

# Where We Should Say Stop: The Limit of Markets

## 1. Introduction

There *are* legally enforced limits to markets. In the UK, you need a firearm certificate to buy a gun, you cannot legally sell Cannabis, the buying and selling of sex is legal in some circumstances and illegal in others, organs can be legally donated by living people but not bought or sold, and paying for contract pregnancy is outlawed.<sup>1</sup> This essay will discuss justifications that motivate views about where the limits of markets *should be*. These justifications are examples of proposed moral principles and I will evaluate them through the method of reflexive equilibrium. I will use reflexive equilibrium in a weak sense, comparing the proposed moral principles for the moral limits of markets and our moral experiences to ensure that they are all *consistent* with one another. Using this method ‘we are able to recognize some [moral principles] as more secure and others as less so, and we can use that recognition to revise our less secure judgements and principles in light of our more secure ones’.<sup>2</sup>

I will argue that something I call the ‘new nuanced account’ is a good account for the limits of markets. I reach this conclusion by first evaluating essentialist arguments. I argue that essentialist arguments, in all their forms, are flawed either due poor logical form or because they cast the net of permissibility too wide because their moral principle or principles are not consistent with our moral experiences.

I then move to evaluate an alternative: the nuanced account that Satz proposes. I explain and evaluate the model, using reflexive equilibrium to demonstrate that it has the opposite problem, putting some things being the limits of markets in a way which is not consistent with our moral experiences. To remedy this, I remove one of Satz’s principles which I deem to be the issue. This results in an under-extensive scope for the remaining principles compared to our moral experiences, namely around issues of equality between citizens in a democratic sense, and so I make an alteration to the principles to render a scope which is *just right* in reflexive equilibrium terms: one in which all of our moral experiences and our moral principles are consistent. At the end of the essay, I then defend the position I have motivated from worries about its lack of decisiveness by illustrating that a lack of decisiveness is a strength of this model.

## 2. The Essentialist View

Essentialist arguments about the moral limits of markets claim that by the nature of certain goods or services, those goods or services *should not* be subject to market transactions. Thus, these goods or services should not be bought or sold under any conditions. The term ‘market-inalienability’ will be useful here. As Radin defines it, for a good to be market-inalienable is for that good to not permissibly be bought or sold on the market.<sup>3</sup> If an essentialist believes that sex is market-inalienable, then they believe that there is no moral justification for buying or selling sex in all circumstances. I will discuss nuanced views in more depth in §3, but the distinction between them and essentialist positions is that the essentialist is *only* interested in arguments which assert the moral limits of

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<sup>1</sup> See (The Home Office, 2022), (The Criminal Prosecution Service, 2023), (The Criminal Prosecution Service, 2019), (UK Public General Acts, 1989), and (GOV.UK, 2023)

<sup>2</sup> (Cohen, 2008, pp. 20-21), for an example of how this works, see (Cohen, 2008, pp. 78-79)

<sup>3</sup> (Radin, 1987)

markets by outlawing transactions concerning certain goods or services because of something about the nature of the good or service, whilst nuanced views *could be* interested in this but *will also* be interested in more.

Through the term ‘essentialist’, which I am borrowing from Satz, I am grouping two types of motivation. The first is what I will call ‘shopping list’ essentialism, and the second is essentialism as motivated by a general principle.

‘Shopping list’ essentialism is essentialism motivated through many separate absolute rules about the permissibility of transactions for certain goods and services. For example, to be a shopping list essentialist may simply be to hold that babies are market-inalienable because one of the moral absolute rules about the limits of markets is that babies ought not be the subject of market transactions. The reasoning here is weak because it is circular. For shopping-list essentialists, something should not be bought or sold if it is a part of the list of market-inalienable things, but something is on the list if it market-inalienable.

The circular nature of shopping-list essentialism means that most essentialists defend their position using general principles. An essentialist general principle must be a general principle which produces a *fixed* set of goods and services as being market-inalienable, which I will suggest opens the principles to criticism through our methodology of reflexive equilibrium. Let me demonstrate how.

One example of an attempt of general principle essentialism comes from Carole Pateman who defends her judgement that contract pregnancy is market-inalienable by arguing that reproductive labour is a form of labour which is *more* integral to the identity of the woman performing it than other types of labour.<sup>4</sup> Thus, her argument points towards a general principle like:

**The Pateman Principle** – Something is market-inalienable if it is integral (or integral *enough*) to a person’s identity.

There are several problems with Pateman’s approach. It is unclear what quite Pateman means: how integral must something be for it to be beyond the limits of markets? How is one meant to determine the degree of integral-ness something has regarding a person’s identity? Pateman offers no answer to either question. Viewing the principle through the essentialist lens, she is claiming that *some goods or services* are market-inalienable on account of *that type of good or service* being too integral to the personal identity of *all people*. On this interpretation it is perhaps not permissible to have a market in contract pregnancy because reproductive labour is a type of thing which is always too integral to personal identity.

Rather than directing criticism at this particular essentialist principle, I will use it to direct a criticism at all accounts of the limits of markets which use general essentialist principles, like this one. This critique applies equally to positions like Pateman’s, advocating a single general principle, and positions which argue for a conjunction of several general essentialist principles.

There are strong enough counterexamples to induce the moral experience that, at least in some extreme circumstance, the sale of *almost any* good or service is morally permissible. What if selling reproductive labour will lift an agent, Martha, from poverty in a sustainable way? What if Martha will be a surrogate for close friends, but friends who wish to compensate her for the labour that she will undertake for them? What if our cultural understanding of women’s sexual labour changed? These counterexamples ask

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<sup>4</sup> (Pateman, 1996)

two types of question. Firstly, must it always be the case that the good or service meets the necessary threshold of the essentialist principle(s) to be judged market-inalienable? Secondly, are there not instances where, whether the good or service meets this threshold, transactions involving the good or service can be beneficial?

The power of these two questions is so strong that I can only recognise an essentialist justification for the market-inalienability of one good or service: people. That slavery, for example, has an essentialist justification is not enough to defend the entire essentialist position. The moral experience that I have of the moral limits of markets is not one where there are no limits apart from the trading of human-beings as possessions. So, the essentialist justification for the moral limits of markets cannot be the moral principle which is consistent with my moral experiences – and thus is deemed to be a mistaken attempt at the moral limits of markets by reflexive equilibrium.

### 3. The Nuanced View

If we cannot find reflexive equilibrium with essentialist principles which deem goods and services to be market-inalienable, can we instead find a set of moral principles and experiences which are consistent through a view which sees goods and services as neither market-inalienable nor market-alienable, but rather looks at the circumstances prior to and consequences of transactions in such a way that views goods and services as partially market-alienable (sometimes market-inalienable and sometimes not)? Satz presents her ‘nuanced’ view about noxious markets with four parameters which act as what I will label ‘triggers for concern’ for the moral limits of markets.<sup>5</sup> They are:

1. If an agent is vulnerable before the transaction.
2. If an agent has weak agency before the transaction.
3. If the transaction will cause harm for an individual.
4. If the transaction will cause harm for society.<sup>6</sup>

These principles do not act as absolute rules which if broken necessarily entail the wrongness of a transaction but rather act as *triggers for concern* through which one can make a judgement about the wrongness of a transaction. For example, if Pauline is a drug dealer, the judgement about the moral status of the transaction, and thus whether she *ought to be* able to sell drugs, comes from *some* combined judgement which takes these four factors into account. There is no *particular* way in which Satz proposes this judgement should be made, and that is for the better: there is no way that one can measure up exactly how much harm is done to an individual, assign it a value,  $x$ , and then determine how much of an increase in agency,  $y$ , is needed to make the harm justifiable.<sup>7</sup> I will suggest that supporters of Satz’ view must instead claim that they can use these triggers to make some type of *considered judgement* about the permissibility of transactions. This model does mean that there is no decisive answer to hard questions, something we will return to in §5. It should be stressed that any model like this does not simply consider the triggers for concern in relation to the seller. All agents who are impacted by the transaction, be it buyers, sellers, or anyone else, are considered.

Take the example of Emily. Emily is a drug addict in a dangerous financial situation. She wants to buy drugs that themselves won’t do harm even though doing so

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<sup>5</sup> (Satz, 2010, p. 93)

<sup>6</sup> (Satz, 2010, p. 98)

<sup>7</sup> See (Richardson, 1994, pp. 115-117) and (Satre, 1975, pp. 295-296) for some classic accounts of value incommensurability

will mean that she doesn't have the means to afford medication she needs and so the transaction is detrimental to her health. In this case, it seems to me that there is reason to think that Emily buying drugs hits three of our triggers for concern (harm is being done to her, lacking agency, and being vulnerable), and so we can determine that her buying drugs should be beyond the limits of markets.

It should be noted that taking this approach would have some serious consequences. Drug addicts like Emily may just turn to the black market, which will only serve to make Emily more vulnerable and do her *more* harm. Secondly, to discriminate about who can and cannot sell drugs could discriminate against those in poorer positions – limiting their options for how to make money and raise themselves out of poverty.<sup>8</sup> If Emily were to turn to selling drugs because she has no financial alternative, then removing her legal ability to sell drugs may condemn her to a world of financial peril and poverty. These two arguments motivate me to propose an amended third trigger for concern:

**3\*.** If the permissibility of the transaction, or the lack of permissibility of the transaction will cause harm for an individual.

I am yet to mention Satz's fourth trigger for concern regarding harm for society. This trigger gives Satz's nuanced view a much more extensive scope: placing more transactions beyond the limits of markets. Take the viatical market, for instance.<sup>9</sup> A viatical investment occurs when an investor, Mr Brightside, purchases the rights to the life-insurance pay-out of another individual, typically someone who has a terminal illness or is elderly. Let's say that Mr Brightside purchases the rights to the life-insurance pay-out of Mr Darkside, who has been diagnosed with a terminal illness, for £500,000. Both parties are very happy with this agreement. Mr Darkside is happy that he has some extra money to spend on some dream holidays with his family and to help fund the education of his children. Mr Brightside is happy that, upon the expected death of Mr Darkside within the next year, he will double his £500,000 investment when the life insurance policy pays out £1 million. This transaction is one which does no harm to any individual, is one in which both parties have full agency, and is one in which no-one is vulnerable (perhaps there can be similar situations where the seller could be vulnerable but let us cast those aside for now). However, some people may worry that such a transaction is beyond the limits of the markets. This intuition is what is captured in the fourth trigger for concern: that the transaction is somehow harmful to society. Satz understands this harm to society as occurring in markets where their operation can 'undermine the social framework needed for people to interact as equals, as individuals with equal standing'.<sup>10</sup>

An argument can be made that a market in viaticals undermines the social framework needed for Mr Brightside to treat Mr Darkside as an equal. The death of Mr Brightside is a means to an end for Mr Darkside. Perhaps no-one has captured this point better than the President of the Fort Lauderdale Viatical Company when he said: "There have been some phenomenal returns, and there have been some horror stories where people live longer".<sup>11</sup>

There is also a particular subcategory of transaction which triggers concern via Satz's fourth parameter: transaction which are 'harmful for the standing of the parties as equal citizens in a democracy'.<sup>12</sup> For example, Tobin claims that 'Any good second year

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<sup>8</sup> See (Radcliffe-Richards, 2001) and (Radin, 1987)

<sup>9</sup> My discussion of viaticals takes inspiration from 'Markets in life and Death' in (Sandel, 2013)

<sup>10</sup> (Satz, 2010, p. 95)

<sup>11</sup> (Page, 1998)

<sup>12</sup> (Satz, 2010)

graduate student could write a short examination paper proving that voluntary transactions in votes would increase the welfare of the sellers as well as the buyers'.<sup>13</sup> Satz's fourth trigger ensures that there is a reason other than the welfare of the sellers and buyers (and other than the prior weak agency or vulnerability, which could be easily avoided in this scenario) by which we can find a market in votes objectionable.

Satz's nuanced account that I have now described avoids the circularity of shopping list essentialism and narrow scope of essentialism as motivated by general principles. For these reasons, I believe that there is potential in the nuanced view. However, I also believe that it is culpable to criticism. Namely, I will argue that although the increase in scope given to the account by the addition of Satz's fourth trigger for concern, harm for society, gives us a motivation to rule that selling votes is not permissible, it also rules out other things in a way that conflicts with our moral experiences, and we have reason to question the principle through reflexive equilibrium.

#### **4. The Argument for the Removal of the 'Harm For Society'**

An argument which demonstrates the counter-intuitively large scope of the nuanced account can take inspiration from Radcliffe-Richards. She argues that prohibiting transactions like the sale of organs is harmful to the point of irresponsible, even if it does take advantage of extremely vulnerable individuals:

If we find the trade repugnant because of the harm it does to vendors, we must find the idea of making their situation worse by stopping the trade more repugnant... We should find it much more repugnant that the Turkish father should be forced to keep his kidney and watch his daughter die than that he should sell it and save her.<sup>14</sup>

The argument for at least partial market-alienability for organs is powerful. To completely place the organ market beyond the moral limit of markets could result in the permissibility of situations where great amounts of harm may be done. At this point, I imagine that some supporters of Satz's nuanced account may claim that her account can allow the Turkish father to sell his kidney because the fourth parameter of her model is considered alongside the other triggers for concern – with the consideration of the psychological and emotional harms done to the father and the death and suffering of the daughter outweighing the considerations of the vulnerability of the pair prior to the transaction and the degradation done to the social framework which holds people as equals by allowing some people to be able to exercise power over others to persuade them to physically remove parts of their body as a part of a trade. Although it would be foolish to make a strong claim overall about what Satz's nuanced view would decide in this case, because there is no exact calculus given by Satz for how to make the judgement considering the triggers for concern, the fact that there is a strong argument to be made for the account resulting in a justification for letting a girl die when she need not, in the name of equality, is a strong argument for doubting the inclusion of considerations about equality.

The sale of organs is not the only market through which we can generate this type of argument. Consider the example of Mr Brightside, Mr Darkside, and the viatical market again. An argument from the trigger for concern around societal harm, that the buying and selling of viaticals causes people to treat other human beings as a means to an

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<sup>13</sup> (Tobin, 1970, p. 269)

<sup>14</sup> (Radcliffe-Richards, 2001, p. 48)

ends and hope for their death in order to ensure their financial well-being, makes the decision of whether to allow a market transaction which has potential to bring joy and fulfilment to the lives of many, does no harm to any individuals, in which all parties involved are not vulnerable, and in which all parties have full agency suddenly much less obvious than it would otherwise be. Between this case and the case against a market for organs, it seems that the considering harm to society can lead to instances where the moral principles generate values of permissibility are not consistent with our moral experience.

## 5. The New Nuanced Account

Removing Satz's fourth trigger for concern does, however, leave the scope of the remaining nuanced account too narrow to be consistent with our moral experience. For example, the remaining triggers for concern *would not* give us reason to suppose that a marketplace in votes is beyond the moral limit of markets:

1. If an agent is vulnerable before the transaction.
2. If an agent has weak agency before the transaction.
- 3\*. If the permissibility of the transaction, or the lack of permissibility of the transaction will cause harm for an individual.

I believe that we can alter these principles in such a way that they justify votes being market-inalienable. To do this I will think about our first two premises in a similar way to how we now think about our third premise:

- 1\*. If the permissibility of the transaction or the lack of permissibility of the transaction will cause an agent to become vulnerable, or if they are already vulnerable.
- 2\*. If the permissibility of the transaction or the lack of permissibility of the transaction will cause an agent to lose agency, or if they already have weak agency.
- 3\*. If the permissibility of the transaction or the lack of permissibility of the transaction will cause harm for an individual.

This works because a marketplace in votes will cause agents to become vulnerable and lose agency. The rich could buy up the votes of everyone else and remove their ability to have a voice. If enough of the Scottish votes were bought up, it would become very difficult for Scottish independence to happen even if a huge majority of Scots were in favour. Their agency would be compromised. They could also become vulnerable, perhaps with the implementation of harsh taxation laws or the removal of certain rights. Thus, we have now reached a point whereby the moral principles of 1\* 2\* and 3\* are consistent with our moral experiences: the extension of what is determined to be impermissible by our moral principles is *just right*.

At this point I will move to support my new nuanced account by pre-empting a criticism – this account fails to make it clear exactly whether and/or to what extent market transactions are permissible in hard cases. This assessment of the new nuanced account is correct. It fails to be decisive in hard cases. It is not clear what judgement should be

made about the permissibility or extent of permissibility for markets like prostitution, organs, or contract pregnancy. The account creates strong arguments both for and against these markets being within the moral limits of markets:

|                           | <b>For</b>  | <b>Against</b>   |
|---------------------------|---|--|
| <b>Prostitution</b>       | ‘Sex markets as affirming a woman’s right to autonomy, sexual pleasure, and economic welfare’ <sup>15</sup> | ‘There are ways in which the experience of prostituted women, even of the so-called “free” prostituted women in Western countries, does seem to replicate the conditions of slave life.’ <sup>16</sup><br>Prostitution results from and results in sexual violence <sup>17</sup> |
| <b>Organs</b>             | Financial gain for the seller which can pull agents from vulnerable situations <sup>18</sup>                | Creates a market which exploits the ‘desperation’ of the poor and vulnerable <sup>19</sup>   |
| <b>Contract Pregnancy</b> | As above <sup>20</sup>  | The possibility of oppression for poor or ignorant women <sup>21</sup><br>The commodification of genetics <sup>22</sup><br>The surrogate mother ceding some control over her body for 9 months <sup>23</sup>   |

Although I agree that this new nuanced account fails to make it clear exactly whether and or to what extent markets on hard cases are permissible, I disagree that this should act as evidence in an argument criticising the new nuanced account. Rather, I think the way that the model deals easily with easy cases and recognises the difficult cases *as difficult* is a merit of the account. Hard cases are hard because there are strong arguments to be made both for and against permissibility or regarding the extent of permissibility. The new nuanced model explains the genuine reasonable dispute that is present in discussions about the permissibility or extent to permissibility in markets of sex, organs, and contract pregnancy. In opposition to those who may critique the new nuanced account for not be decisive enough, I believe that a philosophical position that recognizes the inherent complexity of certain issues is better than one which oversimplifies and fails to acknowledge the complexity. The fact that the account is not decisive in hard cases is support for, rather than an argument against, the idea that the extension of permissible market transactions justified by the moral principles is *just right*.

## 6. Conclusion

In conclusion, this essay argues for a *new* nuanced account where the principles which justify the moral limits of markets are 1\*, 2\*, and 3\*: principles based around harm, vulnerability, and agency which look both to the circumstances prior to the transaction

<sup>15</sup> See views of COYOTE, (Satz, 2010, p. 154) quoted.

<sup>16</sup> (Jeffreys, 1997, p. 176)

<sup>17</sup> (Jeffreys, 1997, p. 242)

<sup>18</sup> (Radcliffe-Richards, 2001, p. 48)

<sup>19</sup> (Satz, 2010, p. 195)

<sup>20</sup> (Radin, 1987, p. 1930)

<sup>21</sup> (Radin, 1987, p. 1930)

<sup>22</sup> (Radin, 1987, p. 1932) and (Phillips, 2011, p. 735)

<sup>23</sup> (Arneson, 1992, pp. 161-162)

and the consequences of permissibility of the transaction. This conclusion is supported by the reflexive equilibrium of *consistency* reached between 1\*, 2\*, and 3\* and our moral experiences. More than just being consistent, this account also explains dispute around moral experiences, by *not* having a decisive edge in hard cases because of its use of triggers for concern rather than absolute rules.

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