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Public cartels, private conscience

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Abstract
Many contributors to debates about professional conscience assume a basic, pre-professional right of conscientious refusal and proceed to address how to 'balance' this right against other goods. Here I argue that opponents of a right of conscientious refusal concede too much in assuming such a right, overlooking that the professions in which conscientious refusal is invoked nearly always operate as public cartels, enjoying various economic benefits, including protection from competition, made possible by governments exercising powers of coercion, regulation, and taxation. To acknowledge a right of conscientious refusal is to license professionals to disrespect the profession's clients, in opposition to liberal ideals of neutrality, and to engage in moral paternalism toward them; to permit them to violate duties of reciprocity they incur by virtue of being members of public cartels; and to compel those clients to provide material support for conceptions of the good they themselves reject. However, so long as (a) a public cartel discharges its obligations to distribute the socially important goods they have are uniquely authorized to provide without undue burden to its clientele, and (b) conscientious refusal has the assent of other members of a profession, individual professionals' claims of conscience can be accommodated.

Keywords
conscience, conscientious objection, conscientious refusal, public cartels, professional rights, professional obligations

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To claim that professionals may engage in 'conscientious refusal' is to assert that they may rightfully invoke claims of conscience (moral or religious) as grounds for not complying or cooperating with the provision of goods that those served by the profession have a recognized legal right to access or to request. The most common setting for such conscientious refusal is medicine, where conscientious refusals to provide abortion, some forms of contraception, and some forms of end-of-life care (for example, terminal sedation or assisted dying) are not uncommon. Although there is apparently a fair amount of ambivalence within the profession on the permissibility of conscientious refusal, a large number of medical professionals (and in some nations, clear majorities) evidently believe that members of their profession have a right to have such conscientious refusals honored.[1] And while the bulk of the discussion of conscientious refusal has focused on medicine, rumblings of conscientious refusal in education have been heard (Kaiser, 2015; Strauss, 2014), and one could well imagine how claims of conscientious refusal could arise in professions where that possibility has heretofore been largely ignored (for example, a prosecuting attorney opposed to capital punishment refusing to take on cases where the death penalty is a possible outcome).[2]

The most common rationale given for honoring a professional right to conscientious refusal appeals to professionals' moral integrity. Professionals are moral agents, it is argued, and to compel them to engage in conduct they believe immoral fails to respect their integrity as moral agents (Giubilini, 2014; Magelssen, 2012; Wicclair, 2011). On this rationale, 'to force people to do something they believe to be wrong is always an assault on their personal dignity and essential humanity' (Murphy and Genius, 2013). Indeed, to deny claims of conscience is, on this view, to require professionals to be complicit in practices they judge to be evil.

My primary concern in this article is theoretical rather practical. Indeed, at the level of practice, I shall endorse a fairly orthodox stance according to which claims of conscientious refusal may sometimes be honored.[3] At the level of theory, however, I reject a claim that all defenders of conscientious refusal, and a large number of its opponents, support: namely, that, in the professions in which such a right is paradigmatically asserted, individual moral integrity grounds a moral or pre-institutional right to conscientious refusal. Because this claim is widely accepted, much of the literature on the ethical permissibility of honoring conscientious refusal has focused on how to 'balance' this right against the various concerns critics raise about conscientious refusal.[4] (I outline the three most prominent of these concerns in section 'Objections to conscientious refusal'.) Such talk of 'balance', I believe, reflects the largely unexamined assumption that there is such a right of conscientious refusal on the part of individual professionals. This assumption is incorrect, I shall argue, and by erroneously accepting it, opponents of conscientious refusal have conceded more than is necessary to its defenders and misdiagnosed the strongest moral basis for opposing conscientious refusal.

The primary fact that both opponents and defenders have overlooked is that the professions in which conscientious refusal is invoked nearly always operate as *public cartels*. As I illustrate in section 'US medicine and three features of public cartels,' members of public cartels (for example, medicine in the US) enjoy various economic benefits, including protection from competition, that are made possible by governments

exercising their powers of coercion, regulation, and taxation. However, a parable I offer about the emergence of a public cartel (section ‘Public cartels: A parable’) underscores the morally objectionable features of permitting conscientious refusal by professionals working within such cartels. Public cartels may be justifiable in particular industries or professions, but to assume that individual professionals within those cartels have a right to conscientious refusal is to license them to disrespect the profession’s clients, in opposition to the liberal ideal of neutrality among conceptions of the good, and to engage in moral paternalism toward them; to permit them to violate duties of reciprocity they incur by virtue of being members of public cartels; and to compel those clients to provide material support for conceptions of the good they themselves reject. If I am correct, then by neglecting the fact that the professionals who might invoke claims of conscience are socioeconomic actors, entrusted with the provision of socially important goods by virtue of their membership in a profession that functions as a public cartel, conscientious refusal’s opponents have not rested their case on the strongest philosophical ground. Moreover, to talk in terms of ‘balancing’ professionals’ moral integrity with other practical concerns overlooks that professionals in public cartels are, first and foremost, subsidized agents of the public will and guardians of the public good. As I conclude in section ‘No basic individual right to conscientious refusal’, to acknowledge a moral or pre-institutional right to conscientious refusal in such professions is to permit such professionals to assert economic or political rights concerning the distribution of socially important goods that they emphatically do not have.

That said, honoring some instances of conscientious refusal is consistent with this stance. As I show in section ‘Individual accommodation, collective obligation’, the obligations that professions functioning as public cartels have are essentially collective but derivatively individual, that is, their obligation to distribute the socially important goods they have been made uniquely permitted to provide requires that their clientele be able to access those goods without undue burden, and so long as such access occurs and conscientious refusal has the assent of other members of a profession, individual members of the profession may permissibly opt out of providing those goods. Still, this position is not a compromise[5] arrived at by ‘balancing’ moral integrity against other normative considerations. Rather, professionals’ moral integrity is *accommodated* within a framework that prioritizes the professions’ obligations to provide the goods over which it exercises cartel control above individual professionals’ moral integrity.

Objections to conscientious refusal

Before enumerating the most common reasons offered against conscientious refusal, some clarification of the case in its favor is in order. As noted earlier, the case for professional conscientious refusal largely rests on the value of individual moral integrity. Its advocates claim that disallowing conscientious refusal compels individuals to act contrary to their own convictions or identity. Although not all proponents of conscientious refusal explicitly appeal to individual rights, their position nevertheless seems to rest on the assertion that professionals have a *moral* or *pre-institutional* right to refuse to participate in practices to which they object. In calling the right in question a moral or pre-institutional right, I intend that the right in question is logically independent of its

recognition in any institutional or political setting. Individuals who assert a right to conscientious refusal are not requesting that some body or group *establish* such a right. Rather, the individuals are seeking the acknowledgement and honoring of a right they take to pre-exist these institutions. The right in question is thus not legal, political, or civil. Rather, it rests on facts about individual integrity that both exist independently of, and have normative significance apart from, any institutional facts. Proponents of a moral or pre-institutional right to conscientious refusal are likely to ground this right in a broader right to moral personhood. This position is nicely captured by Warren Quinn:

> A person is constituted by his body and his mind. They are parts or aspects of him. For that very reason, it is fitting that he have primary say over what may be done to them . . . In giving him this authority, morality recognizes his existence as an individual with ends of his own – an independent *being*. (Quinn, 1993: 170. See also Brock, 2008)

Individual professionals are end havers quite apart from their involvement in their professions. The alleged right to conscientious refusal thus flows from the notion that denying such a right would fail to respect practitioners as beings with their own ends, ends which can nevertheless come in conflict with various professional expectations. To insist that institutions or professions must permit conscientious refusal is therefore to insist that a moral or pre-institutional right to personal integrity be incorporated into the practices of those institutions or professions.

For ease of exposition, I will henceforth speak primarily in terms of a right to conscientious refusal, keeping in mind that this denotes a putative moral or pre-institutional right. If there is such a right, it grounds a presumption in favor of its institutional or professional recognition. Nevertheless, unless the right of conscientious refusal is absolute or indefeasible (and few rights are), then there may be countervailing considerations that, individually or collectively, are sufficient to rebut that presumption. Critics of conscientious refusal have tended to focus on three considerations in particular.[6] (Again, because the bulk of the discussion of conscientious refusal in the professions has pertained to medicine, it is convenient to illustrate these objections by reference to medicine.)

The first is possible incompatibility between conscientious refusal and other professional norms or values. Recognizing a right to conscientious refusal may appear to permit professionals to disregard 'internal' ethical norms perceived as definitive of their professions. For instance, some assert that permitting physicians to refuse to perform abortions may conflict with physicians' duties to protect patients' health or to respect their medical autonomy.

A second worry concerns 'scaling up', that is, the impact that honoring claims of conscience might have on the provision of goods to the profession's clientele. If a large enough number of professionals invoke claims of conscience so as to make a particular good difficult to access, then a profession's clients or beneficiaries may become de facto unable to access the good or may turn to riskier, legally unsanctioned avenues for attaining that good. Such appears to be the case regarding abortion.[7]

A third and final concern we may call 'authenticity'. Professionals may appeal to conscience to deny the provision of some good even for reasons that are not 'conscientious' (for example, that providing a particular service cuts into a professional's income, that the professional fears the social stigma of providing a controversial good, etc.) (Deans, 2016; Harris et al., 2018; Shaw and Downie, 2014). Honoring conscience claims could therefore permit professionals to forego providing goods for reasons that ought not to be legitimated, which in turn could contribute to the 'scaling up' problem as well as unfairly shifting the burden for providing that good to a smaller number of fellow professionals. Hence, there is a need for criteria and procedures to determine which conscience claims are genuine and worthy of recognition. Some medical ethicists have suggested that 'medical tribunals' are apt for this purpose (Card, 2016).

Whether these considerations are sufficient to deny a right to conscientious objection will turn on debatable questions regarding how strong the pre-institutional right in question is and how weighty these considerations are. Yet notice that these worries nevertheless concede the in-principle justifiability of individual conscientious refusal. If it could be shown that honoring conscience claims coheres with (or can be plausibly balanced against) other professional norms or values, would not 'scale up' so as to threaten access to the goods the profession provides, and could be authenticated satisfactorily, then those who press these worries would presumably retract their opposition to honoring such claims. But even opponents of conscientious refusal generally concede that there is a right of conscience on the part of individual professionals in the first place. They have instead assumed that a right of conscience is defensible and then proceeded to argue over what kind of compromise between this right and these other worries is best.[8] I do not mean to rule out the possibility that even the most equitable compromise will entail that a right to conscientious refusal ought not to be recognized. Rather, a more incisive case against such a right emerges, I contend, once the economic role that professions in which conscience claims are typically invoked is analyzed and the moral implications of this role are fully spelled out.

US medicine and three features of public cartels

Economic actors sometimes decide whether to provide a good by consulting their moral consciences. Such decisions appear particularly common in the grocery industry, for example. Some grocers opt to sell only vegetarian or vegan cuisine, cruelty-free meat, sustainably caught seafood, 'fair trade' or farm-to-table dishes, and so on, for reasons that are moral as well as market-based. It would be strange to designate these decisions as instances of 'conscientious refusal' though. For while they are conscientious, the possibility of their representing 'refusals' presupposes an institutional or professional background in which such decisions are at odds with expected norms concerning the distribution of the goods at issue. But there is not, in the grocery industry at least, a background of relevant norms against which such 'refusals' are intelligible.

That conscientious refusal can occur only in socioeconomic or professional contexts with recognized norms for the provision of goods tends to be downplayed in discussions of its ethical defensibility. One such context is when a profession operates as a public cartel. A cartel is any arrangement in which entities otherwise in competition within a

given profession or industry seek to restrict competition. The tactics used by *private* cartels to reduce competition are diverse and can include price fixing, restricting output, establishing market shares, and limiting entry into the industry.[9] A *public* cartel is standardly defined as a cartel arrangement established or maintained by government's coercive powers of regulation, taxation, criminalization, and so on. Professions with public cartels operate as *de jure* monopolies, occupying a market niche created and sustained by public means.

To get a better handle on the nature of a public cartel, let us consider medicine as practiced in the US. Physicians in the US compete with one another, either individually or as contributors to group practices, hospitals, and so on. Nevertheless, American physicians enjoy certain government-backed restrictions on competition alongside significant subsidization of their professions and other commercial activities associated with their profession.

For example, US physicians benefit from an array of barriers to entry into their profession. Physicians must have appropriate medical training from an accredited medical school, where such accreditation is granted by an organization (the American Medical Association) itself composed of physicians. Furthermore, practicing physicians must be licensed, where licensure is governed and administered by boards staffed by physicians already in the profession. Such measures protect physicians from competition from new physicians, especially those from foreign nations (Sopher, 2014). US physicians also work actively to protect themselves from rival non-physician providers, such as nurse practitioners or physician assistants, capable of providing at least some of the care reserved for physicians, and from alternative forms of medicine, such as acupuncture (Anderson et al., 2000; Blevins, 1995; Cholbi, 2015: 489–490).

These practices are of course supported by government's coercive power. Punishments for the unlicensed practice of medicine vary across the US, but in my home state, a felony conviction can result in up to 3 years imprisonment, a $10,000 fine, or both (State of California, 1980). Individuals can also be subject to civil damages stemming from foreseeable injuries from the provision of unlicensed care.

Public cartels and their members thus benefit from officially sanctioned restrictions on the *supply* of the goods they provide. But they also typically benefit from measures that stimulate *demand* for their goods. Again, take medicine in the US. The Affordable Care Act now mandates that individuals have health-care insurance. These measures clearly encourage the use of medical services. Furthermore, an array of other policies, public or private, require the use of medical services. These include mandatory physical examinations for various occupations, military service, participation in scholastic sports, immigration eligibility, or the issuance of life insurance, as well as childhood vaccinations, eye examinations for those seeking driver's licenses, workplace or schoolhouse drug testing, drug testing as a precondition for public assistance, premarital blood testing, and so on. Of course, governments also sponsor public health programs (anti-smoking campaigns, for instance) that may dampen demand for particular medical services. Hence, some practitioners benefit more from the profession's functioning as a public cartel. Nevertheless, government policy has generally had an overall stimulus effect on the market for medical services. In most every developed nation, medical care spending as a percentage of gross domestic product has increased about twofold since

1970 (OECD.Stat, n.d.). In the US, the increase has been over threefold since 1960, from about 5 percent to nearly 18 percent in 2016 (Centers for Medicare and Medicaid Services, n.d). No doubt not all of this increase in demand in medical services is due to government policy that stimulates such demand (factors such as an aging population matter as well). But it is unlikely that the relationship between increases in health-care spending and the introduction of national health-care systems and other government-sponsored forms of medical insurance in the past half century is a coincidence (True Cost Blog, 2009).

American medicine thus enjoys a monopoly on the goods it provides as well as benefitting from policies that promote demand for those goods. Reduced competition and increased demand are, of course, economically advantageous for these practitioners. A third feature renders the practice of medicine still more lucrative. The quality of medical care is advanced through a variety of *public subsidies*. One of these is support for medical education. Federal and state funding for graduate medical education totals about $15 billion annually, or $35 per citizen (Heisler et al., 2016). A second form of subsidy is funding for medical and pharmaceutical research. US government support for medical research comes to over $117B annually, or $360 per citizen (Harris, 2015).

It is thus not surprising that positions within professions that have public cartel status, such as medicine, have been highly coveted. Together, the three features typical of cartels serve to take goods that are usually already in high demand anyway and create additional demand, while increasing their quality and desirability and reducing competition for their provision. Professionals within public cartels thus benefit from lower economic risk and greater economic reward.

Not every public cartel will have all three of these features (restrictions on supply, stimulation of demand, and governmental subsidization of its products) in so unambiguous a way. Whether an industry or profession is a public cartel is therefore a matter of degree. And it is not my purpose to argue against the existence of public cartels or to single out US physicians for criticism or blame (Especially so, since my own profession – university-level research and education – has several attributes of a public cartel, including individual and institutional accreditation that serve as barriers to entry into the industry, public support for research, and *de jure* or de facto requirements of university-level education for entry into various other professions that stimulate demand for the goods my profession provides.) Public cartels occupy a distinctive market niche, but this can be justified in light of the goods that a public cartel provides (LaFollette and LaFollette, 2007: 253). In the case of medicine, for instance, the goods it provides (longevity, freedom from pain or discomfort, participation in worthwhile personal or vocational activities, etc) are primary social goods that can only be safely and effectively provided by individuals with certified scientific and clinical competence. Having medicine function as a public cartel has clear public benefits, including reducing risk to patients, improving quality of care, and so on. There is, then, a good case to be made that some goods should be distributed by means of public cartels, medical care among them. Conversely, public cartels are inadvisable for industries that distribute goods of lesser value, whose provision requires less expertise or care, and so on. A plausible case for a

public cartel for florists, bartenders, or pest control specialists would be hard to make, for example.

The question at hand is what specific moral obligations encumber those individual professionals who benefit from being members of public cartels. As mentioned earlier, the notion of conscientious refusal is intelligible only against a background of professional obligations according to which the provision of the 'objectionable' goods is otherwise expected.

That professions in which conscientious refusal has become a matter of controversy are typically public cartels has been noted, particularly by those who conceptualize the obligations of such professions in social contract terms. For example, one common view of medicine is that because 'health care professions have been entrusted with power and authority, as well as certain rights and privileges, as the sole providers of goods and services of vital public importance', the professions have 'incurred certain responsibilities and obligations to society, most importantly to ensure the availability and adequacy of the standard range of services' (Brock, 2008; see also Wester, 2015). Because the medical profession has a monopoly on the provision of its services, it can be seen as a 'public utility' charged with the exclusive distribution of a socially important good (Alta Charo, 2005). So if public cartels are parties to a social contract, what are that contract's terms, and do they permit or prohibit professionals within those public cartels to deny goods on grounds of personal conscience?

Understanding the terms of this contract and their implications necessitates focusing on the burdens that conscientious refusal imposes in a context where a profession has the features I have associated with public cartels. We sometimes overlook the background distribution of economic rights and benefits that structure such interactions, thereby incorrectly supposing that such professionals and their clients 'stand to each other as any two random agents endeavoring to secure their various ends as they make their way through the world'(Fenton and Lomasky, 2005). The next section offers a parable that illustrates what is morally distinctive about such interactions.

Public cartels: A parable

Suppose a community is transitioning from predominantly agrarian to predominantly industrial. As a result, a need for community grocers arises. Several grocers open for business, but one in particular, Bhojan Grocers, is especially successful. In fact, Bhojan has come to have a market-based monopoly on groceries in the community. It came to this monopoly through fair competitive means and maintains it without engaging in anti-competitive behavior. Its monopoly is not due to any legal barriers to entry into the industry, nor does it benefit from any policies that stimulate demand for its products nor any subsidies for their development or refinement. Bhojan simply sells better products at better prices, and so on, so that no other grocer has proven able to attract enough business to stay afloat. By refraining from anti-competitive practices, Bhojan has declined to use its monopoly position to attain cartel status.

However, being operated by Hindus, Bhojan conscientiously refuses to sell beef. Purchasing and consuming beef is legal in this community, but it is controversial inasmuch as the community contains a mix of ethically motivated vegetarians, citizens

concerned about the climate change impact of beef consumption, and a Society of Sirloin Lovers, overseen by LeBoeuf. Occasionally debates break out in the local media about the moral propriety of eating beef and of Bhojan not selling beef. LeBoeuf is inconvenienced by Bhojan's conscientious refusal to sell beef (raising his own livestock is not a realistic prospect and the nearest town with a grocer that sells beef is half a day's drive away). But LeBoeuf does not have a legitimate moral basis for complaint about Bhojan's religiously based unwillingness to sell beef, and certainly not a complaint sufficient to justify his (or the local authorities) compelling Bhojan into selling beef. His conception of the good includes the belief that enjoyment of a medium rare New York strip is essential to a well-lived life; the conception of the good held by Bhojan's proprietors includes no such belief. LeBoeuf and the Sirloin Lovers have to hope that their tastes are (or will become) sufficiently popular that a rival grocer catering to carnivores can successfully operate.

However, suppose that, with or without Bhojan Grocer's backing, the community council creates a system for grocery licensing and a set of training standards for grocery employees, each of which is backed by stiff fines for violators. Furthermore, because the community is frequently beset by natural disasters (it sits at the heart of the Midwest's 'tornado alley'), the community council requires every household to have a basic emergency kit. The council arranges for the costs of these kits to be offset by issuing coupons for emergency supplies that can be redeemed at Bhojan. The local schools also institute a training program at secondary schools for students interested in careers in 'the grocery professions'. The council also initiates a grant program for research into improving food refrigeration and packaging technologies.

For the moment at least, Bhojan remains the only grocer in town. But thanks to these community measures, it has become the sole member of a public cartel. It has a monopoly on operating grocery stores and benefits from various public subsidies that promote demand for, and the quality of, its products. Is it still the case that LeBoeuf has no basis for moral complaint? On its face, he is no worse off with Bhojan as the sole member of a public cartel than he was with Bhojan enjoying a grocery monopoly. LeBoeuf seemingly has no beef, either way.

Yet the establishment of the public cartel has brought about an important shift in the allocation of rights among Bhojan and its customers. When merely a monopoly, Bhojan enjoyed a liberty or privilege with respect to selling beef; it had no duty to sell beef to LeBoeuf (or to anyone). So too did LeBoeuf have a liberty or privilege with respect to buying beef from Bhojan (or from any other seller); he had no duty to buy beef. But once Bhojan enjoys public cartel status, this symmetry of liberties is disrupted. LeBoeuf retains his liberty with respect to buying beef, and it is still the case that LeBoeuf cannot buy beef in the community, just as before. Yet the explanation for this inability has changed. New legal and political facts provide Bhojan with a *de jure* power to deny (or at least burden) LeBoeuf's liberty to buy beef. Previously, when Bhojan acted merely as a market-based monopoly, such sales of beef to LeBoeuf did not occur because Bhojan did not desire that they occur. But with Bhojan now functioning as the sole member of a public cartel, Bhojan is in a legally entrenched position to deny LeBoeuf the beef he desires. The grocer has thereby gained a power or authority over LeBoeuf's choices it did not have before.

This modification of rights and powers brought about by the establishment of the public cartel gives LeBoeuf's complaints newfound moral heft. For the community in question is a politically liberal one: Citizens are to honor one another's rights and refrain from harming one another, but law and policy are designed to be neutral in their rationales, not favoring any one conception of the good over another. Only in this way can law and policy satisfy the liberal requirement of legitimacy, to wit, that they be justified to citizens in terms those citizens can accept (Dworkin, 1985). Bhojan and LeBoeuf have clashing conceptions of the good. Bhojan conscientiously objects to selling beef; LeBoeuf does not conscientiously object to its purchase or consumption. What factors should determine which of these conceptions of the good should prevail? Note that Bhojan's owners do not appeal to their own moral integrity so as only to justify their own refusal to eat beef. Whether they consume beef is their personal business. But given that their commercial business functions as a public cartel, Bhojan (in refusing to sell beef) is in effect endorsing that others not consume beef either,[10] that is, that others live by Bhojan's scruples. Hence, thanks to its public cartel status, Bhojan is empowered to target LeBoeuf and other beef eaters for objectionable moral paternalism (Scoccia, 2000). Bhojan denies beef eaters this good not because eating beef is bad for their welfare; it denies them this good because, by Bhojan's lights, eating beef (and by extension, Bhojan's selling it) is sinful, cows are sacred, and so on. Bhojan being the sole member of a public cartel provides it a power (both in a causal and a moral sense) to compel others to conduct their business according to its scruples. With respect to a vitally important good (food), the grocer has thus acted paternalistically in substituting its moral judgment for LeBoeuf's on the grounds that, with respect to the clash between their respective moral stances regarding beef eating, its judgment is superior to LeBoeuf's (Cholbi, 2017; Groll, 2012; Shiffrin, 2000). Such a judgment does not reflect equal respect for LeBoeuf's conception of the good.

To this point, our parable has established that Bhojan's denying LeBoeuf access to beef (once it comes to enjoy public cartel status) grounds a complaint that LeBoeuf is not accorded the same respect as Bhojan. Yet LeBoeuf's complaint can be strengthened further. In creating the regime of criminalization, taxation, regulation, and on, which established Bhojan as the sole member of a public grocery cartel, the community council gave Bhojan (and any other grocer) an array of benefits and privileges while simultaneously denying various liberties to others. (Other members of the Society of Sirloin Lovers, for instance, could not satisfy LeBoeuf's desire for beef by opening an unlicensed grocery employing those who do not meet the newly established professional training standards.) The only legitimate basis for such an arrangement is public welfare, that is, that grocers provide a vitally important good for which such a regime is necessary. But what may the community ask of Bhojan and other grocers in exchange for an arrangement in which community members forego certain liberties so that Bhojan may have more powers? Were the tables turned, Bhojan representatives would (were they being reasonable in Scanlon's sense (1998: 192–194)) agree that it would be unreasonable for the terms of that exchange not to include a provision that professions benefitting from public cartel status be required to provide controversial goods to their clientele even over their own conscientious objections to such goods. For unless a good has been declared contrary to the public good by its sale being outlawed, clients of a public cartel

have foregone various rights and entrusted the cartel with the provision of all those goods deemed compatible with the public welfare.

LeBoeuf's complaints can be pushed still further, however. For recall that the community council has also incentivized shopping at Bhojan while establishing programs that train Bhojan's workforce and improve its products. As a citizen, LeBoeuf has been taxed to support these programs and has been compelled to use a resource (that is, his income) by which he exercises his liberty to buy the mandatory emergency kit from Bhojan. In LeBoeuf's mind, these facts add injury to insult. For not only is Bhojan able to morally paternalize him and violate the duties of reciprocity they owe him and other citizens thanks to their enjoying public cartel status, LeBoeuf is asked to foot the bill for these insults. LeBoeuf is thereby compelled to lend material support to an entity legally empowered to prioritize its conceptions of the good over his, and indirectly, to support a conception of the good to which he is opposed.

No basic individual right to conscientious refusal

The parable of Bhojan and LeBoeuf enables us to isolate the moral considerations that speak against there being a right to have private claims of conscience honored in those professions that enjoy public cartel status. In essence, defenders of conscientious refusal (and a fair number of its critics too) have not appreciated that transactions between professionals within public cartels and those seeking controversial goods from those professionals is one already structured by asymmetries in their rights and powers. Those asymmetries may be justifiable in light of the nature of the goods public cartels provide, but they must nevertheless be circumscribed by a basic moral equality between the parties. More specifically, the professionals within public cartels are still subject to duties of equal respect toward their clients and their clients' conceptions of the good and have no rightful claim to prioritize their moral or religious convictions over others (Schuklenk and Smalling, 2017). In order for their operating as a cartel to be justified, they must be willing to provide those goods over which they exercise cartel powers. The refusal of practitioners to do so cannot be justified to those seeking such goods in terms that they can reasonably accept. Having the ability to deny goods to which one conscientiously objects does not imply a morally justified power to deny those goods and so amounts to unwarranted moral paternalism. Objecting professionals are in effect deciding controversial moral matters for others under the auspices of 'merely' deciding for themselves. Such professionals thus exercise 'quasi-legislative powers without equivalent democratic legitimacy'(Lynch, 2008). Such professionals also incur duties of reciprocity that include providing those goods which have been legally defined as public benefits for whose provision the public cartel is responsible. 'Claiming an unfettered right to personal autonomy while holding monopolistic control over a public good constitutes an abuse of the public trust' (Alta Charo, 2005) as one skeptic about conscientious refusal has put it. Finally, those denied legally permissible goods through professionals in public cartels may rightfully complain that the state and the profession have compelled them to provide material support for an arrangement that fails to respect them as a moral equal of others.

Again, my criticisms of conscientious refusal by practitioners within public cartels are not an attack on public cartels (or on medicine as the clearest instantiation of such a cartel). My central claim is simply that private individual conscience is incompatible with enjoying the benefits of membership in a professional public cartel. Note that the case made here against their being a right of conscientious refusal does not hinge on details about the *consequences* of acknowledging such a right, including the compatibility of this putative right with other professional norms, or worries about 'scaling up' or the authentication of claims of conscience. The wrongs of honoring conscientious refusal within public cartels instead rest on economic and political facts about the relations between professionals who enjoy the benefits of public cartels and those seeking the goods those cartels provide.

One worry about my position is that conscientious refusal by some practitioners who enjoy the benefits of their profession functioning as a public cartel seems defensible, even innocuous. For instance, in some jurisdictions, barbers and hairdressers enjoy certain public cartel-like protections (for instance, licensing requirements) for reasons that seem minimally defensible.[11] Barbers and hairdressers are in contact with human bodies and tissues, and so it appears reasonable to subject them to licensing requirements. Yet it would seem surprising if barbers or hairdressers had no right to refuse to provide some services their clients are legally permitted to seek out. A barber who refused to shave a racist symbol into the hair of a white supremacist seems to be within her rights to do so, for example, even though (arguably) the barber thereby prioritizes her own values over that of the white supremacist.

Such an example does not contravene my thesis that individual professionals do not have a right to conscientious refusal, however, even if we counterfactually assume that the industry has the other definitive features of a public cartel (state policies that stimulate demand for hairdressing and public subsidization of product development or quality). For one, the mere fact that an industry operates in a public cartel-like fashion does not show that it ought to. After all, industry practitioners may succeed in persuading lawmakers to grant them public cartel status even absent a compelling rationale for doing so.[12] More to the point, such examples underscore the need for care in describing the socially important goods that professionals are entrusted to provide in exchange for membership in a public cartel. That concerns for consumer health and safety appear to motivate licensure for hairdressers and barbers (rather than, say, concerns about their competence as aestheticians, etc.) suggest that the socially important good is best described as the provision of haircuts under safe conditions, and so on, *not* as the provision of any haircut whatsoever under safe conditions. Hence, the refusing barber may reasonably claim that she did not refuse to provide the white supremacist customer the good he is entitled to seek from her.[13]

A second worry about my stance regarding conscientious refusal by members of professional cartels is that it may appear that whether such refusals wrong their clients turns on the nature of the rights the clients have with respect to those goods. One might argue, for instance, that in the case of Bhojan's refusal to sell beef, LeBoeuf has no legitimate claim to beef and so is not wronged by his inability to acquire it due to Bhojan's monopoly and its conscientious unwillingness to sell beef. I contend that even if LeBoeuf has no claim right to beef, he is nevertheless wronged in this instance because

he is unable to exercise his liberty at all. Bhojan's 'positive' duty to sell beef to LeBoeuf is not based, as many positive duties are, on any welfare claim on LeBoeuf's part. It is instead based in the fact that Bhojan, thanks to its status as a cartel, makes it the case not merely that LeBoeuf cannot beef from Bhojan but that he cannot buy beef period. Bhojan's 'positive' duty is therefore a special instance of a negative duty, that is, the duty not to use one's powers to preclude others from exercising their liberties.

All the same, those more sympathetic to conscientious refusal may be unmoved by this response to their objection. However, notice that in many instances, the goods that conscientious refusers operating within professional cartels opt not to provide are not goods that their clients are merely at liberty to acquire. They are goods, such as healthcare procedures, to which they are apparently entitled. In that case, the clients have a stronger basis for asserting that they have been wronged, for they are not denied access to a good they are at liberty to acquire but a good on which they have a legitimate claim. In many instances, then, conscientious refusal by a professional cartel wrongs clients by violating the cartel's obligation to provide a good to which the clients are morally entitled.

My arguments notwithstanding, supporters of an individual right to conscientious refusal may nevertheless feel as if those with moral or religious qualms about providing some good are placed in a moral bind or dilemma if such a right is not acknowledged. I certainly grant that conscientious objectors may feel distress at having to provide a good to which they object. But this complaint is insufficient to ground a right to have such refusals honored. For one, the dilemma is one of professionals' own making which they have full opportunity to avoid (Cholbi, 2015; LaFollette and LaFollette, 2007; Savulescu, 2006; Schuklenk and Smalling, 2017). Gynecologists who (for example) oppose abortion are not like Bernard Williams' famous example of Jim, who unwittingly stumbles into an apparent moral dilemma while vacationing in South America (Williams, 1973). They enter the profession voluntarily, and unless their vocational training is especially poor, they will learn that abortion is among the goods the profession is legally permitted to provide. And even in the case where the provision of a good is legalized or accepted after an individual has joined a professional cartel, the conscientious objector can avoid its provision by leaving the profession. After all, no one has a right that her profession's conditions of credentialing, and so on, remain static in perpetuity, just as they were when she initially enters a profession. Hence, whether the objectionable good is one that the profession has long provided or comes to be expected to provide during the course of an individual's professional career, the same remedy – dissociating oneself from the profession – is available to a practitioner without her having to invoke claims of conscience. So unlike the case of conscientious objection to military service, where an objector whose right is not acknowledged can end up imprisoned (or even executed, in the case of deserters), there is an option available to them that enables them to honor their consciences without being deprived of any other rights or liberties, namely, not entering (or leaving) the profession (Cantor and Baum, 2004; Cholbi, 2015; Fiala and Arthur, 2014; LaFollette and LaFollette, 2007: 250).

That objecting professionals can honor their own claims of conscience without refusing the provision of the relevant goods also gives the lie to the suggestion that such professional conscientious refusal can be justified in terms akin to those that justify civil

disobedience. Conscientious refusal is not a professional's last resort (Rawls, 1971: 373) and unlike those who oppose general statutes and policies, professionals can avoid complicity with them by foregoing participation in the profession. The analogy with civil disobedience is further weakened by the fact that conscientious refusers do not show the integrity that the civilly disobedient do in being willing to accept detrimental personal consequences for their conscience-motivated choices. In accepting (for instance) punishment or risking societal disapproval, the civilly disobedient manifests the moral conscientiousness that differentiates them from ordinary violators of the law who presumably hope to 'get away with' their unlawful conduct. But conscientious refusal manifests no such willingness. Indeed, what defenders of a right to conscientious refusal seek is *immunity* from any detrimental personal consequences for their refusals (LaFollette, 2017). And in conscientiously refusing, a professional need not dissent from her profession's legal requirements in a public or communicative way, as justifiable civil disobedience requires (Brownlee, 2012; Rawls, 1971: 366).[14]

Defenders of an individual right to conscientious refusal may also suspect that my position reflects unduly harsh judgments of conscientious refusers and their motives. A conscientious refuser does not deny a client a good to which she objects so as to disrespect that client or that client's conception of the good, nor with the aim of engaging in moral paternalism. Rather, they see themselves as safeguarding their own moral integrity. Thus, conscientious refusal lacks the objectionable features that, as I argued, entail that a right thereunto should not be recognized.

Certainly professional conscientious refusers need not have explicitly paternalistic aims toward those to whom they refuse to provide the good in question. Their own moral character, not the moral character or choices of others, grounds their conscientious refusal. Paternalism is therefore not their reason for their conscientious refusal. Yet not having paternalistic aims need not entail that conscientious refusers are not acing paternalistically toward those who seek the goods they mean to deny. For a person may show the lack of respect for other rational agents characteristic of paternalism without intending to act paternalistically. Paternalism is an action kind, and it is possible to engage in it without intending to do so or even knowing that one is doing so, just in the way that one engage in cruelty unintentionally, accidentally, or out of ignorance (Cholbi, 2017). In the case of conscientious refusal, moral paternalism is a foreseeable outcome despite being unintended. In such an instance, we may think better *of the refuser* than when the refuser acts intentionally so as to disrespect or paternalize the client requesting the controversial good. But the refusals themselves retain all their morally objectionable properties. Moreover, individuals, including professionals working within public cartels, have duties of moral probity, among which is to interrogate and come to understand the morally significant properties of their actions. That some conscientious refusers may not grasp that their refusals can be disrespectful or paternalistic may excuse those actions, but still render refusers blameworthy for their moral ignorance.

Finally, we should not forget that objecting professionals have other avenues of recourse. They may attempt to persuade the broader public that the good to which they object is genuinely immoral and ought not to be provided. In so doing, they would be engaging in what Kant termed the 'public use' of reason, presenting (in the manner a 'scholar' might) the case for disallowing the provision of the good. What I have argued

here is that practitioners within public cartels must conduct themselves professionally on the basis of a restricted 'private use of reason' associated with the 'post' or 'office' with which they have been entrusted. In this private capacity, they are, in Kant's words, 'entirely passive' and so obligated to obey. But there is no contradiction, as Kant saw, between compelling those entrusted with the pursuit of public ends to obey in official contexts while permitting them in their public role to argue that those ends should be pursued in other ways (Kant, 1996).[15] Such is the burden of conscience professionals may face. But they ought not to be given a unilateral right to shift the burden of conscience onto the profession's clientele (Cholbi, 2015: 492; Kennett, 2017: 71).

Individual accommodation, collective obligation

I have argued that members of professions that enjoy public cartel status do not have a fundamental pre-professional or moral right to invoke claims of conscience that restrict access to those goods with respect to which their profession functions as a public cartel. It is crucial, however, that this conclusion's implications, both theoretical and practical, not be exaggerated or misunderstood. Its implications are both more and less friendly to conscientious refusal than one might expect.

Expressed in terms of Hohfeld's (1919) vocabulary of rights, I have argued that (a) the beneficiaries or clients of a public cartel have a claim against public cartels to be provided the crucial goods over which the cartel has a monopoly, and so on, and (b) the individual members of that profession have no conscience-based power to alter the beneficiaries' or clients' claims against the profession to provide them the crucial goods over which the cartel has a monopoly, and so on.

Note though that (a) and (b) are compatible with individual professionals being granted a *contingent* right to conscientious refusal. For whatever obligations *individual* professionals within public cartels have are derived from the obligations that their professions acquire due to their enjoying the rights, privileges, or goods characteristic of public cartels. And unlike the parable outlined in section 'Public cartels: A parable', public cartels always have more than one member, and the obligations of the profession as a whole may not filter down to each member of that profession (Alta Charo, 2005; Brock, 2008). This permits some latitude in how professions meet the obligations they face as public cartels so long as they discharge these obligations as a body, that is, the moral permissibility of honoring individual claims of conscience is contingent on the profession's capacity to provide the goods over whose provision it operates as a cartel. It may therefore be permissible to exempt particular practitioners so long as doing so allows a profession to discharge its collective societal obligations (Brock, 2008).

Suppose that abortion is deemed a socially important good essential to adequate health. If there are a sufficiently large number of gynecologists or other medical professionals able to perform abortions, and these professionals are distributed geographically, and so on, so that procuring an abortion is not unreasonably burdensome to those who seek it, then members of the medical profession who conscientiously object to abortion may permissibly be granted a right to opt out of performing abortions so long as their opting out does not change these empirical facts so as to unduly restrict anyone's access to abortion. Again, my argument shows that there is not, in those professions that

enjoy public cartel status, an individual right to conscientious refusal. But this can be compatible with some individual professionals having a discretionary institutional right to conscientious refusal against a backdrop wherein their profession as a whole discharges its responsibilities to the public with respect to the goods whose provision they monopolize. Supporters of a right to conscientious refusal may therefore be heartened that, as a practical matter, my conclusion does not rule out conscientious refusal altogether. In fact, at a practical level, I embrace the stance regarding conscientious refusal that Dan Brock (2008) has called the 'conventional compromise'. But unlike Brock, my stance is not a compromise between a pre-institutional or moral right to conscience and a profession's collective obligations. Rather, when (as is often the case) the profession at issue is a public cartel, individual practitioners may be granted a provisional permission to act on their conscientious convictions so long as doing so does not undermine the profession's ability to fulfill its societal obligations. Claims of conscientious refusal can thus be *accommodated* but not vindicated as morally basic. Again, individual professionals within cartels have no unilateral power to ignore the legally permissible claims of beneficiaries or clients to goods their profession monopolizes.

Moreover, a contingent right of accommodation for conscientious refusal carries in tow a contingent obligation for practitioners to provide a good even in the face of their conscientious objection to its provision. For a profession acting as a public cartel has a collective obligation to provide the goods over which it monopolizes access under terms that are not unreasonably burdensome. Hence, the same considerations that permit an institutional right to conscientious refusal also entail an obligation on the part of a profession's practitioners to provide the public goods in question if doing so is required to ensure that their provision is not unreasonably burdensome. A women's health professional working in the panhandle of western Oklahoma, for example, may be morally required to provide abortions despite her own conscientious opposition if her facility is the only facility able to do so within hundreds of miles. Furthermore, this collective obligation imposes positive duties on any profession that functions as a public cartel. If (again) a good is deemed of sufficiently great value to the public and a profession has a publicly enforced monopoly on its provision, then the profession must take measures to ensure that the good is provided to the public on terms that are not unreasonably burdensome. In the case of (again) abortion, this may mean that the medical community must take special measures to ensure that physicians are trained to perform abortions, to ensure that abortion providers are geographically distributed so as to ensure public access to the procedure (by, say, offering loan forgiveness or other economic incentives to physicians willing to set up practices in areas where demand for the procedure greatly exceeds supply, etc.).

Moreover, professional bodies may be within their rights to implement policies disallowing claims of conscientious refusal among their members. They may reject such policies because they result in undue burdens for the profession's clients or beneficiaries or because the goods whose provision the conscientiously objecting professional opposes are so fundamental to the profession's standards of probity or care that their denial would amount to malpractice. (It is difficult to envision, say, a medical organization permitting physicians to conscientiously object to weighing patients or taking their temperatures.) They may also reject such policies because they believe they will result in unfair burden

shifting from those professionals invoking conscientious refusal to the provision of some good to those professionals willing to provide that good. On the view I have defended, the conscientious objector, after all, is making a claim to be exempted from professional obligations that encumber others. Conscientious refusal claims are contingent permissions to deny patient claims, permissions granted by other professionals only when the collective's obligations are truly and fairly met.

Conclusion

I have suggested that the debates concerning professional conscientious refusal have, up to this point, largely neglected the socioeconomic context in which many professions operate, namely, that those professions are public cartels that not only have a monopoly on the legal provision of certain publicly valued goods but benefit from stimulated demand for these goods and public subsidization of the development of these goods. For such professions to admit claims of conscience at the ground level, that is, as moral or pre-institutional rights held by individual practitioners of those professions, is to permit their members to exercise a form of coercive moral paternalism at odds with these professions' public role. Moreover, doing so is at odds with duties of reciprocity that professionals acquire by virtue of the competitive shields and public resources their professions enjoy. And while the accommodation of conscience can be permissible under some circumstances, this is not because the putative right to conscientious refusal is balanced against other equally fundamental considerations. This right is instead permissibly honored only when another *more* fundamental right –the right beneficiaries of a public cartel have to reasonable access to the goods it provides – is satisfied.

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Notes

1. A 2009 US survey (Lawrence and Curlin, 2009) found that a majority of physicians agreed *both* that 'a physician should never do what he or she believes is morally wrong, no matter what experts say' and that 'sometimes physicians have a professional ethical obligation to provide medical services even if they personally believe it would be morally wrong to do so'. A recent survey of medical students in the UK (Strickland, 2012) found almost half of the

students surveyed believed that physicians have the right to conscientiously object to any procedure whatsoever. Surveys in societies without traditions of conscientious refusal often find significant minorities in support of such a right (Finland: Nieminen et al., 2015; Norway: Nordstrand et al., 2014). Intriguingly, conscience appears to resonate more in Western societies with strong individualist traditions. Muslim medical students in the US, for example, are often granted exemptions from cross-gender medical examinations, even though such exemptions are rare in Middle Eastern societies that adhere to conservative Islamic customs (McLean, 2013).

2. As appears to be the case for Florida state's attorney Aramis D. Ayala (Robles and Blinder, 2017).
3. This comes with a large (and for supporters of conscientious refusal, potentially unsettling) caveat, as we shall see in section 'Individual accommodation, collective obligation'.
4. I note that a recent survey article on conscientious objection in medicine (Wester, 2015) casts the dispute as concerned with the proper 'balance' between patient and practitioner interests. See also Giubilini, 2014.
5. It resembles, for instance, the 'conventional compromise' advocated in Brock 2008. We shall have occasion later to pinpoint how my position differs from Brock's.
6. For discussions of these common objections, see Benn (2007), LaFollette and LaFollette (2007), Lynch (2008), Savulescu (2006), and Wester (2015).
7. For corroboration of these worries with respect to conscientious refusal to abortion, see Chavkin et al. (2013), Fiala and Arthur (2014), Kassebaum et al. (2014), and Minerva (2015).
8. Among those who represent the conflict as one involving a practitioner's rights and these concerns are Brock (2008), LaFollette and LaFollette (2007), and Schuklenk and Smalling (2017).
9. Common examples of private cartels include the Organization of Petroleum Exporting Countries (OPEC) and the several organizations that have attempted to monopolize production or distribution of illegal drugs such as cocaine.
10. Note that in fashioning policies that render Bhojan a public cartel, the community need not endorse Bhojan's opposition to beef eating. These policies may be rooted in neutral considerations. All the same, these policies give Bhojan powers, backed by the community's political authority, and so on, to enforce a non-neutral stance regarding beef eating. The community may therefore violate norms of neutrality even through seemingly neutral policymaking.
11. I thank Stephen Munzer for this example.
12. That the state recently passed legislation permitting hair salons and barbers to serve free alcohol to customers (State of California, 2017) suggests that concerns for public safety may not be paramount in motivating licensure requirements for such establishments anyway.
13. An additional reason to believe the barber may have a right to refuse is that doing so contributes to an act of public expression (the white supremacist will be displaying the symbol for all the world to see) to which she objects, whereas in the case of medicine, for example, the fact that a gynecologist who might object to providing abortion provides one anyway is very unlikely to become public knowledge.
14. This is of course not an argument *against* civil disobedience in professional contexts. Indeed, it may be that the best way to salvage conscientious refusal is to reconceputalize it as civil disobedience wherein practitioners would not be immune from detrimental consequences of

refusing goods on conscience-based grounds. Kennett (2017: 79) suggests that such reconceptualization, by making individuals answerable for their claims of conscience, is not necessary in order not to 'trivialize' conscience.

15. As Kennett (2017: 75) succinctly says, Kant would view conscientious refusers as 'active where they should be passive and passive where they should be active'.

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