

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

## Introduction

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In 1989, a Jesuit priest named Joseph Towle was called to the home of a teenager named Jesus Fornes.<sup>1</sup> When Father Towle arrived, Fornes explained that he had done something terrible: he had killed a man.

To make matters worse, two other teens had been convicted of the crime. Father Towle encouraged him to see an attorney. After their conversation, Fornes confessed to the attorney who represented Morales, one of the convicted teens. Fornes spoke to the attorney at the Bronx Supreme Court while the attorney awaited sentencing for his client's case.<sup>2</sup> Fornes said "it wasn't right" that the two boys would be sentenced for the crime.<sup>3</sup> Moments later, the attorney appeared at his client's sentencing, advising the court that he planned to move to set aside the verdict because of the newly discovered evidence.

Fornes then sought advice from a Legal Aid attorney. Fornes told him what had happened, and the attorney told him to keep his mouth shut. He explained that "what you may end up doing is putting yourself in the middle of the case [and] you would end up being prosecuted, [but] the other two who you tell me didn't do anything would not necessarily end up being released."<sup>4</sup>

Fornes followed the attorney's advice and refused to testify. When Morales's attorney moved to set aside the verdict, and the court scheduled a hearing on the motion, Fornes invoked the Fifth Amendment privilege and refused to answer questions.<sup>5</sup> Over ten years later, Fornes had died in an unrelated incident and Morales was still in prison.

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<sup>1</sup> 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> (describing the facts from *Morales v. Portunondo*, 154 F. Supp. 2d 706 (S.D.N.Y. 2001)).

<sup>2</sup> *Morales*, 154 F. Supp. 2d at 712.

<sup>3</sup> *Id.* at 713.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

Inspired by the facts of the case, Professor Kevin C. McMunigal<sup>6</sup> solicited responses from lawyers, psychologists, and members of the clergy to answer the following hypothetical:

*David has been convicted of a murder that was committed by Steven. Steven has told you the truth about what happened. Would you say anything to Steven about whether or not he should come forward? Would you give moral advice? If you would counsel him, what would you say and why? Would you counsel Steven if he had not asked, "What should I do?"*

The responses reveal a variety of understandings about each profession's role in Steven's decision-making process.

Reverend Donald Cozzens would counsel Steven, whether or not Steven solicited his advice, because he believes he has a duty to remind Steven that he should strive to live for others. Cozzens explains that if Steven confesses, Cozzens's work would not be completed; he would stand by Steven as he steps forward to exculpate David. Reverend Bush would also encourage Steven to confess to the crime, regardless of whether Steven explicitly asked for advice. Bush argues that, from both a consequentialist and deontological perspective, a pastor should encourage Steven to come forward and accept responsibility.

Professor Overholser, a psychologist, would use effective therapy to help Steven make the best decision. He would use the Socratic method to encourage a discussion that focuses Steven's thoughts on virtue ethics.

Finally, the lawyers did not agree about how to help Steven. Professors Stephen McG. Bundy, Jeffrey L. Kirchmeier, and Timothy W. Floyd would provide legal and moral advice, but would not tell the client how to apply his own moral views and would not impose their own moral views. Kirchmeier and Floyd would not offer their personal moral views, and Bundy would offer his moral views only if Steven solicited them. Professor Carrington, who is director of the Mississippi Innocence Project, was involved in a similar case in which defense counsel told the man who confessed to keep his mouth shut, and then continued to represent the convicted men. Carrington would provide legal and moral advice, whether or not Steven asks for it. Finally, Professor Vida B. Johnson would keep things simple; unless Steven had decided to confess, she would advise him to keep quiet and say nothing.

This dilemma has been analyzed in many legal ethics classes, but these classes usually focus on the attorney's legal confidentiality obligations. Our symposium examines the dilemma from a unique perspective: how attorneys should counsel their clients, and how other professions would counsel their clients differently.

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<sup>6</sup> Judge Ben C. Green Professor of Law, Case Western Reserve University School of Law.