozzens*

Before placing my cards on the table, I want to trace briefly my own moral development as a Catholic clergyman who is regularly called upon for moral and ethical counsel by parishioners, students, and colleagues—and not infrequently by strangers who continue to regard and even trust the advice of ordained ministers. In doing so, I hope to point to the foundational structures shaping my response to the questions before this symposium as well as to the historical factors that I see as contextual. In other words, I will be writing with an awareness of the traditional ethical sources undergirding Christian moral discernment¹ and from more than forty-five years of pastoral experience. During these years I have learned to regard the existential context (the redundancy is intended) of ethical dilemmas as relevant to moral issues as the time honored sources of scripture, theology, philosophy, and, more recently, the social sciences.

I also want to say at the beginning that during a review of the literature on professional ethics, I was struck by the intellectual humility I found in David Luban's comments on Lon Fuller's analysis of client interest versus public interest. Luban writes, "In his many writings on the adversarial ethics of the legal profession, Fuller made it clear that he was aware of the problem that advancing client interests may not be in the public interest; but he never found a successful solution to it. That is because no successful solution can be found."² There may be no successful solution based purely on philosophical grounds to the case addressed in this symposium, but I will argue there is a clear direction a priest should take in responding to Steven's question, "What should I do?" Fuller's focus was on client interest versus public interest. My focus, understandably, will be on Steven's interest (my "parishioner") versus David's interest (justice in the

* Rev. Donald Cozzens, Ph.D., is writer in residence and adjunct professor of theology at John Carroll University. His books include *The Changing Face of the Priesthood* (2000), *Sacred Silence: Denial and the Crisis in the Church* (2002), *Faith That Dares to Speak* (2004), and *Freeing Celibacy* (2006).

¹ Lisa Sowle Cahill identifies Scripture, Tradition (theology), Philosophy, and the social sciences (sociology, psychology, anthropology) as ethical sources for Christian decision making. Lisa Sowle Cahill, *Sexuality and Christian Ethics: How to Proceed*, in *SEXUALITY AND THE SACRED: SOURCES FOR THEOLOGICAL REFLECTION*, 19, 21–24 (James B. Nelson & Sandra P. Longfellow eds., 1994).

² David Luban, *Natural Law as Professional Ethics: A Reading of Fuller*, in *NATURAL LAW AND MODERN MORAL PHILOSOPHY* 176, 204 (Ellen Frankel Paul, Fred D. Miller, Jr. & Jeffrey Paul eds., 2001).

face of an unjust conviction). I trust my analysis will carry some of the same intellectual humility evident in Lon Fuller's writing.

I. COUNSELING STEVEN

The participants in this symposium were presented with the following questions:

Would you say anything to Steven about whether or not he should come forward? If you would counsel him, what would you say and why? Would you counsel Steven if he had not asked, "What should I do?"

Yes, I would counsel him. I would say something not only because Steven asked "What should I do?" but because of my value system shaped by sacred scripture, my theological and philosophical education, and my pastoral experience. So, if Steven had not asked for my counsel, I would have offered it nonetheless. What follows are considerations that shape my decision to say something and the nature of the counsel I would offer—and how I might offer it.

From a philosophical perspective, I understand that *life isn't fair*. Steven, I assume, might reason that it is not his fault that David has been convicted of a crime of which he is innocent. Many in Steven's situation might simply conclude, "Too bad for David." Even those outside the legal fraternity know that an individual is not compelled by the force of law to incriminate himself or herself. Steven, in the hypothetical before this symposium, is half way through serving a year on probation for a minor drug offense. Acknowledging his guilt here will lead to consequences far beyond a year's probation. Moral advice drawn from natural law theory would urge Steven to put himself in David's shoes and ask "What is the right thing to do here?" There is, I hold, something in the human heart that prompts an individual to right a wrong whenever possible. I assume this weighs on Steven's conscience. While *life isn't fair*, there is evidence that an instinct for fairness rests within the human heart. In counseling Steven, I would draw on this instinct. "Steven," I might ask, "what would you want David to do if you stood convicted of a crime he committed?"

As a parishioner, Steven has some familiarity with sacred scripture. He has heard in church the call of the Hebrew prophets to live righteous and just lives. In my counseling of Steven, I would be ready, if the circumstances were right, to quote the words of Micah: "He has told you, O mortal, what is good; and what does the Lord require of you but to do justice, and to love kindness, and to walk humbly with your God?"³ I would also be ready, again if the moment were right, to remind Steven of Jesus' words shortly before his arrest and trial which led to his crucifixion. "This is my commandment, that you love one another as I have loved

³ Micah 6:8 (New Revised Standard Version).

you. No one has greater love than this, to lay down one's life for one's friends."⁴ Assuming Steven has a fundamental understanding of the Gospel, I would be ready to remind him of the great paradox at the center of Jesus' teaching—that the fullness of life is found in dying to our own self-interest; in striving to be men and women for others.

From a theological perspective, Christians are called to lives that are not simply grounded in what is legal or compelling by the law of the land, but to what is right and just in light of the Law of God, a law transmitted by scripture and his religion's theological tradition. Steven may not be compelled by civil law to step forward to right David's unjust conviction, but he should consider that he may be compelled to do so by the force of conscience. And for the believer, conscience is the ultimate law, the siren call of divine law, if you will.

At this point, as a kind of sidebar, I want to comment on the 2001 *New York Times* story related to the Jose Morales and Ruben Montalvo case that was the springboard of this symposium. Father Joseph Towle, pastor of a South Bronx parish, stepped forward in 2001 claiming one of his parishioners, Jesus Fornes, had confided in him that he had killed a man. Moreover, Jose Morales and Ruben Montalvo stood convicted for the murder he had committed. Jesus Fornes asked Father Towle what he should do. The priest responded, "I told him that if he had the courage and the heart to do it, that he should go to the court and that he should acknowledge that he was responsible and the others were not."⁵ Jesus Fornes did in fact go to the court and confide his story to a lawyer for one of the young men. My comment has to do with Father Towle's advice to his parishioner. "I told him that if he had the courage and the heart to do it, that he should go to the court" *If he had the courage and heart to do it* Jesus Fornes did have the courage and heart to come forward. And I see his decision as an act of moral courage. But even had he not had the courage and heart to come forward, I believe he would still have had a moral obligation to do so. In other words, I believe Father Towle gave Fornes a moral escape clause by stating, "*if he had the courage and the heart to do it*" So, from my perspective, Steven has an obligation to come forward even if he might not have the courage and heart to do so.

II. CONSIDERING CONTEXT

Individualism has been recognized as a defining character of American society since Alex de Tocqueville's astute analysis of our national spirit. But moral philosophers and my own Catholic tradition insist that a healthy individualism needs to be balanced by a corresponding regard for the common

⁴ *John* 15: 12–13 (New Revised Standard Version).

⁵ Jim Dwyer, *In Court, a Priest Reveals a Secret He Carried for 12 Years*, N.Y. TIMES, July 17, 2001, available at <http://www.nytimes.com/2001/07/17/nyregion/in-court-a-priest-reveals-a-secret-he-carried-for-12-years.html?pagewanted=all&src=pm>.

good, for the *commonweal*.⁶ Failing this balance, individualism slides down a slippery slope into the pool of narcissistic self-absorption. On the other hand, the ideal of the common good unchecked by a healthy individualism easily drifts in the direction of totalitarianism. Now whether or not Steven understands the force of his culture's instinct for individualism, he has nonetheless been shaped by its pervading spirit. This spirit prompts him, even compels him, to "take care of himself," to look to his own best interests first. Others might tell Steven he would be a fool to do anything other than to keep his mouth shut. De Tocqueville and others were right to see that radical individualism diminishes our appreciation of the heroic dimension to modern life.⁷ In counseling Steven to step forward and acknowledge his guilt for the murder David now stands convicted, I understand that he would indeed be doing something not only heroic—but necessary.

III. BEYOND PROFESSIONAL ADVICE

Now that I have listened carefully to Steven, waited for the graced moment to speak to him the truth of our shared faith and the comforting yet challenging message of the Gospel, I must sit back and see if my words of counsel have reached him. Assuming he has taken to heart the Gospel challenge of self-sacrificing concern and compassion for David, still another responsibility rests on my shoulders. I must let Steven know that I am willing to stand with him as he steps forward to give testimony to David's innocence. Steven needs to understand that I am going to be at his side, to the extent possible, as he bears witness to his own culpability in the killing of which David stands convicted. This is important if Steven is to see that the Gospel imperative to which I am calling him is not yet another ideology indifferent to his own dignity and wellbeing. We are most true to our human dignity not when we stand alone in the docket of the accused—or the docket of conscience—but when we stand for fairness and justice as one rooted in community, with people we know and trust who are ready to confirm our decision to do what is right and true no matter the consequences.

I suspect the psychologists and lawyers represented in this symposium would accept their obligation to stand with Steven to the extent possible and appropriate if he were to decide—with or against their counsel—that it is right and just to do what he can to rescind the unjust conviction of David.

The moral decision facing Steven will define his character for the rest of his life. While this decision reveals the stark loneliness of the human person faced with such significant moral choices, Steven has a right to know that he does not ultimately stand alone. As he stands before the bar of justice, he deserves to know that his priest, therapist, and attorney are but a step away.

⁶ See ROBERT BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 142–66 (1985).

⁷ See CHARLES TAYLOR, *A SECULAR AGE* 184–85 (2007).