

MORAL INDETERMINACY, NORMATIVE POWERS AND CONVENTION

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Abstract

Moral indeterminacy can be problematic: prospectively it can give rise to deliberative anguish, and retrospectively, it can leave us in a limbo as to what attitudes it is appropriate to form with respect to past actions with indeterminate moral status. These problems give us reason to resolve ethical indeterminacy. One mechanism for doing so involves the use of our normative powers to place obligations on ourselves and to waive our claims against others. This mechanism could operate through an explicit agreement, but could also operate through implicit endorsement of a social convention. However, there are important limits on when the mechanism can eliminate moral indeterminacy.

1. Introduction

Sometimes, it is indeterminate whether an action is morally impermissible: it is neither determinately permissible nor determinately impermissible.² I will argue that this indeterminacy can be problematic: we are left in a limbo concerning how to act or how to react to others' actions. I will consider whether social conventions can provide solutions to these problems, by making determinate what our moral permissions and requirements are. Specifically, I will discuss one mechanism which focuses on our normative powers to impose obligations on ourselves, and withdraw our

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² I am assuming throughout that the indeterminacy is not merely an epistemic phenomenon. This assumption will be disputed by so-called epistemicists, who hold that when we take ourselves to encounter indeterminacy about a state of affairs, really we are only encountering uncertainty about this state of affairs. The contemporary locus classics for a defense of epistemicism is Timothy Williamson, *Vagueness*, (London: Routledge, 1994).

claims against others. This leaves the mechanism's operation limited—it can only create determinate moral permissions when the indeterminacy arises from people's conflicting claims.

If conventions could introduce determinacy, then this potentially means that our contingent social practices give us moral direction when *a priori* reasons fall short. If you like, culture can fill in some of the gaps that are left by reason alone. In pessimistic moods, some of us may worry that these *a priori* gaps are common. To the extent that they are, we will have a particular interest in how conventions can plug them.

2. Two Examples of Moral Indeterminacy

Since the potential for conventions to eliminate moral indeterminacy can depend on whether or not the indeterminacy arises from conflicting claims of moral persons, it will help to introduce a case that involves conflicting claims, and a case that does not.

Let us start with a case that does not involve a conflict between agents with full moral status. It is determinately wrong to terminate a one-year old. Somewhat contentiously, I will assume that it is determinately permissible to terminate a one-day old zygote. However, there seems no specific point in an entity's continuous development from zygote to one-year old at which it acquires moral personhood. There is no millisecond at which it suddenly become impermissible to terminate it. Instead, the entity passes through a range of borderline cases of moral personhood. When the entity is in this range, it is indeterminate whether it is *permissible* to terminate it.

In addition, it could be indeterminate whether this termination is morally *required*. An agent could face more than one *pro tanto* duty. Physicians acquire moral obligations to provide medical procedures where appropriate. So if a physician has no grounds for conscientiously objecting to abortion, then she will typically have an obligation to provide one when appropriate and upon request. The physician's moral obligations might plausibly be influenced by the legal and medical codes of her community. But suppose these codes fail to specify a precise age at which it becomes impermissible to terminate a foetus. Instead, these codes vaguely specify a reasonable person standard for determining whether an abortion is appropriate. Suppose further that a woman has strong reasons for aborting a foetus that is a borderline moral person. Given

the woman's reasons, if the foetus were determinately not a moral person, then a physician would be morally required to perform the abortion. Consequently, given the foetus is indeterminately a moral person, it is similarly indeterminate whether the physician is morally required to perform the abortion. The abortion is simultaneously indeterminately required and indeterminately impermissible.³

Now let us consider an example of moral indeterminacy arising for full-fledged moral agents. Suppose that a community has no social norms for how late a noisy party can go. Plausibly, this would give rise to moral indeterminacy. It could be determinately permissible to make noise at 8pm, and determinately impermissible to make noise at 3am, and yet there is no precise millisecond at which it becomes impermissible for the party to continue being noisy. It is not as if it could be that when the clock moves from 11:29 38s to 11:29 39s, it suddenly becomes appropriate for neighbour Jones to jump from her bed and think, 'Right, now *that* is just too much!' As such, there may be borderline cases of parties that make noise too late into the night. For example, a party that is noisy until 11.30pm could be such a party. If so, it would be indeterminately permissible for someone to host a noisy party that late.

3. Is moral Indeterminacy Problematic?

Should we regret the existence of moral indeterminacy? In what follows, I will argue that it creates a problem for us when *deliberating* about what to do, and a problem for how we *react* to actions—our own actions and others'.

3.1. Problems with Deliberation

First take deliberation. When it is indeterminate what you morally ought to do, you are confronted with a deliberative question for which there is no determinately correct answer. It is as if you are presented with a borderline case of a red tile, and forced to put it into a pile for red tiles or a pile for tiles that are not red. Since each category is unsuitable, you cannot reasonably conclude that

³ See also some of Robert Williams's examples in his 'Indeterminacy, Angst and Ethics,' in this issue of *Ratio*.

the tile ought to go in either category. Being forced to make this sort of choice might seem frustrating.

But must this choice be frustrating? Clearly, any choice will be arbitrary. But Buridan's ass need not find it frustrating to pick a bale of hay. So why not relax and pick arbitrarily, knowing that you are doing your best?⁴

We might have a special worry with moral arbitrariness. A moral choice will affect other people. But if we are concerned for, and respect, the people we affect, then we might feel uncomfortable making an arbitrary choice that disadvantages them. Often, we can avoid this anguish by ensuring that our choices are interpersonally justifiable insofar as we can tell others about the valid reasons behind the choice we made. But there are no such valid reasons when we pick arbitrarily: the reasons run out before a conclusion can be reached. Perhaps, we can justify to others our resolution to implement a procedure of choosing arbitrarily; but this falls short of a substantive justification of the particular choice that we make as the outcome of this procedure. So we might think there is something specially problematic about arbitrary moral choices.

Our attitudes towards ties may support this. We typically prefer to avoid making an arbitrary choice and use chance to break the tie. For example, we might toss a coin to distribute an indivisible benefit to one of two equally good claimants. Still, it is somewhat puzzling why we should be happier leaving these moral matters to an arbitrary fall of a coin, rather than an arbitrary choice of an agent.

I suggest the explanation may lie in epistemic considerations concerning the agent's motives. All parties have good evidence that the fall of a coin genuinely was arbitrary. Meanwhile, even if an agent genuinely makes an arbitrary choice, doubts may remain about whether the choice was unbiased—doubts that might even be in the mind of the agent herself. These doubts are especially likely when the agent is one of the persons whose interests are affected. This raises the possibility either that the agent is biased towards herself or overcompensates and ends up biased towards

⁴ Ruth Chang argues that arbitrary stipulations are appropriate to resolve vagueness, but not to resolve two things being 'on a par.' Ruth Chang, 'The Possibility of Parity,' *Ethics* 112 (2002), pp. 659–688 at pp. 679–688. For criticism of Chang on this point, see Cristian Constantinescu, 'Value Incomparability and Indeterminacy,' *Ethical Theory and Moral Practice* 15 (2012), pp. 57–70; Williams, 'Indeterminacy, Angst and Ethics.'

others. Consequently, it would be rare to be confident that one's choice was entirely arbitrary.

The possibility of bias is significant in another way too. Sometimes, we will not know whether there is a determinately right thing to do or whether it is indeterminate what to do: our powers of discrimination are not up to the task of finding the border between the determinate and the indeterminate. This is not least because the border itself is vague—the phenomenon of so-called higher-order vagueness. This imprecision in our moral discrimination is compounded by the problem of bias, which introduces another way in which our discrimination can be unreliable. Together, these epistemic problems mean that we will frequently be unsure whether our action is determinately permissible or not.

3.2. *Reactive Attitudes towards Indeterminately Impermissible Actions*

The second type of problem concerns the aftermath of deliberation. After deciding whether to perform a determinately impermissible action, a residue of deliberative anguish is likely to remain in the attitudes that the agent and others appropriately form towards the action. These would be reactive attitudes, to use Peter Strawson's helpful terminology.⁵ That is, these are distinctively interpersonal attitudes that we adopt towards ourselves and others when holding each other accountable for our actions and determining whether these actions were performed with appropriate goodwill and respect.

One site for this residue is in the agent's own reactive attitudes towards her decision. Take the party example. Suppose you throw a noisy party that goes on so late that it is a borderline case of a morally impermissible party. The retrospective attitude towards having performed an impermissible action is guilt. Since it is indeterminate whether the party is impermissible, it would be indeterminate whether guilt is appropriate. Assuming you are aware that it is indeterminate whether guilt is appropriate, what attitudes is it appropriate for you form towards your own action? A glib response is that there is no fact of the matter about what attitudes are appropriate. But that answer obscures the fact that it no longer seems appropriate either to experience full-fledged guilt or to experience full-fledged lack of guilt. Instead, the appropriate attitude would be somewhere in between.

⁵ Peter Strawson, 'Freedom and Resentment,' *Proceedings of the British Academy* 48 (1962), pp. 1–25.

Another site of this residue concerns the attitudes of other people towards the agent. What attitudes is it appropriate for your neighbours to take towards you for throwing the party so late? If it were determinate that you acted permissibly, then your neighbours would be obliged to make their peace with your behaviour. Meanwhile, if it were determinate that you have acted impermissibly towards them, then they would be justified in feeling resentment towards you. But while it remains indeterminate whether you acted permissibly, they are left in an unstable middle ground.

It is perplexing how to characterise this middle ground. It is not, however, a topic that has received much attention. I tentatively suggest that we can assimilate our reactive attitudes towards indeterminate wrongdoing to our reactive attitudes towards uncertain wrongdoing. To introduce uncertainty, imagine yourself wondering whether that bump in the road you just drove over was the neighbour's pet. If you consider simultaneously the hypothesis that you maimed someone's pet and the hypothesis that you did not, then it would be appropriate for you to be in a state that is somewhere between full-fledged guilt and its absence. Now take the neighbour's perspective. They know that Malteser's tail is now wonky, but they are not sure whether the red car speeding away is yours. Wondering whether someone has just maimed your pet is to be in a state somewhere between full-fledged resentment and its absence. In both the case of guilt and resentment, I think that the appropriate attitudes when one is uncertain about whether wrongdoing occurs have an ambivalent nature. Similarly, I suggest that there is an ambivalence in the appropriate attitudes to form towards an action that is indeterminately permissible. Since it is unpleasant to feel ambivalently guilty, and unpleasant to be the target of someone else's ambivalent resentment, these reactive attitudes function as sanctions. In that sense, a residue of the deliberative anguish remains.

3.3. A Motivation for Removing Moral Indeterminacy

We have looked at deliberative anguish and its residue in reactive attitudes. Both are problems for us because they are (i) undesirable in themselves; and (ii) inescapable even when everyone is appropriately morally conscientious. Even if someone cares as much about morality as we could demand, she would still experience deliberative anguish when confronted with an action that is indeterminately impermissible and indeterminately required. To

illustrate this, consider our earlier example of a physician who has to decide whether to provide an abortion when the foetus is on the margins of moral personhood. Even if the physician tries her moral best, she will face deliberative anguish and will be the object of ambiguous reactive attitudes after the fact. This should strike us as sub-optimal. Indeed, it might seem simply unfair, if we think that a fair moral system always leaves someone an option to avoid sanction. A more attractive moral system would allow morally conscientious agents to avoid these costs. This point does not show that moral indeterminacy is an illusion, since it may just be that moral life is not as fair as we should like. But it does show that we have reasons to eliminate moral indeterminacy, if we are able.

4. Conventional Mechanisms

If moral indeterminacy is problematic, how can it be eliminated? There are plausibly several mechanisms by which it could be removed. In what follows I will explore one of these: the establishment of a convention that eliminates the indeterminacy. To be clear about the mechanism from the start: this moral potency of conventions does not derive from the aforementioned problems with moral indeterminacy. Instead, the conventions have normative force from an independent source. My claim is just that this independent normative force can eliminate moral indeterminacy in the sense that it becomes determinate which actions are permissible, impermissible or required.

There are at least three motivations for exploring conventional solutions. First, examples like the neighbourhood party example naturally suggest these solutions: it seems what is missing is a general convention for how late parties should end. Second, in order to remove semantic indeterminacy about descriptive matters of fact e.g. baldness, a common proposal is that we should establish more detailed semantic conventions. Even though there are significant disanalogies between semantic and moral indeterminacy, the question still arises whether a similar strategy might work in the moral case. Third, in legal contexts, authoritative legal conventions can solve the problem of indeterminacy in the law. Consequently, the question arises also to whether a similar approach might be possible in the moral domain. While we lack moral authorities whose decisions bind the rest of us in the way that

courts' precedent binds future legal decisions, it might be possible for moral conventions to play a similar role.

My proposal will focus on how conventions can interact with our normative powers: by endorsing conventions, we exercise our powers to impose obligations on ourselves and release others from their obligations. In that respect, my proposal differs from—and potentially complements—three familiar normative appeals to convention. First, my proposal is different from the claim that 'coordinating conventions' can provide us with solutions to coordination problems.⁶ Take the convention of driving on one side of the road. This coordination solution creates a pattern of behaviour that allows each individual's pursuit of her own self-interest to harmonise with others' pursuit of their self-interest. Second, 'constitutive conventions' can provide concrete ways of instantiating abstract values.⁷ For example, we have moral reasons to be civil towards and respectful of each other, and social conventions can determine which types of behaviour count as civil or respectful. Third, sometimes 'there is a need for some principle to govern a particular kind of activity, but there are a number of different principles that would do this in a way that no one could reasonably reject.' In the face of this, Thomas M. Scanlon proposes that 'if one of these... principles is generally... accepted in a given community, then it is wrong to violate it simply because this suits one's convenience.'⁸ This principle appeals to our reasons to cooperate for mutual gain. My proposal differs from all three of these conventional mechanisms because these three give no role to the exercise of our normative powers in their rationales for why our obligations change.

5. Removing Moral Indeterminacy by Voluntary Choice

To develop my account of how a convention can interact with our normative powers, I wish to first turn to a different way that we can eliminate moral vagueness: by making voluntary choices.

⁶ David Lewis, *Convention: A Philosophical Study*, (Cambridge MA: Harvard University Press, 1969).

⁷ Andrei Marmor, *Social Conventions*, (Princeton: Princeton University Press, 2009).

⁸ Thomas M. Scanlon, *What We Owe to Each Other*, (Cambridge MA, Harvard University Press, 1998), p. 339; See also Barbara Herman, *Moral Literacy*, (Cambridge MA: Harvard University Press, 2007).

Voluntary choices are familiar ways that people can ‘shape their normative landscape,’ to use David Owens’s apt phrase.⁹ For example, by making promises or contracts, a group of people can impose on themselves moral obligations to perform certain actions. If the agreements are voluntary, and their terms are understood, then the obligations are typically generated. The reason why is that we have a normative power to impose obligations on ourselves, and we can exercise this power through communicating our voluntary choices.

These obligations can remove indeterminacy, but only by making morality more restrictive. That is, they leave us with fewer things that we are determinately or indeterminately permitted to do. This is potentially a drawback, because moral freedom can be a good thing.¹⁰

As well as making morality more restrictive, can voluntary choices eliminate indeterminacy by making it more permissive? They can, but only in a limited range of circumstances. Consider the neighbourhood party example. Let us assume a party that is noisy until 11.30pm is a borderline case of an excessively late noisy party. Now suppose that the residential association comes together and unanimously agrees that parties may continue making noise until 12am but no later. This agreement would mean that the moral indeterminacy is resolved in favour of greater moral permissibility. The agreement is an example of an exercise of another normative power of ours—the power to withdraw our claims against others, releasing them from obligations to us. We can exercise this power to withdraw both determinate and indeterminate claims.

The residential association’s agreement creates a *new* way for the community to organise their moral lives. In addition, individuals can make voluntary choices to take part in *pre-existing* practices. Onora O’Neill argues that key obligations to care for children can be understood in this way:

Once imperfect obligations are institutionalized, certain positive special obligations are established to which certain positive

⁹ David Owens, *Shaping the Normative Landscape*, (Oxford: Oxford University Press, 2012).

¹⁰ Of course, it is a familiar point that a restriction on an individual’s freedom may benefit *others*. Indeed, it may benefit them insofar as it leaves them better able to pursue their own plans. For example, a restriction on physical violence takes away an option to behave violently, but this then creates more valuable opportunities for others to pursue other projects.

rights correspond. For example, one aspect of institutionalizing a fundamental obligation to care for children in particular social circumstances might be to assign social workers a positive obligation to monitor specific children at risk.¹¹

Here a background institution specifies obligations for people who fill the role of e.g. parent or social worker. If someone voluntarily chooses to play this role, then they assume these obligations.

This story can be told in the case of indeterminacy:¹² by voluntarily agreeing to join institutions, one can acquire determinate obligations that supersede one's prior indeterminate obligations. Similarly, one can waive one's rights and release others from their corresponding indeterminate duties. Thus, by voluntarily joining a pre-existing institution, one can resolve moral indeterminacy in either a more restrictive or permissive direction.

6. Removing Moral Indeterminacy by Convention

So far, we have focused on how explicit choices can resolve moral indeterminacy. These choices do so by constituting exercises of our normative powers to impose obligations on ourselves and to release others from obligations towards us. In what follows, I will argue that explicit choices are unnecessary in this respect. As well as through explicit agreement, we can re-shape the normative landscape by implicitly endorsing a convention.

To argue for this claim, my strategy will be to begin with an idealised example of a *universal* convention, thereby postponing the complication of conventions that are only partially endorsed. So let us return to the example of the noisy parties. Suppose that no explicit agreement has been made about which time a noisy party must end. As such, it remains indeterminate when a noisy

¹¹ Onora O'Neill, 'Children's Rights and Children's Lives,' *Ethics* 98 (1988), pp. 445–463, at pp. 448–9; see also p. 458.

¹² Indeed, this may be the right story in O'Neill's example of the social workers. O'Neill offers this example, in the context of theorising imperfect duties to care for children: institutionalising imperfect duties can create specific perfect duties, although these institutionalised duties do not 'exhaust the content of a fundamental imperfect obligation.' O'Neill, 'Children's Rights,' p. 489.

Some people characterise an imperfect duty as one that under-specifies what an individual must do to fulfil the duty, leaving her latitude for choice in this respect. In that respect, we might think there is a type of moral 'indeterminacy' here. However, there appears to be a difference between this under-specification and the alethic indeterminacy involved in vagueness or incommensurability.

party should end, and some parties will be borderline cases of a noisy party that goes on too late. Let us suppose that 12am is a time at which it is indeterminate whether the party went on too late. Let us suppose that Jones chooses in a morally arbitrary manner to end her noisy party at 12am. The next week Smith throws a party and decides simply to follow Jones's lead, turning off the music at 12am as well. With these two salient precedents, the following week, Bloggs throws a party and does the same... And so on. Eventually, a regular pattern emerges within this community: each time someone throws a party, the music is turned off no later than 12am. This would intuitively strike us as a convention, and it fits Thomas Scanlon's definition of a 'social practice' as consisting in 'the fact that the members of a given group generally behave in a certain way, have certain expectations and intentions, and accept certain principles as norms.'¹³

Does this convention alter the moral facts about when a party should turn off its music? The case is currently too under-described for us to tell. Consider two ways of filling in the details. First, we might imagine that the other residents bear the 12am parties grudgingly. When Jones throws the very first party that turns off the music at 12am, the other residents adopt towards Jones reactive attitudes that are ambivalent between toleration and resentment. Further, let us suppose that they harbour these ambivalently resentful attitudes towards *all* the subsequent party-throwers. In this variant of the case, I think we should conclude that the moral convention does not alter the underlying moral facts: it remains indeterminate whether it is morally permissible to continue making noise at a party until 12am.

¹³ Scanlon, *What We Owe*, p. 295. It would not fit some philosophers' definitions of conventions. In particular, it would not fit David Lewis's conception of a convention as a solution to a coordination problem, if we require that each takes part in the convention because it is in her self-interest to do so, providing that others do so as well. Lewis *Convention*. The party convention could more plausibly be fitted into Andrei Marmor's conception of a 'constitutive convention.' Marmor makes use of John Searle's notion of constitutive rules as ones that 'do not merely regulate, [but] create or define new forms of behavior.' John Searle, *Speech Acts*, (Cambridge: Cambridge University Press, 1969), p. 33. Marmor notes that these rules can create new social practices. These may help make concrete certain abstract values. For example, 'the value of friendship is too indeterminate to specify, in and of itself, what... [forms of behavior are expected of friends as instantiations of the values of friendship].' Marmor, *Social Conventions*, pp. 150–151. A convention can help with this specification. To relate Marmor's point to our discussion, is worth noting here that by 'indeterminacy,' Marmor appears to mean something like under-determination, rather than the alethic notion of indeterminacy that I am discussing in this essay.

But we can fill in the details of the case in a different way that supports the view that the convention removes the indeterminacy. Suppose that the residents of the community come to accept the convention of throwing parties until 12am. They come to judge that this is the 'way things are done around here' and consequently tolerate the 12am parties. Moreover, they come to judge that it is inappropriate to resent someone whose party makes noise that late. This does not seem an unlikely way for the community to react: it seems a fact of human nature that we are liable to accept common behaviour as morally acceptable. But if the residents universally come to accept the 12am parties, and common knowledge arises about this universal acceptance, then these parties do actually become morally acceptable. The reason why is that a convention has emerged based around a social code according to which a noisy party is permissible just in case it ends before 12am. By endorsing the convention, the residents have implicitly accepted this code, and common knowledge has emerged about this. As a result, the residents have withdrawn their claims against the parties: implicitly endorsing the code counts as exercising their normative power not to object to the parties that last until 12am and their normative power to impose an obligation on themselves not to have parties that last past 12am.

The convention also grounds certain counterfactual facts about which explicit agreements would be made. If there were now to be a neighbourhood association meeting to decide how late parties can go, the outcome of this meeting would be easy to predict: since the neighbourhoods' residents comply with the actual convention, and there is no preferable alternative, the meeting would choose to formally enact the informal *status quo*. That is, the community's implicit endorsement of the party code makes it the case that hypothetically they would explicitly agree to implement the code if they were to make such an agreement. In turn, this implicit endorsement of the code undermines the need for an actual explicit agreement. Why go through the trouble of convening, deliberating and deciding, if the outcome of this meeting would simply be to settle upon the code that is already widespread and complied with? Given the costs of formalised collective-decision-making, it is prudent to make do with extant informal collective decisions. A central rationale for formal institutions is to make sure the community is run in a way that reflects the overall will of the community. If this rationale is achieved outside of these institutions, then there is a case for bypassing the institutions.

So far, we have looked at how the code becomes prevalent in a community. Now let's consider each individual's relationship to this code. We may suppose that they never explicitly agree to it. Rather they become socialised into thinking that this is the appropriate way for parties to be run, and form their normative expectations accordingly. If there is common knowledge that the code is implicitly endorsed, then this endorsement constitutes an exercise of their normative powers in the same way that an explicit adoption of the code would do. Thus, by implicitly endorsing the code, citizens can impose on themselves determinate obligations to conform to the code, and withdraw any indeterminate claims that they have against someone who follows the code.

7. When can Conventions Remove Moral Indeterminacy?

So, in some circumstances at least, a social convention can remove moral indeterminacy. The mechanism for removing the indeterminacy was an implicit endorsement of a convention. This can constitute an exercise of people's normative powers in the same way that an explicit agreement can. Now let us consider how and under what conditions this mechanism can operate. One obvious limitation to the mechanism's operation is that it can only resolve the moral indeterminacy *locally*. That is, the moral indeterminacy will remain outside of the community governed by the convention. In addition to this, there are three significant limitations to the scope of the mechanism.

7.1. *Unjust Conventions*

Plausibly, the noisy party convention would be free of moral taint. But not all social conventions are so innocent. Some conventions distribute benefits and burdens unfairly. Other conventions institute or support problematic social relationships, such as those at the heart of group-on-group oppression. When the convention is morally problematic, it may well be unable to remove ethical indeterminacy.

Unjust conventions may be unable to make morality more restrictive. For example, if a privileged group endorses a social code that sustains their privilege and oppresses another group, this endorsement does not generate for the privileged group an obligation to comply with it. (Indeed, in this scenario it is plausible that the social code would involve actions that are

determinately impermissible.) So an unjust code may fail to shift indeterminate moral permissions into determinate moral obligations.

Equally, unjust conventions may be unable to make morality more permissive. Suppose a dominated group internalises oppressive social norms according to which members of this group ought to be deferential to a privileged group. By internalising these norms, the dominated group may accept the oppressive ideology on its own terms, and endorse the social conventions based around this ideology. But typically this endorsement would not constitute a valid exercise of their normative powers. As a result, the dominated group's implicit endorsement of the convention would not withdraw their claims against the privileged group. Consequently, the convention would not resolve indeterminate obligations of the privileged into determinate permissions for them.

What counts as an unjust convention in these contexts is a difficult issue that I cannot resolve here. By failing to separate the morally problematic and unproblematic conventions, my analysis is correspondingly limited. All I can do is flag the difference that is made by injustice in the convention, leaving unfinished the hard work of giving an account of this injustice.

7.2. *Minority Opposition to Conventions*

At the beginning of Section 6, we considered a convention that is universally endorsed. But what if the convention is only endorsed by the majority of the community? Perhaps there is a minority who never attend parties, but value getting early nights. What if these members consider the convention excessively permissive, and refuse to endorse it? Similarly, there could be a minority of community members who are party animals that are unwilling to bind themselves to stopping parties at 12am.

What if they consider the convention excessively restrictive, and refuse to endorse it? The convention could still exist if enough of the majority take part in it—universal participation is not a necessary condition for the existence of a convention. But would the minority's opposition interfere with the ability of the convention to resolve moral indeterminacy?

Opposition to a convention places a significant limitation on how the conventional mechanism can remove moral indeterminacy. The majority's endorsement of a convention does not constitute an exercise of the minority's normative power to withdraw

their claims against the convention or their normative power impose obligations on themselves. So, if there is common knowledge that the minority's opposition exists, or is likely to exist, then the minority have not withdrawn their claims against the conventionalised behaviour. Consequently, to the extent that the indeterminacy is grounded in these claims, the moral indeterminacy persists.

This is a significant limitation to the application of the conventional mechanism. That said, there are two further considerations that tell the other way.

First, it may be that the minority does endorse a higher-order resolution procedure. For example, they may hold that when there is disagreement about a communal matter, this disagreement should be resolved democratically by majority vote. They may hold that this resolution can take place in formal institutions, like the residential association's meetings, but also that the will of the majority can become manifest informally. *If* they hold all of these views about how to resolve conflicts, and then they are aware that the majority endorses the convention, then the minority derivatively endorses the convention as well.

Second, a difference is made by whether the minority have communicated their opposition to the convention. Suppose they have not voiced their opposition. We cannot straightforwardly infer from this silence that they are not opposed, since often people have ulterior reasons for remaining silent, such as to avoid social conflict. But in some circumstances, opposition can be voiced without significant cost—for example, if the community has well-run association meetings. If the minority has not made use of these opportunities while the convention has emerged, then it would be reasonable for the other citizens to interpret the minority's silence as assent. As such, the silence could constitute a speech-act (or a *speech-omission*) that publicly endorses the code, even though the minority has not explicitly endorsed the code.

Moreover, withdrawals of claims can become permanent. Whether they do become permanent depends on the nature of these claims: it is relatively easy for this to happen with claims over social rules and property, but much harder, and arguably impossible, for it to happen with our claims over our bodies. For example, consider easements. Suppose that Jones has an estate between a residential area and the town centre. The residents of that area could reach the town centre much more easily if they took a shortcut across Jones's estate. When the first few residents

take this shortcut, it is open for Jones to object and assert her claim that they do not trespass. But suppose Jones has known that many people have been taking these shortcuts over a long period of time, and Jones has failed to voice any objection. Assuming there was no significant costs to Jones's objecting to these shortcuts, Jones's failure to object has given the residents an easement to her property. If this has gone on for long enough, then this easement may become permanent. In this way, withdrawals of claims can become permanent.

7.3. *The Source of Moral Indeterminacy*

The convention mechanism can only remove certain types of moral indeterminacy. It operates through the exercise of our normative powers to impose obligations on ourselves and withdraw claims against others. Accordingly, this mechanism can remove ethical indeterminacy only when this indeterminacy results from the claims of moral persons.

This does not cover all of morality. Our initial abortion example would not be covered. Take a borderline foetus such that it is indeterminately impermissible to terminate it. The fact that this termination is indeterminately impermissible is not explained in terms of the claims of competent moral persons. As such, a community cannot make this action determinately permissible simply by withdrawing their claims against these abortions. This is a point that generalises to all types of moral indeterminacy that do not arise because of people's claims against certain forms of behaviour. This type of moral indeterminacy cannot be resolved in the direction of a more permissive morality.

It could still be resolved in the direction of being more restrictive. The community could impose obligations on themselves. They could impose obligations on themselves not to terminate foetuses beyond a certain stage of development. By doing so, they would not reduce the indeterminacy of their obligations *insofar* as these obligations are grounded in the rights of the foetus. Still, they could convert a situation in which they have all things considered indeterminate moral requirements (not to terminate borderline persons) into determinate moral requirements not to do so. This would be a way of making the ethics of abortion more restrictive.

But while this resolution may remove the problems with moral indeterminacy, it comes with an obvious cost. The moral freedom

to perform abortions is valuable to many people, and in particular to women who would want these abortions. Social movements advocating women's right to choose are motivated by an appreciation of this value. Promoting this value seems more important than avoiding the problems associated with moral indeterminacy.

Unfortunately, the value of women's reproductive choices cannot be promoted through a convention that converts indeterminately impermissible terminations into determinately permissible ones. This is because the convention cannot eliminate the moral reasons against these terminations—reasons that stem from the borderline personhood of the foetus.

In this respect, the best the convention can do is to impose obligations on people not to sanction people who terminate borderline persons. For example, a community can impose on itself obligations not to legally or socially sanction women who seek terminations of these borderline foetuses. Similarly, the community can bind itself not to legally or professionally sanction physicians for performing these terminations. But while the absence of these sanctions may make for a society with more legal or social freedom, it does not make for more moral freedom. The indeterminately impermissible status of the terminations would remain.

Given the political importance of abortion controversies, it is worth pointing out that the practical significance of this result may be quite limited. This significance would depend on where the range of borderline moral persons lies, and how large the range is. It may be that the range is not very large. If so, the impossibility of resolving the moral indeterminacy would affect only a small range of cases.

Still, the abortion example is merely one illustration of a general result that is theoretically interesting: the conventional mechanism under discussion cannot resolve moral indeterminacy in the permissive direction when the moral indeterminacy is not grounded in people's claims.

8. Conclusion

Let us end with a brief summary. We have looked at a mechanism for removing moral indeterminacy. This mechanism works through the exercise of our normative powers: just as explicitly agreeing to a code can shape our obligations and claims, so implicitly endorsing the code of a convention can do so. In this

way, endorsing a convention can remove moral indeterminacy in either a permissive or restrictive direction. This can eliminate problems that come with moral indeterminacy, including deliberative anguish and ambivalent reactive attitudes towards indeterminately impermissible actions. But a convention can only achieve these moral transformations locally and under a limited range of circumstances. The convention can remove moral indeterminacy through this mechanism only when the convention is just and when it is universally adopted—either by people who favour the convention on its own terms or by people who think that norms can be specified by the will of the majority, and that the convention embodies this will. Moreover, through this mechanism, the convention can only shift the moral indeterminacy in a more permissive direction when the moral indeterminacy is sourced in people's moral claims. When this is not the case, the moral indeterminacy can only be resolved in a restrictive direction—an unhappy result whenever moral freedom is valuable. Thus, the role for this conventional mechanism must be modest. If a more ambitious role for convention in resolving moral indeterminacy is to be sought, then it must be sought through other mechanisms than the one considered here which is based on individuals' normative powers.¹⁴

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¹⁴ The thought that social practices are necessary for generating determinate duties is frequently associated with Hegel. So one conclusion we may draw is that if the Hegelian project is to succeed, then it will require more powerful theoretical resources than the ones explored in this essay.