The Many Faces of Conscience: A Comment on Professor McLeod

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I need to start with a couple of apologies. For this conference it seems that Professor McLeod is summarizing in a few minutes what appears to be a complicated and book length argument, and I’m commenting on that summary, and so it’s likely that I won’t have grasped the full argument. So for that I apologize in advance.

Professor McLeod’s paper has two parts. The first part is about the value of conscience as a general matter. Why should we respect and try to accommodate conscience anyway? The second part is a more specific argument related to abortion: Professor McLeod argues that although the consciences of medical professionals who are committed to providing abortions and of those who are opposed to performing abortions are both valuable, the former group—that is, the abortion providers—should receive greater accommodation. It is likely that this more specific argument is of greater interest to the participants in this conference. But time is limited, and although I would have objections to that more specific argument,¹ my

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¹ Professor McLeod’s specific argument is based on the assumption that doctors have a fiduciary obligation to serve their patients’ interests and wishes over their own interests, coupled with the claim that abortion providers are complying with that obligation while abortion refusers are not. Lawyers of course have a similar obligation to their clients. The fiduciary obligation runs out, however, when a client proposes to violate a law or to commit a homicide: at that point, the lawyer’s obligation is to follow the law and to protect life, not to implement the client’s wishes. But in a jurisdiction that has prohibited abortion on the assumption that the fetus is a human person and that abortion is the taking of human life, this is exactly what the patient seeking an abortion is proposing to do; and
assignment was to talk about general premises and problems involving conscience. So with apologies (and this is my second apology), I’m going to focus on the first part of Professor McLeod’s paper.

So, . . . in our society we have inherited a longstanding commitment to something like the sanctity of conscience, and so we commonly suppose that as a society we should, if possible, try to accommodate people in the exercise of their conscience—even if we think they are mistaken. Probably the most familiar instance has to do with conscientious objection to military service. A Quaker may object to serving in war because he believes that war is always wrong. If his society agreed with that view it presumably would never go to war; so the fact that a society through its authoritative institutions decides to fight a war (maybe for defensive or humanitarian purposes) suggests that the society believes the Quaker’s premise is mistaken. Even so, a commitment to the sanctity of conscience may lead the society to try to excuse the Quaker from military service; and in fact American law has typically tried to do just that.

Some such basic commitment to conscience has arguably been a central and distinctive feature of modernity. But this commitment is also somewhat mysterious, and I think it is helpful to begin by noticing what we might call the paradox of conscience.

THE PARADOX OF CONSCIENCE

We might think of the paradox as growing out of a gap between the first person and third person perspectives. So, from the first person perspective, to say that I should do what I believe to be right is almost tautological. To say that something is the right thing to do is basically to say that it is what I should do. But from the third person perspective, it’s much less clear why other people, or society, or institutions (like government), should try to accommodate me, or anyone, in acting on beliefs that they believe to be mistaken.

In most situations any such proposition would seem quite counterintuitive. Suppose that after a math test, Johnny comes to the teacher and complains, “On the last question—What is 10 minus 6? I wrote 5, and you marked my answer wrong and lowered my grade. Why did you do that?” The teacher says, “I did it because you gave the wrong answer. 10 - 6 equals 4, not 5.” “Whatever,” Johnny responds. “Either way, I sincerely believed—and maybe I still believe—that 5 is the correct answer. Wouldn’t you agree that I should write down the answers that I believe to be correct? In fact, you even said so: when you handed out the test you said for us to

it seems far-fetched to analyze the situation in terms of a fiduciary obligation to carry out the patient’s wishes.
write down what we thought were the right answers. So, . . . I did exactly what you told me to do, and yet you’re punishing me for doing that. You’re punishing me for doing what I sincerely believed to be right. What kind of teacher—what kind of human being—are you anyway?"

In most contexts, this kind of objection is not likely to succeed. Normally, we get rewarded for doing what *is* right, not what we *believe* to be right. So it’s true that Johnny should write the answers that he believes to be correct (that’s the first person almost-tautology); but (now the third person perspective) it’s also true that he will be rewarded by others only for writing the answers that *are* correct, or that the teacher and the relevant authorities believe to be correct.

And yet when a similar disagreement, between an individual and an institution or society, is put under the heading of “conscience,” we routinely say that the institution or society ought at least to respect and maybe accommodate or excuse the conscientious but presumptively mistaken believer. Why?

**THE THREE STAGES OF CONSCIENCE**

It seems that we assign high value to something we call “conscience,” but there is a risk of equivocation here. And so we need to notice how the vocabulary of “conscience” is used in different ways, with potentially divergent implications, and how conceptions of conscience have changed over the course of modernity. Professor Marie Failinger has observed that freedom of conscience “began as an argument that government must ensure a free response by the individual called distinctively by the Divine within” but by now “has come to mean very little beyond the notion of personal existential decision-making.”

I want to elaborate on Professor Failinger’s observation by dividing the modern history of conscience into three rough stages. In stage one, at the beginning of the modern period, the prominent champions of conscience were Martin Luther and Thomas More. Luther defied the church and the empire with his famous, “Here I stand: I can do no other”; More went to the Tower of London and eventually to the scaffold because he would not violate his conscience by affirming the validity of Henry VIII’s divorce from his wife Catherine and his marriage to Anne Boleyn. At the time,

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neither man’s conscience was accommodated, but More at least suggested that it should have been—that he should have been excused—on grounds of conscience—from taking the mandatory oath.³

Although Luther’s and More’s understandings of conscience differed in important respects that I won’t try to summarize here, they shared the view that conscience meant acting in accordance with their sincere beliefs about what God requires. So they were trying to act in accordance with the will of a person—a divine Person. And that personal quality may be relevant in thinking about the paradox of conscience. Just as a parent might commend a child for doing what the child sincerely judges to be right, even if the parent would have a different judgment, so a personal God might forgive or even commend a human being for acting as she believes God wants, even if that belief is mistaken. The person who does that is at least embracing the basic religious precept of loving and honoring God; in that respect, the person is to be commended, not condemned.

This religious conception of conscience, and this personalist response to the paradox of conscience, is still apparent two centuries later in the thinking of James Madison, perhaps the most important proponent of freedom of conscience in the American founding period. Madison’s conception of conscience differed from More’s and Luther’s, I believe, in ways that again I won’t try to elaborate on here; but in his seminal Memorial and Remonstrance against Religious Assessments, he shared their understanding of conscience as a sincere belief about what God requires of us.⁴

More recently, though, this theistic conception of conscience has come to seem unacceptably narrow. In a world in which many people no longer believe in God, the theistic conception may seem to discriminate in favor of religious people. And so in what I’m calling stage two, the part about God’s will is discarded and replaced. Morality is substituted for God: and so acting on conscience is redefined or at least refined to mean acting in accordance with what one believes to be morally right. In American law, the Vietnam era cases of United States v. Seeger⁵ and United States v. Welsh⁶ reflect this transition. The draft law offered exemptions to men whose objection to war was tied to belief in a Supreme Being, but the Supreme Court contorted the statutory language to mean, basically, a sincere moral objection to war. So even non-theists like Seeger and Welsh could qualify.

3. I discuss this period and these claims in detail in Steven D. Smith, The Disintegrating Conscience and the Decline of Modernity, in ch. 1 (2023).
4. I discuss Madison’s views in some detail in id., at ch. 2.
Replacing God with morality may seem like a necessary move, and really not much of a change from stage one anyway, because Luther and More and Madison would all likely have agreed that doing what God wants is the morally right thing to do and that is why we should do it. Still, the second stage position creates its own problems. Without the personal dimension, it is not clear whether conscience thus redefined has a good answer to the paradox I noted earlier. An impersonal or objective morality may not have the same power to excuse or forgive that a personal God has.

There may be good answers to this doubt, but the doubt is reenforced by a different difficulty: although we routinely talk about “morality,” in the world today it is not at all clear that we understand—and it at least seems quite clear that we do not agree on—what we are talking about. I don’t mean just that we disagree about substantive moral questions, like the permissibility of abortion—although of course we do—but that we don’t agree on what morality even is. What sort of thing does the term even refer to? Thus, philosopher Michael Smith has observed that “if one thing becomes clear by reading what philosophers writing in meta-ethics today have to say, it is surely that enormous gulfs exist between them, gulfs so wide that we must wonder whether they are talking about a common subject matter.”

In his book After Virtue, Alasdair MacIntyre showed that in the past, moral discourse typically had either an Aristotelian or a theistic meaning (or both). Morality might refer to the realization of an indwelling telos or final cause; or it might refer to obedience to God’s will. But neither of these conceptions commands any consensus today. And so when we talk about something being moral or immoral, what exactly do we even mean? That it will or won’t produce the greatest amount of pleasure for the greatest number? That it will or won’t conform to maxims that we can will to be universal laws? That something produces in us emotivist reactions of approval or disapproval? Each of these understandings has had its philosopher-proponents, and yet they seem to be utterly different. They do not seem to be just slightly variant interpretations of the same basic thing—different “conceptions” of the same basic “concept.” Rather, they seem to be referring to totally different things. But without some shared understanding, when we talk about morality, or conscience, we may just be talking past each

other, like ships passing in the night. And of course many people may offer confident moral judgments about this or that without having any definite conception of what morality means at all.

Justice Holmes mocked the way lawyers talk about law as if it were some “brooding omnipresence in the sky.” His remark would seem to be even more apt as applied to a good deal of modern talk about morality.

This state of affairs is awkward for conscience. The commitment to conscience today often seems to mean something like: we should try to accommodate people in doing what they think morality requires, although we have no idea or at least no agreement about what morality even is.

Contemporary discussions of conscience often try to bypass these difficulties, though, by understanding conscience by reference neither to God nor to some objective morality, but instead to something like personal identity, or authenticity, or integrity. And this is what I am calling stage three. In stage one, conscience urges us to strive to be faithful to God. In stage two, conscience urges us to act in accordance with some objective morality. In stage three, conscience tells us to be true to ourselves—to something like our true or genuine or authentic selves.

But this conception of conscience in terms of personal authenticity again creates its own problems. To see how, imagine two characters: Harry the surfer dude, and Hannibal the sadist.

Harry says, sincerely, “I’m a surfer. That’s my authentic identity; it’s who I truly am. I live, I exist, to surf.” Harry points out that if he is drafted to serve in the military, he won’t be able to be the person he truly and authentically is. Is Harry entitled to the same consideration as Peter the Quaker, or Welsh the nontheistic but reflective moral pacifist?

Hannibal the sadist believes that his authentic self is one that is bent on inflicting gratuitous suffering on others. That is who (he thinks) he truly is. Would we say that in this case, in inflicting gratuitous pain Hannibal is acting in accordance with conscience? And even if we would, is there any conceivable reason why we would want to accommodate Hannibal in this perverse pursuit of “conscience”?

Inevitably, I think, questions like these push the residents of stage three away from a pure commitment to authenticity or integrity back in the direction of morality—or of something like authenticity or integrity tilted toward true morality and valuable because and insofar as it is tilted toward morality. The stage three person may talk mainly about authenticity or integrity.

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But what is really doing the work is some (perhaps unarticulated) sense of morality lurking around the edges of the discussion.

So the doctor who feels conscientiously committed to providing abortions will be accommodated because that commitment expresses his identity. Or so the stage three proponent of conscience may say. But Harry the surfer dude won’t be excused from military service because even if surfing is indeed the essence of his identity, that is not a “morally” oriented identity. Hannibal the sadist doesn’t get our respect because even if his authentic self is bent toward inflicting pain, that is an immoral kind of authenticity. The talk may be about identity, or integrity, or authenticity. But what matters, it seems, is morality.

This move away from pure authenticity back to objective morality may be a sensible one. But it leaves us with the same problems we noticed at stage two.

**PROFESSOR MCLEOD IN STAGE THREE?**

So, those are my three stages, each with its own problems. I hesitate to place Professor McLeod into this framework because, once again, I’ve only heard a summary of her position and I may not fully understand it, and also because her conception of conscience seems to me quite unconventional—maybe not in the field of medical ethics (I don’t know), but relative to the overall modern tradition of conscience.

Unlike Luther and More and Madison and Elliot Welsh and the US Supreme Court, Professor McLeod doesn’t define conscience as a person’s reflective judgment about what he or she should do. Conscience seems rather to be the unbidden and largely unreflective and nonrational impulses or intuitions we have, perhaps resulting from internalized oppression, that may actually conflict with our more reflective moral judgments.

On this view, it is very hard for me to imagine why a society would want to accommodate conscience. True, as Professor McLeod explains, there might be a kind of therapeutic value in conscience, or at least in recognizing and addressing our unreasoned and perhaps perverse impulses and intuitions (now dignified with the name of “conscience”), in the same way that in psychoanalysis there is thought to be value in acknowledging and confronting the subconscious or subrational factors that may influence us. But that wouldn’t be a reason to respect conscience, or to accommodate it. As I understand her, Professor McLeod thinks that even from a first-person perspective, conscience is not something that we as persons ought to follow but rather something that we should overcome, or reform, or
bring into line with our conscious moral judgments. So we shouldn’t be trying to accommodate even our own consciences, and it is hard to see why a society or government would want to accommodate anyone in the exercise of their conscience.

I doubt very much, moreover, that when the medical professionals whom Professor McLeod quotes say they have an obligation of conscience to provide abortions, they are invoking anything like this conception of conscience not as reflective moral judgments but rather as subrational intuitions or impulses. If they were, any plea for accommodation would be doomed from the start.

That said, however, I suspect, tentatively, that Professor McLeod’s overall position fits within my stage three, and that it faces the challenges characteristic of that stage. Professor McLeod begins by ostensibly rejecting “objective morality” in favor of a “subjectivist” conception and “subjective moral values.” These are slippery terms, especially in this context, and I am not at all sure what Professor McLeod means by “subjective moral values.” She also invokes values like authenticity and integrity. This seems symptomatic of a stage three position.

And yet what Professor McLeod actually favors, it seems, is an authenticity or integrity tilted toward morality (whatever that is). Thus, she wants to encourage people to “retool,” and to reshape their consciences, so as to live more in accordance with their moral judgments or endorsements. Why? Why not go the other way, striving to bring our reflective judgments into line with our “consciences”? I’m not sure, but I’m guessing it’s because in contrast to subrational conscience our reflective moral judgments are a better guide to what is truly moral.

And indeed, Professor McLeod talks about the desirability of “moral knowledge,” and of societal debates about what is really moral. I find it hard to make sense of these suggestions except on the assumption that moral judgments are about something that is “objective” at least in the sense that it is independent of those judgments.

Now, this assumption may be right—I happen to think it is—but I can’t tell what sort of metaethical position informs these suggestions. So I can’t form any opinion about whether Professor McLeod’s position might offer some sort of answer to the paradox of conscience. As far as I can see, that paradox still looms.