



Digital Commons@

Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 29

Number 4 *Symposia—The Religious Voice in the
Public Square and Executing the Wrong Person:
The Professionals' Ethical Dilemmas*

Article 35

6-1-1996

Sacred Secrets or Sanctimonious Silence

Teresa Stanton Collett

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Teresa S. Collett, *Sacred Secrets or Sanctimonious Silence*, 29 Loy. L.A. L. Rev. 1747 (1996).

Available at: <https://digitalcommons.lmu.edu/llr/vol29/iss4/35>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

SACRED SECRETS OR SANCTIMONIOUS SILENCE

*Teresa Stanton Collett**

At the outset I confess that I am neither a trained theologian, nor a member of the ordained ministry; neither a canon lawyer seeking to defend the content and structure of religious law, nor a disaffected Catholic hoping to prove the callous disregard of fundamental human values in the formal teachings of the Roman Catholic Church. Rather, the perspective I bring to the case of Ben Jones is that of a Roman Catholic who has spent the past five years studying and writing about ethical issues confronting practicing lawyers. I approach this problem openly affirming that the Church's teachings are true while recognizing that the application of those teachings to concrete situations is often ambiguous or difficult.

I. PROFESSIONAL SECRETS

There is a superficial appeal to disposing of the moral issues presented by Ben's statements to Father Samuels by characterizing the conversation as pastoral counseling. This alters the rules governing disclosure because the statements of Ben Jones would not have been made during the Sacrament of Penance and Reconciliation. Therefore the priest would not be subject to the sacramental seal of the confessional.¹ Rather, the priest's obligation to keep Ben's secret would be that of any professional who receives information pursuant to professional status. Ben's story would be considered a "profession-

* Professor of Law at South Texas College of Law, Houston, Texas; Visiting Professor of Law at Notre Dame Law School. Professors Robert G. Blakey, Gerald Bradley, Patrick Schiltz, and Father Reginald Whitt have provided valuable comments on an earlier draft of this Essay. The footnotes have benefitted from the hard work of my research assistant, Tim Heverin.

1. Commentary to Canon 983 states: "The canons do not touch extra-sacramental confidentiality, to which the ordained minister is bound as is any recipient of confidences, but bound even more so when the relationship of the minister to the individual is analogous to that of a professional counselor." *THE CODE OF CANON LAW: A TEXT AND COMMENTARY* 691 (James A. Coriden et al. eds., 1985) [hereinafter *COMMENTARY*]. See also Canon 1548 § 2, 1° which exempts clerics from testifying at an ecclesiastical trial as to information "made known to them in connection with their sacred ministry." *Id.* at 981.

al secret" that could be disclosed only "where keeping the secret is bound to cause very grave harm to the one who confided it, to the one who received it or a third party, and where the very grave harm can be avoided only by divulging the truth."²

Even employing this test, however, it is unclear whether Father Samuels should disclose Ben's secret under the moral principles embodied in canon law. The priest must determine whether the very grave harm—the execution of an innocent man—can be avoided only by divulging the truth that is revealed in Ben Jones's statements. While it is true that many lay people would believe that disclosing Ben Jones's statements would avoid the very grave harm threatened, as a lawyer I am somewhat skeptical. The experience of other convicted felons who have sought relief by offering new evidence acquired after their convictions suggests that divulging the secret would have little effect,³ especially if Ben Jones is unwilling to come forward and corroborate Father Samuels' testimony.

The seminal case illustrating this is *Herrera v. Collins*.⁴ Herrera was convicted of murdering two law enforcement officers. Evidence tending to establish his guilt included (1) bloodstains matching the victim's blood found on Herrera's blue jeans and wallet and on the seat in the car Herrera often drove, (2) Herrera's social security card found at the scene of the first murder, (3) eyewitness identifications, and (4) his handwritten letter describing the murders.⁵

The U.S. Supreme Court described the facts and issue presented by Herrera's appeal of the district court's denial of habeas relief:

2. CATECHISM OF THE CATHOLIC CHURCH § 2491 (1994).

3. See, e.g., *Herrera v. Collins*, 506 U.S. 390 (1993) (rejecting petitioner's claim that habeas relief was required by the Eighth and Fourteenth Amendments due to actual innocence where after-acquired evidence was not sufficiently convincing of petitioner's innocence); *Stockton v. Angelone*, 70 F.3d 12 (4th Cir. 1995) (rejecting habeas petition where claim of actual innocence is supported by affidavits, none of which contain eyewitness accounts); *Phillips v. Walker*, No. 92 Civ. 8018, 1996 WL 1236 (S.D.N.Y. Jan. 2, 1996) (holding that a statement by a state witness that she felt pressured by state attorney does not warrant habeas relief on the grounds of after-acquired evidence of perjury). But see *Schlup v. Delo*, 115 S. Ct. 851 (1995) (permitting habeas review where defendant alleged ineffective assistance of counsel due to failure to present alibi witnesses who would corroborate defendant's claim of actual innocence). On remand, *Schlup v. Delo*, 912 F. Supp. 448 (D. Mo. 1995), the district court granted a hearing of the habeas petition where the claim of actual innocence was supported by several affidavits of eyewitnesses, all of whom adequately explained their prior refusal to testify.

4. 506 U.S. 390 (1993).

5. *Id.* at 394-95.

Petitioner Leonel Torres Herrera was convicted of capital murder and sentenced to death in January 1982. He unsuccessfully challenged the conviction on direct appeal and state collateral proceedings in the Texas state courts, and in a federal habeas petition. In February 1992—10 years after his conviction—he urged in a second federal habeas petition that he was “actually innocent” of the murder for which he was sentenced to death, and that the Eighth Amendment’s prohibition against cruel and unusual punishment and the Fourteenth Amendment’s guarantee of due process of law therefore forbid his execution. He supported this claim with affidavits tending to show that his now-dead brother, rather than he, had been the perpetrator of the crime.⁶

A majority of the Justices held that while execution of an innocent person may violate the Eighth and Fourteenth Amendments, Herrera had not made a sufficient showing of his “actual innocence” to require habeas relief.⁷ Herrera was executed by lethal injection on the morning of May 12, 1993.⁸

Claims of actual innocence by death row inmates were reconsidered in *Schlup v. Delo*.⁹ The U.S. Supreme Court reviewed a claim of ineffective assistance of counsel which alleged that the attorney failed to call alibi witnesses who would have established the defendant’s actual innocence. Justice Stevens, writing for the majority, directed trial courts to grant relief in cases where the habeas petitioner demonstrates that a constitutional violation has probably resulted in the conviction of one who is actually innocent. Actual innocence is established if “it is more likely than not that no reasonable juror would have convicted . . . in the light of the new evidence.”¹⁰

6. *Id.* at 393.

7. *Id.* at 417. The affidavits offered to support Herrera’s claim of actual innocence included one from an attorney and former state court judge who had represented Herrera’s brother, Raul, in an unrelated matter. This attorney said that Raul had confessed to the killings to him. Other affidavits included one from Raul’s son—who was nine years old at the time of the shootings—who said that he was in the car with his father when he committed the crimes; one from a former cellmate of Raul who said that Raul had admitted to the killings while in jail; and one from a former schoolmate of the brothers who said that Raul had admitted the killings. *Id.* at 396-97.

8. *Herrera Proclaims Innocence to the End Before Execution*, HOUSTON POST, May 13, 1993, at A20.

9. 115 S. Ct. 851 (1995).

10. *Id.* at 867.

Herrera and *Schlup* illustrate the basis for my skepticism about whether revealing Ben Jones's secrets will avoid the grave harm of Frank Smith's execution. In order to obtain relief from the federal courts, Frank would have to show the existence of a constitutional violation to satisfy standing requirements for habeas corpus relief and his actual innocence to satisfy the *Schlup* test. Nothing in our facts indicates a constitutional violation and, absent Ben Jones's willingness to corroborate Father Samuels' testimony, it is unlikely that a court would find that no reasonable juror would have convicted when presented with the testimony of Father Samuels.¹¹

Alternatively, Frank Smith might seek clemency from the governor in light of the new evidence. However, if the only evidence is the testimony of Father Samuels, it seems unlikely that the governor will pardon Frank or commute his sentence.¹²

Arguably, so long as there is any possibility that the execution of Frank Smith could be avoided through disclosing Ben's secrets, Father Samuels ought to do so, particularly in light of the Church's general disapproval of the death penalty.¹³ This argument assumes either

11. This analysis assumes that Father Samuels would be allowed to testify. Evidentiary rules prohibiting hearsay and privileged communication would probably forbid admission of his testimony. See FED. R. EVID. 501, 801-04.

12. See Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943 (1994); George M. Ahrend, Note, *Herrera v. Collins: Does Actual Innocence Warrant Federal Habeas Corpus Relief?*, 29 GONZ. L. REV. 425 (1994); Kelli Hinson, Comment, *Post-Conviction Determination of Innocence for Death Row Inmates*, 48 SMU L. REV. 231 (1994); Tara L. Swafford, Note, *Responding to Herrera v. Collins: Ensuring That Innocents Are Not Executed*, 45 CASE W. RES. L. REV. 403 (1995). For an examination of clemency boards as they exist in Texas, see Stephen E. Silverman, Note, *There is Nothing Certain Like Death in Texas: State Executive Clemency Boards Turn a Deaf Ear to Death Row Inmates' Last Appeals*, 37 ARIZ. L. REV. 375 (1995). For an examination of the procedural due process questions stemming from *Herrera* and clemency, see Daniel Lim, *State Due Process Guarantees for Meaningful Death Penalty Clemency Proceedings*, 28 COLUM. J.L. & SOC. PROBS. 47 (1994); Daniel T. Kobil, Note, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201 (1993); Henry Pietrkowski, Note, *The Diffusion of Due Process in Capital Cases of Actual Innocence After Herrera*, 70 CHI.-KENT L. REV. 1391 (1995).

13. Pope John Paul II writes:

On this matter [the death penalty] there is a growing tendency, both in the Church and in civil society, to demand that it be applied in a very limited way or even that it be abolished completely. The problem must be viewed in the context of a system of penal justice ever more in line with human dignity and thus, in the end, with God's plan for man and society. The primary purpose of the punishment which society inflicts is "to redress the disorder caused by the offence." Public authority must redress the violation of personal and social rights by imposing on the offender an adequate punishment for the crime, as a

that avoiding the execution of an innocent man is a moral good that must be pursued regardless of the cost, or that the possibility of achieving this good outweighs the moral cost of revealing the professional secret. The first assumption relies upon the primacy of the good posited and rejects a utilitarian calculus. The second assumption accepts the legitimacy of a utilitarian analysis, finding that revelation is warranted by the good to be achieved.¹⁴ If it is ethically acceptable to weigh the possible good obtained through disclosure against its costs, it is still not readily apparent that disclosure is ethical in this case.

The facts reveal that Ben Jones is a lapsed Catholic who sought out Father Samuels after an extended separation from the Church. While revealing Ben Jones's secret may not violate the canon law of the Church since it is not under the seal of confession, Ben Jones probably will feel that Father Samuels betrayed his trust if the secret is disclosed without his permission. He is likely to perceive the distinction between a professional secret and a sealed confession as merely a legalistic distinction with no real moral substance.

The sense of betrayal and subsequent disillusionment that may follow disclosure of Ben's secrets could lead Ben to reject his faith in Christ and the teachings of the Church. By repudiating his faith, Ben would become an apostate. Apostasy is one of the sins that, if unrepented, may result in eternal separation from God.¹⁵ Father Samuels cannot disregard this possible outcome. He is charged with the solemn duty to safeguard the soul of each person entrusted to his care as priest.¹⁶

condition for the offender to regain the exercise of his or her freedom. In this way authority also fulfills the purpose of defending public order and ensuring people's safety, while at the same time offering the offender an incentive and help to change his or her behavior and be rehabilitated.

It is clear that to achieve these purposes, the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender, except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically nonexistent.

POPE JOHN PAUL II, *THE GOSPEL OF LIFE [EVANGELIUM VITAE]* ¶ 56, at 99 (1995).

14. Pope John Paul II has written on the limited legitimacy of consequentialism as a system of moral reasoning. See POPE JOHN PAUL II, *THE SPLENDOR OF TRUTH [VERITATIS SPLENDOR]* ¶¶ 74, 75 (1993).

15. 1983 CODE c.751 (explaining that "apostasy is the total repudiation of the Christian faith").

16. Pope Pius IX, *Amantissimi Redemptoris* §5 (1858), in *THE PAPAL ENCYCLICALS (1740-1878)* 351 (Claudia Carlen IHM ed., 1981).

So, assuming the moral legitimacy of considering the anticipated consequences in this case, we are left weighing the possibility of avoiding a great evil—the execution of an innocent man—against the possibility of causing a great evil—Ben’s loss of eternal salvation. Also weighing against disclosure is the possibility that the revelation of Ben’s secret will be publicized and cause others to avoid seeking the spiritual counseling that is fundamental to the ministry of Christ. Absent more facts that increase the possibility that revealing Ben’s secret would successfully stop the execution, Father Samuels should not reveal Ben’s secret without his consent.

This does not excuse Father Samuels from vigorously encouraging Ben to reveal the truth to the authorities. Such encouragement should include every moral and practical argument that the priest can marshal, up to and including discussions of God’s vengeance for allowing innocent blood to be shed. Any communication technique, short of coercion, should be used if it enhances the success of persuading Ben to “do the right thing.” But in the end, it is Ben who must disclose the truth in order to avoid the great evil—not Father Samuels.

II. SEALED CONFESSION

Does the preceding analysis change if the statements were made to Father Samuels during the Sacrament of Penance and Reconciliation? Absolutely. Father Samuels’ silence is required regardless of his actual ability to stop Frank Smith’s execution.

Canon law provides: “The sacramental seal is inviolable; therefore, it is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason.”¹⁷ Priests who violate this canon by making known the contents of the confession and identity of the penitent—by name, through the circumstances described, or by implication—are subject to automatic excommunication.¹⁸ The seriousness of this punishment is illustrated by the fact that only the pope can reinstate the priest to full communion with the

17. 1983 CODE c.983, § 1. The *Code* uses the Latin word *nefas* to stress the gravity of the offense. *Nefas* is defined as “[a]n offence against divine law, an impious act, sacrilege.” OXFORD LATIN DICTIONARY 1167 (5th ed. 1976). *Nefas* may have moral implications as well. It is secondarily defined as “[a]n offense against moral law, a wicked act, crime.” *Id.*

18. 1983 CODE c.1388, § 1. The excommunication prohibits the priest from exercising any ministry or public worship. *Id.* c.1331, § 1.

Church.¹⁹ Even priests who reveal the contents of a confession in such a way that little danger exists that the penitent will be identified are subject to discipline, the severity of which is "in accord with the seriousness of the offense."²⁰

If Father Samuels learned of Ben's secrets in the course of a confession, the seal of confession forbids disclosure, regardless of the good that may be achieved as a result.

In her book, *Ethics in the Sanctuary: Examining the Practices of Organized Religion*, Margaret P. Battin provides this chilling example of the seal's strength:

In a much-publicized case in Langerberg, West Germany, several years ago, Jurgen Bartsch, a fifteen-year-old butcher's apprentice, confessed to his priest that he had committed a murder. The priest attempted to persuade Bartsch to give himself up to the police. When he was unable to do so, the priest followed Roman Catholic church law requiring absolute confidentiality of the confessional and did not reveal information about the murder or Bartsch's intentions. Bartsch committed three more murders—all of them eleven-year-old boys, all of whom he subjected to sexual torture prior to killing them—before he was caught four years later.²¹

19. *Id.* c.1388, § 1. "A confessor who directly violates the seal of confession incurs an automatic (*latae sententiae*) excommunication reserved to the Apostolic See; if he does so only indirectly, he is to be punished in accord with the seriousness of the offense." *Id.* The canon's comment stresses the seriousness of this offense.

If the penitent and his/her sin are easily known from the confessor's behavior, there is a direct violation of the seal, punishable by a *latae sententiae* excommunication. The seriousness of the offense is clear from the fact that it is one of only five excommunications reserved to the Holy See.

COMMENTARY, *supra* note 1, at 927.

20. 1983 CODE c.1388, § 1. Indirect violations occur when there "is only a danger that the penitent and sin will be revealed" as opposed to direct violations where "the penitent and his/her sin are easily known from the confessor's behavior." COMMENTARY, *supra* note 1, at 927.

21. MARGARET P. BATTIN, *ETHICS IN THE SANCTUARY: EXAMINING THE PRACTICES OF ORGANIZED RELIGION*, 21 (1990) (citing *Murder Case Debate on Priest's Duty*, THE TIMES (London), Dec. 16, 1967; and *How Secret the Confessional?* TIME, Dec. 22, 1967).

As a personal aside, I am thankful the editors of the *Loyola of Los Angeles Law Review* did not pattern the hypothetical facts after this case.

In her notes accompanying this example, Professor Battin reveals that Bartsch confessed to seventy other attempts, in addition to the four murders for which he was convicted.²²

The dilemma experienced by the priest in this true story places our example of Father Samuels and Ben Jones in a less dramatic light. Nothing in our facts indicates that Ben poses an ongoing threat to the safety of others within the community. Nonetheless, the fact remains that Frank Smith is innocent of the crime for which he was convicted, and that he is scheduled to die within a week of Ben's confession to Father Samuels. Under these circumstances, should Father Samuels disclose the contents of Ben's confession in an attempt to preserve the life of Frank Jones?

The first half of this Essay examined the possible consequences of this particular disclosure and concluded that disclosure was not warranted. That conclusion was due in large part to the probability that disclosure would not save Frank, given the legal standards governing post-conviction relief for claims of "actual innocence." Certainly, the conclusion that disclosure is unwarranted is not weakened by changing the church law from permissive disclosure to absolute silence. However, the outcome of any particular problem will change under consequentialist reasoning if the probable consequences change.

The rule governing professional secrets, which admits an exception based upon a particular consequence—avoiding a grave harm²³—can be distinguished from the rule regarding secrets revealed in the confessional, which admits no exceptions regardless of the particular or general consequences.²⁴ In discussing the morality of a rule that absolutely prohibits disclosure, it is important to remove the consequentialist "out." Therefore let us assume that disclosure by Father Samuels alone could stop the execution of Frank Smith. Should Father Samuels break the seal?

Under the standard governing professional secrets, if disclosing the secret would stop the execution of Frank Smith, the secret should be disclosed, even in the face of the possible apostasy of Ben Jones as a result. Is this also true if the secret is revealed during confession? The answer given by canon law is no. Is this defensible under consequentialist reasoning? In answering this question, we must

22. *Id.* at 271 n.1.

23. *See supra* note 2 and accompanying text.

24. 1983 CODE c.983, § 1.

examine the interests that the seal is intended to protect by a complete prohibition.

III. INTERESTS PROTECTED BY THE SEAL

The seal of confession is said to derive from Christ's commandment to confess our sins.²⁵ In order to assist in the fulfillment of this command, the Church enjoins its priests to remain silent concerning the existence or contents of a confession. This is done so that individually, and as the People of God, penitents need not fear earthly consequences from revealing post-baptismal sins as a part of seeking reconciliation with the Church and forgiveness from God.²⁶

A. *Benefits to the Penitent*

Access to the sealed confessional is of value to the penitent because it inspires compliance with Christ's command. It also provides a safe space, and thus moral reflection, conversion, and reformation. Finally the seal provides evidence of the possibility of radical transformation through grace—a transformation that is so dramatic that the old sinful being is no longer spoken of or remembered.

B. *Benefits to the Priest*

The seal is of value to the priest because it allows him to hear of the most base passions and actions without the possibility of intervening through human agency. It encourages reliance upon God's power to transform the sinner, rather than reliance upon the priest's power to intervene through human acts that he may or may not be capable of performing. Ultimately the seal protects the priest from the sin of despair—the despair of one who knows the worst of human nature and believes that only human will stands as a barrier to a world dominated by evil.

25. JOHN R. ROOS, *THE SEAL OF CONFESSION* 1-3 (1960); see also James 5:16 (“[c]onfess your faults to one another, and pray one for another, that ye may be healed.”); John 20:23 (“[w]hosoever sins ye remit, they are remitted unto them; and whosoever sins ye retain, they are retained.”); Matthew 16:19 (“whatsoever thou shalt bind on earth shall be bound in heaven; and whatsoever thou shalt loose on earth shall be loosed in heaven.”).

26. 1983 CODE c.959; see Dexter Brewer, *The Right of a Penitent to Release the Confessor from the Seal: Considerations in Canon Law and American Law*, 54 JURIST 424, 429-30 (1994).

C. *Benefits to the Church*

The Church benefits from the seal because it assists in fulfilling its mission of reconciling all people with God. Although reconciliation with God is possible without the intercession of the priest,²⁷ the existence of the Sacrament of Penance and Reconciliation evidences God's continual offer of grace to those who regret their sinful acts, confess them, and resolve to avoid sin in the future.²⁸ Without the seal of confession, the ability of the Church to be a living sign of God's continual offer of grace would be diminished. For many the offer of grace would come at too high a price—the price of potential disgrace and retribution by those who have been harmed by the penitent's sins.

The Church further benefits from the seal because it reinforces the separation of the Kingdom of God from the realm of earthly principalities. It affirms the independence and superiority of the Church's claim over the spiritual dimension of life.²⁹ Imagine the plight of the priest hearing the confession of a French resistance fighter who killed two Nazi sympathizers while they slept. Should the contents of the confession be revealed to assure that "justice is done?" Should it be revealed to save the other villagers whom the Nazis threaten to kill if the murderer is not discovered?

Or to use a more contemporary example, what should the Irish priest do when a revolutionary confesses involvement in the killing of British soldiers? Is the priest's situation the same when hearing the confession of the French resistance fighter and the Irish revolutionary? Does the resolution of the priest's dilemma depend upon the nature of the political regimes in power—evil versus morally ambiguous or even virtuous—the status of the victims—sympathizers versus soldiers—the anticipated consequences of revealing or concealing the information obtained in the confessional?

The Church's answer is that the seal does not depend upon any of these considerations. The seal depends upon the obligation of the

27. See CATECHISM OF THE CATHOLIC CHURCH §§ 1434-1439 (1994). Reconciliation with the Church is accomplished liturgically by the Sacrament of Penance and Reconciliation. *Id.* §§ 1422, 1440.

28. *Id.* §§ 1440, 1441, 1446, 1450; see 1983 CODE c.987, 988 (discussing disposition of the penitent and confession obligations); ROOS, *supra* note 25, at 25-48.

29. Kenneth L. Grasso, *Beyond Liberalism: Human Dignity, the Free Society, and the Second Vatican Council*, in CATHOLICISM, LIBERALISM, AND COMMUNITARIANISM 30 (Kenneth L. Grasso et al. eds., 1995).

Church to lead people to obey the command of God to confess our sins, and the fulfillment of God's promise "and their sins and inequities I will remember no more."³⁰ The promises of God, and thus the Church as God's sacramental instrument, are not conditioned upon particular human consequences or the state's recognition of the promises. The Church must remain free to continuously invite people to respond to God's grace and to critique the existing political order effectively. The seal of confession is only a part of maintaining that freedom, but nonetheless a very important part.³¹

IV. FATHER SAMUELS' DILEMMA

Would the interests of the penitent, priest, and Church be compromised by revealing Ben Jones's confession of murder? Do the justifications offered for protecting the resistance fighter in Vichy, France apply with equal force to the murderer who seeks to avoid just punishment? Can reconciliation truly occur when the sinner is willing to compound the sin by allowing an innocent man to die? It is this final question that reveals the paradox of the Christian faith. All who claim redemption through Jesus Christ have already accepted that an innocent man was executed for the sins of others, and that reconciliation with God occurs through His death.³² By Christ's victory over death, He transformed the human understanding of death's power.

Father Samuels' dilemma arises from a conflict between the moral prohibition "thou shalt not kill"³³ and the imperative to "rescue those who are being dragged to death."³⁴ Frank Smith's execution, if it occurs, will be the result of several moral failures: the legal system, where conviction of an innocent man is possible; the Church, which has yet to transform the system of justice to preclude the taking of human life absent the most compelling of circumstances; and Ben Jones, whose choice of temporal freedom and life outweighs his recognition of the obligation to rescue Frank through the acceptance of just punishment for his deeds. Ultimately if Frank Smith is executed, it will be because we all have failed to construct a

30. *Hebrews* 10:17.

31. See 1983 CODE c.834, § 1; Grasso, *supra* note 29, at 30.

32. *Romans* 5:10.

33. *Exodus* 20:13.

34. *Proverbs* 24:11.

system that values human life over vengeance and economic efficiency.³⁵

Is this the right result? Absolutely not. Yet violating the seal of confession is not the right result either. By revealing Ben's confession, Father Samuels would seriously compromise the interests the seal protects. Ben's interest in following God's command to confess his sins is compromised by the creation of a strong disincentive in the form of temporal punishment. His interest in a safe place for self-examination and moral reformation is destroyed by the fact that he can have no confidence that his sins will not be revealed. By disclosing his confession, Father Samuels destroys the Church's living witness of the transforming power of God's grace.

Father Samuels' interests are compromised as well, in that he assumes the burden of achieving the "right result." By undertaking to rescue Frank Smith through the use of the confession, he must be successful to protect himself from subsequent doubts about the price he made Ben pay for the results achieved. If unsuccessful, he risks the despair experienced by many of the faithful when they no longer depend upon God.

Finally, the price the Church pays for the disclosure will be extraordinary. By breaking the seal to benefit others, the Church gives lie to the idea that each person is uniquely important to God. The Church teaches, in the words of a current poster, "God loves each of us as if there were only one of us." That preciousness and unlimited love is belied by the weighing of others' interests in deciding whether to keep the seal. On a more pragmatic level, when disclosure is permissive, it is but a short step to make it mandatory when the costs of silence are perceived as being too high. The human agency that would enforce disclosure would be the State, and thus the independence of the Church is eroded.

The price of free will is very high. It includes all of the human suffering that occurs when people choose wrongly. Yet moral goodness can only exist through free will. Without free will, every act is merely an automatic response. Free will becomes a will to goodness only as a freely chosen response to the call of God.³⁶

35. See POPE JOHN PAUL II, *supra* note 14, at 3-12.

36. Vatican II Ecumenical Council, *Declaration on Religious Freedom [Dignitatis Humanae]* § 2 (1965), in 2 DECREES OF THE ECUMENICAL COUNCILS 1001, 1002-03 (Norman P. Tanner S.J. ed., 1990).

The Church is the visible presence of God among His people. The priest who hears the penitent's confession can only invite, never coerce, a fuller response to God's call to goodness. To violate the seal of confession would be to allow worldly consequences to intrude into one of the sacred places where the faithful meet God. The priest who discloses the penitent's confession violates not only his vows as a priest, but the promise of the One who said, "Your sins I remember no more."³⁷ Father Samuels must maintain his silence and pray for the continuing conversion of Ben Jones, and the salvation, both temporal and eternal, of Frank Smith.

37. *Isaiah* 43:25.

