

## VICARIOUS MORALITY AND THE LAW

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My topic is agency and the dilemmas of vicarious morality peculiar to it. Let us first focus on the manifest need built into human relations for one person at certain times to act in the place or stead of another and to make his act count as the other's. This is a need that is at the heart of our being human.

Thus parents make decisions in the name of and on behalf of their children who are simply unable to act for themselves. Similarly a wife makes decisions in the name of and on behalf of her sick husband who cannot act for himself. We say that parents are their children's natural vicars or agents. And in the absence of parents, custom and law provide guardians and conservators who also serve for the sick and the aged. Thus does law enter the scene, responding to and building upon the vicissitudes of human existence.

Another major area of agency is government, some form of which is required by any group of people. Here again agency enters the picture with officials on every level of democratic government acting as trustees for the people whom they represent. Their acts count as done in the name of the people and, at least in theory, for the benefit of the people.

The same is true in the business world. Officers and directors of corporations act for and on behalf of all the corporate owners who are the stockholders. Likewise directors of charitable and protective institutions act in a fiduciary capacity.

So there is a broad category in both civil and canon law entitled agency, indicating a person acting in the place or stead of another and making his act count as the other's. In addition to the agents listed above there are trustees or independent fiduciaries who act with great discretion but only for the beneficiary and not for their own sake. Whatever gains they make from the use of the trust property is not for their own account but for another. Civil lawyers act for their clients and plead in place of that client.

It is interesting to note that in the long tradition of church law ecclesiastical officeholders such as residential bishops and pastors have always been considered fiduciaries. They are God's repre-

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sentatives with the Roman Pontiff being the vicar of Christ himself. Thus church officials found their fiduciary status a cut above other human trusteeship. "Vox superioris, vox Dei" still echoes through the corridors of church history. In addition it is interesting to note that the Gospels themselves are full of appeals to agency. "He who hears you hears me. He who hears me hears him who sent me." And sacramental theology, especially in the great medieval syntheses, dwelt long and hard on the central philosophical notion of instrumental causality. We Christians believe that Jesus came to act in our name and on our behalf in the unique role of a redemptive agent.

So human life in all its complex richness simply could not flourish without agency. Yet there are limits to agency. For some activities are so intimate and personal, so intrinsically bound up with your identity, your personality, and your destiny that no one may ever act in your place as your agent. Thus you may delegate a friend to sign checks for you but you may not have him take an examination (either medical or academic) for you. You may retain an attorney to represent you in court but you may not retain a substitute to love your children for you. You may give a friend your proxy to present your views at certain board meetings but you may not ask the same friend to eat for you or get a good night's rest in your place. Neither may your friend believe for you, repent for you, hope for you, worship for you. We all have to do our own believing, hoping, loving, eating, playing, studying. And finally in the end we all have to do our own dying. For this there can be no rules of substitution and no agent to act in our stead and on our behalf.

Besides highlighting the essential character of fiduciary and other vicarious relationships for the civil and religious ordering of the human condition, it is important to underline the virtuous character of self giving and altruism which is the hallmark of so many who provide for the needs of another by attributing their own acts and their benefits to the other. History is happily filled with countless examples of such dedicated agents not only in the area of family life but also in government and charitable work.

My point here, however, is to draw your attention to the high risk of compromising your integrity as a person precisely by acting as a trustee or agent, even in the vital service of human needs and even when altruism is the hallmark of that service. For the agent is tempted over and over again to do for others and in their behalf what he would find morally reprehensible if done for himself and in his own name. In other words, an agent, as an agent, finds him-

self tempted to dispense himself from many straightforward and clear obligations of personal morality in the execution of his task.

For example the zealous director of a religious or educational institution may be tempted to endorse an ethically questionable business deal in the name of and on behalf of that charity. There is nothing wrong in this because after all it is for such a good cause. Yet that same director would never think of doing such a thing for his own benefit. How many deceptions are perpetrated upon the public by altruistic agents who would never do this for themselves and who are only acting in this way because it is for such a good cause.

Notice here that the actions undertaken on behalf of one's principal come under a different set of moral rules than those undertaken on one's own behalf. In this way a person becomes a morally split personality: you may do on behalf of others what you may not do on your own behalf. And let me sadly add that when one acts as God's representative, as in the case of ecclesiastics, the temptation is even stronger.

This temptation arises not only from the very fact of selfless service of others involved in so many forms of agency but also from the power which accrues to the agent often as a socially recognized honor and sometimes even on a grand scale. Top government officials and directors of large charitable and educational institutions are good examples. In this rarified atmosphere there is a service but it is a service of lordship. When a man aspires to the presidency of the United States, it is not simply the desire to serve his country that motivates him. We have all found it far easier to serve others from positions of social prestige rather than in roles of menial service.

Some of the greatest saints instinctively recognized this when they set out to follow the example of the vicarious sacrifice of Jesus by becoming poor to aid the poor and even by becoming slaves to redeem slaves. In this role these holy men and women of God accrued to themselves a form of agency which involved selfless service of the needy but which disallowed customary power and the usual forms of honor and public recognition. In this way these saintly agents were freed from the dehumanizing of self by the surrender of power and honor. The grave moral risks of customary agency were avoided by heroic self sacrifice.

Let us also point out that the split between the public person and the private person is amply illustrated by the repeated insistence of the legal profession that a lawyer owes his client every service compatible with justice. In practice this means that a law-

yer may do for his client what he would consider vicious, uncaring, and grossly insensitive if performed for his own account. Thus as an officer of the court the lawyer is expected to observe and fulfill the demands of justice by fidelity to his duties of confidentiality, disinterestedness, and zeal on behalf of the client. Yet this may be done in such a way that the lawyer is dispensed from the more personal virtues of charity, patience, lack of duplicity, and humility—not to mention common courtesy and decency. Acting for their clients, lawyers find their moral responsibility confined to fidelity in fulfilling their trust.

We may get another perspective on this prevailing view of legal ethics by citing from the original sourcebook which inspired it, namely Judge George Sharswood's *Legal Ethics* (1854). Here we read: "The lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury" (p. 84). This means that within the parameters of the law, the lawyer is simply the agent of the client's will, no matter what he thinks of that will. He is clearly not judge or jury and not to act as if he were. At most he may withdraw from the case (without however harming his client's chances and interests), if his conscience does not permit him to continue. All the problems of vicarious morality mentioned above thus are structured into this prevailing view of the lawyer's role and function.

There is, however, another more primordial view of legal ethics in America, a minority view which now and then tries to gain ascendancy. Its source is David Hoffman's *Course of Legal Studies* (1836) where we read: "My client's conscience, and my own, are distinct entities: and though my vocation may sometimes justify my maintaining as facts, or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go" (p. 755). Here there is a larger role for the lawyer's conscience; here the lawyer is not exclusively the agent of the client's will.

Perhaps we should all reflect on these examples of trustees and agents as they affect our lives. For basic to ethical concern is the conviction that our actions are important because the things we choose to do and the way we choose to do them not only reveal or disclose who we are but also, when freely chosen, they make us into certain kinds of people. It is, in other words, through our acts, both as individuals and as agents, that we become more or less human. It is through our personal and professional actions that we

achieve our identity and our destiny. And that ought to be food enough for reflection.

There is need to express my indebtedness to the following scholars from whom I have gained so many insights into the topic we have considered here: Harold Berman, *The Interaction of Law and Religion*. Nashville: Abingdon, 1974; Bernard Lonergan, "Dimensions of Meaning," *Collection*, edited by F. E. Crowe, New York: Herder and Herder, 1967; John T. Noonan Jr., "Making One's Own Act Another's," *Proceedings of 27th Annual Convention, The Catholic Theological Society of America*. 27 (1972) 32-44. David Luban, "Professional Ethics: A New Code for Lawyers," *The Hastings Center Report*. 10 (1980) 11-15.

