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Abstract

The Moral Limits of EU Internal Market Exchange: Equal Respect and Capabilities

by Lyn K.L. Tjon Soei Len

The EU's central task is to improve the lives that European citizens are able to live. This mission is embedded in the EU's commitment to enhance the functioning of the internal market on the basis of the assumption that market exchanges form the primary mechanisms through which individuals pursue their own conceptions of the good life. While the EU aims to enable market exchange through its legal structures, it does not consider the demarcation of the moral limits of its internal market as a European task. As such the EU approach to the internal market has so far been based on a decoupling of the market logic from morality. However, justice – as understood in this paper– requires that European citizens are treated with equal respect and that the exchanges they wish to pursue are subject to a generalizable normative standard. This paper explores the question of how and where the moral limits of the internal market are drawn as a question of justice, and argues that the current European approach to this question fails to safeguard European citizens from denigration in the internal market.

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Key words: capabilities; political liberalism; moral limits of the internal market; sexual morality; denigration.

I. Introduction

The establishment of the EU internal market is portrayed as one of the biggest achievements within the larger project of European unification. However, concerns about a disjunction between European integration through the internal market and ideals of justice have become widespread.¹ Particularly, the EU has been scrutinized for failing to ensure justice in the internal market through a legal framework that governs the foundational aspects of private exchange, i.e. general rules of contract law. First, to the extent that the EU enacts legal instruments that aim to promote internal market exchange, the dominant justificatory narrative of economic efficiency and market growth is criticized for displacing substantive notions of justice embedded in national legal systems.² Second, the failure to enact, on a European level, a system of legal rules that safeguards even a minimum standard for just market conduct represents an important justice deficit in the EU, revealing an internal market without an institutional framework that provides background justice.³

In part, these justice concerns regarding the EU relate to a broader set of worries about the changing role that markets, generally, play in human lives. Channeled as marketization and commodification concerns, they express the idea that some 'things' and relationships should be sheltered from the market and its rationality.⁴ Said differently, some exchanges should simply not occur on the market at all, because they are regarded beyond its moral limits. A society that strives to be just must set some limits to private exchange that

¹ See in relation to contract law D Caruso, 'Qu'ils mangent des contrats: Rethinking Justice in EU Contract Law' in G de Burca, D Kochenov and A Williams (eds), *Europe's Justice Deficit?* (Hart Publishing, 2015).

² See Social Justice Group, 'Social Justice in European Contract Law: a Manifesto' 10 *European Law Journal* 6, 653–674; M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) *European Law Journal* Forthcoming.

³ See MW Hesselink, 'Unjust Conduct in the Internal Market' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532375> , accessed 10 June 2015.

⁴ See MJ Radin, *Contested Commodities. The Trouble with Trade in Sex, Children, Body Parts, and Other Things* (Cambridge, MA: Harvard University Press, 1996); M Ertman and J Williams (eds), *Rethinking commodification: cases and readings in law and culture* (New York: New York University Press, 2005); D Satz, *Why Some things Should Not Be for Sale: The Moral Limits of Markets* (New York: Oxford University Press, 2010); MJ Sandel, *What Money Can't Buy: The Moral Limits of Markets* (New York: Macmillan, 2012).

citizens might be willing to engage in.⁵ If the EU aspires to justice, there must be some moral limits to the internal market, and the question of how and where they are to be drawn is a matter of justice within the larger project of an ever-closer European Union.⁶ Currently, there exists no legal articulation of the moral limits to internal market exchange on a European level. The EU leaves this task to the competence of the Member States. The European Union houses a great variety of national viewpoints on the appropriate moral limits of market exchange expressed within the legal structures that govern market conduct, i.e. national contract laws.

This paper argues that the European approach to the moral limits of its internal market gives rise to an important justice concern that is distinct from issues of marketization and commodification. Namely, the approach gives rise to a political liberal concern regarding denigration, i.e. a failure to treat European citizens with equal respect. From one perspective, the European approach can be portrayed as aspiring to a 'neutral stance' towards plural, and potentially conflicting conceptions of the moral limits of market exchange on a national level. As such, the EU appears responsive to issues of plurality and divergence on the matter of values among the Member States. However, if the aspiration of neutrality is understood from a political liberal perspective on justice, the European approach to the moral limits of its internal market may in fact fail to live up to its ambition. In a pluralistic society, the state's neutral stance serves to show and treat citizens with equal respect, i.e. neutrality serves to avoid denigration of persons, as they pursue their own conceptions of the good. From this political liberal viewpoint, the state should withhold from endorsing any particular (controversial) ideal of the good life

⁵ Without such limits those who are disadvantaged may be willing to engage in desperate exchanges (e.g. exchanging organs for money), will be unable to engage in political life (e.g. market for political votes) or will not be able to afford police protection. See for a powerful illustration JW Singer, 'Things that We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society (2006) 2 Harvard Law & Policy Review 139–159.

⁶ The idea that contract law in Europe is subject to requirements of justice has been explored and argued elsewhere. This paper moves forward on the premise that the EU can be appropriately regarded as subject to requirements of justice. See for a discussion of this connection, within the political liberal tradition of justice, for instance MW Hesselink, 'Unjust Conduct in the Internal Market' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532375> , accessed 10 June 2015; J Klijnsma, *Contract Law as Fairness. A Rawlsian Perspective on the Position of SME's in European Contract Law* (Amsterdam 2014); L Tjon Soei Len, *The Effects of Contracts Beyond Frontiers: A Capabilities Perspective on Externalities and Contract Law in Europe* (Amsterdam 2013). See for a critical view, though not specific to contract law, in this issue: S Douglass-Scott, 'Justice and EU Human Rights: the Basic Structure for EU Constitutionalism? (Or why a 'Justice Based' Foundation for the EU will not work).

granting advantages to those who hold and pursue it, while denigrating and disadvantaging those who do not. This paper argues that by leaving the matter of the moral limits of the internal market to the Member States, the EU fails to ensure that the legal structures that govern internal (European) market exchange will treat its citizens with equal respect.

The establishment of the internal market enables European citizens to engage in exchange with each other, and to improve their lives in accordance with their own conceptions of the good. The central task of the EU –to improve the lives that European citizens are able to live– is embedded in the commitment to enhance the functioning of the internal market. Legal demarcations of moral limits to market exchange should aid in this task. They should not impose serious burdens on individuals as they pursue reasonable conceptions of the good by excluding them from the advantages attached to the availability of state power for the enforcement of their exchanges. If the exclusion is based on moral standards that denigrate the reasonable conceptions of the good that some citizens hold and pursue, that places them at a serious disadvantage and would fail to treat them with the equal respect that they deserve as citizens. It is not the aim of this paper to comprehensively show that the national diverging moral standards for market exchange are disrespectful in this way. Instead, the paper aims to show that the EU fails to safeguard its citizens from being subject to national moral standards that could be disrespectful, because it does not preclude the applicability of national standards that denigrate (some) European citizens. In short, the paper will argue that the EU legal framework that governs internal market exchange does not ensure that the applicable national standards of morality do not disrespect European citizens.

Section II sketches the contours of the European approach to the moral limits of the internal market in its legal framework, focusing both on the moral exceptions that are ensconced in the EU constitutional framework that impact market exchange and in the national private law rules concerning contractual immorality directly governing market exchange. Section III outlines a capabilities-oriented interpretation of political liberalism that is committed to the political value of equal respect and emphasizes the importance and centrality of the lives that individuals are able to live for questions of justice. This interpretation of political liberal justice focuses on the creation and preservation of a space of substantive individual freedoms to formulate, hold and pursue one's own

reasonable conceptions of the good. This section ends by detailing some of its implications for demarcations of the moral limits of the market in the EU's legal structures. Section IV illustrates the risk of denigration in the internal market through the example of sexual morality and will discuss a range of legal demarcations of the moral limits of the internal market that would be incompatible with the political value of equal respect.

II. The EU's Approach To The Moral Limits Of The Internal Market

The European Union seemingly take a 'hands-off approach' towards demarcating the moral limits of internal market exchange in its legal structures, demonstrated in 1. its constitutional framework and 2. its approach to contract law on a European level. In effect, the European approach to the moral limits of its internal market reflects the legal competence and ultimate authority of Members States to demarcate the moral limits of internal market exchange.

Moral Exceptions in the EU Constitutional Framework

Within the EU's constitutional framework, the fundamental freedoms are central to the creation of a single market, the ideal of which includes the absence of internal obstacles to the free movement of goods (Articles 34-36 TFEU). In pursuit of that ideal, the EU's constitutional framework guarantees, in principle, the free movement of things that are lawfully produced or marketed in one Member State, across the internal market as a whole.⁷ The EU aims to preclude national measures if they discriminate against imported goods in a protectionist manner,⁸ in order to overcome obstacles that divergences among national standards may otherwise present. Yet, even when a good lawfully enters (or is created on) the EU's internal market, Member States may still impose, as a matter of exception to the general rule, diverging standards for moral reasons. Namely, the EU

⁷ See on the principle of mutual recognition *Dassonville* ECJ Case 8/74 (July 10, 1974); *Cassis de Dijon* ECJ Case 120/78 (February 20, 1979).

⁸ G Davies, 'The Court's jurisprudence on free movement of goods: pragmatic presumptions, not philosophical principles' (2012) *European Journal of Consumer Law* 25-38.

provisions on the free movement of goods allow measures that restrict the movement of goods on grounds of public morality (Article 36 TFEU).⁹ Member states enjoy a considerable margin of discretion when it comes to the moral demarcation of the internal market space of free movement, demonstrated by a ‘hands off approach’ of the Court of Justice in its case law that addresses the justification of public morality exceptions.¹⁰

The public morality exception played an explicit role in *Henn and Darby* and *Conegate*, regarding restrictions imposed by Member States on the import of pornographic goods. In *Henn and Darby*, the Court held that ‘in principle, it is for each Member State to determine in accordance with its own scale of values and judgment of its appropriate form, the requirements of public morality in its territory’.¹¹ The particular case involved the import of pornographic books and films that were deemed to be of an indecent or obscene nature in (parts of) the UK, i.e., offending a ‘recognized standard of propriety’. The goods considered ‘obscene’ were to be barred on the ground that they tend to ‘deprave and corrupt those exposed to the material’.¹² While the Court stated a condition of non-discrimination –the applicable rules for similar domestic goods must comprehensively, prohibit the making and marketing of such goods– it demonstrated a ‘hands off approach’ to the national conception of morality itself. In *Conegate*, involving the import of life-size female shaped dolls, the Court rehearsed this approach stating that ‘although Community law leaves the Member States free to make their own assessments of the indecent or obscene character of certain articles’ public morality reasons ‘cannot be regarded as sufficiently serious to justify restrictions on the free movement of goods where the Member States concerned does not adopt, with respect to the same goods manufactured or marketed within its territory, penal measures or other serious and effective measures

⁹ The general exceptions to the free movement of goods are stated in Article 36: ‘The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.’ Concept of public morality and public policy are used interchangeable in this paper to express legal demarcations of the moral limits of the internal market.

¹⁰ See C Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford: Oxford University Press, 2013) 42–43.

¹¹ *Henn and Darby* ECJ Case 34/78 (December 14, 1979) para 15.

¹² *Henn and Darby* ECJ Case 34/78 (December 14, 1979) para 6–7.

intended to prevent the distribution of such goods in its territory'.¹³ In these cases, the court demonstrated its 'hands-off approach' with regard to where and how Member States demarcate the moral limits of EU free movement on the internal market qualifying only for reasons of discrimination. In *Jany* the Court affirmed the margin of appreciation concerning national morality standards with regard to the provision of sexual services. As to remind the Member States of their authority in determining what is to be considered immoral, the Court stated that 'So far as concerns the question of the immorality of that activity (...) it is not for the Court to substitute its own assessment for that of the legislatures of the Member States where an allegedly immoral activity is practised legally'.¹⁴

In other case law, the ECJ demonstrated a similar approach with regard to the authority of Member States to demarcate the moral limits of the internal market on the basis of fundamental rights. In *Omega* and *Schmidberger*, the Court held that 'the protection of [fundamental] rights is a legitimate interest which, in principle, justifies a restriction of (...) a fundamental freedom guaranteed by the Treaty such as the free movement of goods'.¹⁵ In these cases the Court left it to the assessment of the Member States to draw the moral limits of the internal market, on the basis of values protected through national fundamental rights. While the Court held that Member States cannot determine the scope of public policy unilaterally,¹⁶ the control on a European level is restricted to the standard of proportionality, i.e. 'only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures'.¹⁷ It thus remains a matter of Member State authority to provide a substantive conception of public policy –for instance through fundamental rights– and assess whether internal market activities are contrary to it. While the aforementioned ECJ cases do not directly address internal market exchanges between private actors, they impact the ability of EU citizens to engage in internal market exchange. On a European level, the task is to determine whether in invoking morality, Member States employ restrictions that are non-discriminatory and proportionate.

¹³ *Conegate* ECJ Case 121/85, (March 11, 1986) para 15.

¹⁴ *Jany* ECJ Case 268/99 (November 20, 2001) para 56.

¹⁵ *Schmidberger* ECJ Case 112/00 (June 12, 2003) para 74; *Omega* ECJ Case 36/02 (October 14, 2004) para 35.

¹⁶ *Omega* ECJ Case 36/02 (October 14, 2004) para 30.

¹⁷ *Omega* ECJ Case 36/02 (October 14, 2004) para 36.

Contractual immorality

The morality of individual market exchanges on the EU internal market is not evaluated and governed by a European instrument of general contract law, but instead by national rules of private law. National legislators (in the case of civil codes) enact open norms (e.g. good morals) that govern the question of contractual immorality, leaving it to the courts to determine its substantive content in reference to the facts of a particular case.¹⁸ The case law on this subject matter varies greatly with respect to the sort of exchanges that are considered immoral and sorts of reasoning that is applied over time and place. There are various ways in which courts give content to substantive notions of contractual immorality. Among other methods, courts give effect to fundamental and constitutional rights in private relationships through the concept of contractual immorality.¹⁹ Such references to constitutional rights occur alongside reliance on other legal sources, i.e. treaties, legislation, case law and general principles of law, which are understood to express a society's common view of morality over time. Through contractual immorality, courts demarcate the moral limits of exchange, holding that certain exchanges are contrary to society's common or shared view of morality. This idea is sometimes expressed by referring to common social opinion (Netherlands), but also by reference to the views that are shared and endorsed by 'the right thinking' members of society (the UK) or reflected in das 'Anstandsgefühl aller billig und gerecht Denkenden' (Germany).²⁰ Although courts interpret these open norms in specific cases, it remains obscure how one can fathom which moral viewpoints ought to be regarded as common and shared in these ways and, for instance, whether the degree of consensus that is desirable for such a label is, for instance, of a majoritarian or minimum nature.

On a European level several initiatives moved towards, initially, the creation of a comprehensive European Civil Code and later, the creation of a common frame of reference and a common European Sales Law (CESL). These developments revealed diverging stances towards the articulation of a common European norm of immorality for

¹⁸ See for instance article 138 German Civil Code and article 3:40 Dutch Civil code.

¹⁹ See C Mak, *Fundamental Rights in European Contract Law* (Kluwer Law International, 2008).

²⁰ The German so-called Anstandsformel refers to a sense of decency of those who are reasonable and fair thinkers.

contractual conduct.²¹ While some projects explicitly intended to avoid diverging national conceptions of immorality by referring to fundamental principles found across the European Union,²² the most recent initiative, i.e. the CESL, excluded the issues of contractual morality from its scope entirely.²³ The latter approach is in line with the status of moral exceptions in the EU constitutional framework discussed in the previous section. Namely, the CESL deals with the rights and obligations that arise from contracts entered into on the internal market; yet, it does not govern the matter whether an internal market exchange qualifies as a binding contract to begin with. The latter is a matter of diverging national conceptions of contractual immorality, which define what is and is not to be considered a contract, i.e. which private exchanges are beyond the moral limits of the internal market.

The EU approach to the question of how and where the moral limits of the internal market are drawn can be read as an aspiration to neutrality in a context of divergence of moral views in a pluralistic society.²⁴ Such a neutral stance resembles a central commitment to and requirement of justice understood within a politically liberal framework. However, the European ‘hands-off’ approach results in a ‘neutral stance’ towards Member State conceptions of moral limits, whereas a political liberal conception of justice is informed by the political value of equal respect for persons. If the EU’s central task is to improve the lives of its citizens, its current approach raises a concern of justice, namely that of denigration in the internal market.

²¹ For instance, within the academic project on the Principles of European Contract Law (PECL) the first publication (PECL Part I 2000) excluded the subject matter from its scope ‘because of the great variety among the legal systems of Member States as to which contracts are regarded as unenforceable on these grounds (...) further investigation is needed to determine whether it is feasible to draft European Principles on these subjects.’ But Part III 2003 included the following rule in the chapter on ‘illegality’: ‘A contract is of no effect to the extent that it is contrary to principles recognised as fundamental in the laws of the Member States of the European Union.’ (PECL section 15:101).

²² For instance in the PECL and the DCFR. DCFR Book II Chapter 7 Section 301 reads: ‘A contract is void to the extent that: a) it infringes a principle recognized as fundamental in the laws of the Member States of the European Union; and b) nullity is required to give effect to that principle.’

²³ See the Proposal for a Regulation on a ‘Common European Sales Law’, COM (2011) 635 final, 20.

²⁴ For instance in the Communication on the CESL the European Commission prefaces the exclusion of immorality by stating that topics that are ‘(...) very important for national laws (...) will not be addressed by the Common European Sales Law.’ Communication ‘A Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market’, COM(2011) 636 final, p 8. The views that Member States express on matters of morality are presented as having deep ties with national identity. See G Comparato, *Nationalism and Private Law in Europe* (Oxford: Hart Publishing, 2014).

III. Equal Respect and Capabilities

Political liberal conceptions of justice envision a state that aspires to be sufficiently neutral in response to the problem of our diverse and possibly conflicting comprehensive views of justice and conceptions of the good.²⁵ At its core lies the political value of equal respect, which holds that the state ought to refrain from endorsing – and thereby giving preferential treatment to – any one comprehensive conception of the good that individuals may hold. What does it mean for a state (in this case: the EU) to be sufficiently neutral in this way? There are multiple interpretations of what political liberalism entails, which share a general commitment to a stance of sufficient neutrality towards variations of reasonable conceptions of the good, while making no such commitment to unreasonable conceptions of the good. On what I take to be a compelling and persuasive – though certainly not the only – account of the distinction between reasonable and unreasonable conceptions, the only decisive, distinguishing factor is the acceptance of the political value of equal respect. The distinction is made by Martha Nussbaum in the following way: ‘(...) respect in political liberalism is, first and foremost, respect for persons, not respect for the doctrines they hold, for the grounding of those doctrines, or for anything else about them. (...) A “reasonable” citizen is one who respects other citizens as equals. A “reasonable” comprehensive doctrine is one endorsed by such a reasonable citizen, that is, including a serious commitment to the value of equal respect for persons as a political value.’²⁶ In other words, the state’s stance of sufficient neutrality is directed towards individuals who hold conceptions of the good that are compatible with their endorsement of the value of equal respect for political purposes. In this view, unreasonable conceptions of the good are identified by their incompatibility with the political value of equal respect and nothing else.

The Ability to Engage in Exchange and Moral Limits to the Internal Market

A capabilities-oriented interpretation of political liberalism emphasizes the importance of the creation and preservation of a space of substantive individual freedoms to formulate,

²⁵ J Rawls, *Political liberalism* (New York: Columbia University Press 1993); C Larmore, *The Morals of Modernity* (Cambridge: Cambridge University Press, 1996); M Nussbaum, ‘Perfectionist Liberalism and Political Liberalism.’ (2011) 39 *Philosophy and Public Affairs* 1, 3–45.

²⁶ See M Nussbaum, ‘Perfectionist Liberalism and Political Liberalism.’ (2011) 39 *Philosophy and Public Affairs* 1, 33.

hold and pursue one's own reasonable conceptions of the good. In short, for individuals to have the substantive freedom – true ability, i.e. capability – to do and be what they regard as valuable, the state ought not only abstain from imposing restrictions, but also engage in the (positive) creation of the necessary preconditions that enable them to freely choose to do and be what they regard as valuable.²⁷ The political value of equal respect requires that a society ensures that each individual has the ability to pursue reasonable conceptions of the good on equal grounds with others. Market exchanges form important means through which individuals pursue their own conceptions of the good and live the lives they deem valuable, e.g. how they obtain income, where they live, what they eat.²⁸ In order to speak of any meaningful ability to engage in exchange on an equal basis with others, people need support from legal institutions. Such support is dependent on the rules that construct the defining structure of contractual relations. These rules – including notably standards of contractual immorality – determine if the private exchanges that people may wish to engage in, are legally binding, and as such are regarded as contracts.²⁹ The defining structure of contractual relations is important for the true abilities of individuals to engage in market exchange.³⁰ In fulfilling this function, contract law excludes some exchanges from the contractual recognition explicitly for reasons of morality. In such cases, the transacting parties are excluded from the significant advantage of the availability of the coercive power of the State for the enforcement of their exchange because their endeavor is considered to be morally unacceptable by the state. That evaluation of the morality of private exchange and market conduct represents the private legal mechanism of demarcating the moral limit of market exchange.

²⁷ See A Sen , *Inequality Reexamined* (Oxford: Oxford University Press, 1992); A Sen, *Development as Freedom* (New York: Oxford University Press, 1999); M Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, Cambridge, 2000); M Nussbaum, *Frontiers of Justice* (Harvard University Press, 2006).

²⁸ Some have argued that the ability to decide on one's own consumption pattern can be closely tied to individual identity and self-determination through lifestyle. See A Strudler and E Curlo. 'Consumption as Culture: A Desert Example' In D Crocker and T Linden (eds), *Ethics of Consumption*, (Maryland: Rowman & Littlefield Publishers, 1998) 269–286.

²⁹ See L Tjon Soei Len, *The Effects of Contracts Beyond Frontiers: A Capabilities Perspective on Externalities and Contract Law in Europe* (Amsterdam 2013).

³⁰ See for an account of contractual capacity as a precondition for market participation S Deakin, 'Capacitas: Contract Law and the Institutional Preconditions of a Market Economy (2006) 2 *European Review of Private Law* 317–341.

Contractual Recognition and Denigration

While the exclusion from the advantage of state support for contractual enforcement is pertinent to issues of distributive justice in a society, the state's expression of moral disapproval is significant on its own accord in light of the political value of equal respect. What does it mean for the state to exclude certain exchanges and certain market pursuits – important to individuals in light of their conceptions of the good – from the advantage of contractual recognition, for reasons of morality? The exclusion from contractual recognition is based on moral standards that are independent of the moral views held by the contracting parties and can be invoked by the state on its own motion.³¹ First, when the state refuses to recognize a market exchange as a contract, the state expresses moral disapproval of the activities and market pursuits that parties are engaged in. Second, the state expresses its endorsement of the moral views on which that disapproval is based. In performing this task in accordance with the political value of equal respect, the state should refrain from endorsing any particular comprehensive conception of the good. Namely, such an endorsement would be denigrating to citizens who hold and pursue a reasonable conception of the good that is incompatible with that conception. The legal structure that demarcates the moral limits of the market would in effect grant advantages (i.e. contractual recognition and availability of public enforcement) to some over others by support the life plans (i.e. market pursuits) of some individuals, while barring those of others. In short, legal standards that exclude market exchanges on such moral grounds would create a market order where some individuals could be denigrated, as their moral views would be regarded incompatible, that is to say wrong, in light of the moral viewpoints endorsed by the state.

The current EU approach to the moral limits of the internal market risks denigrating some of its citizens, because it does not preclude the applicability of national standards (section II) that can only be justified on the basis of a comprehensive conception of the good. The latter would be incompatible with the political value of equal respect and thus unjust within a politically liberal framework (section III). The last section of this paper aims to illustrate this risk through the example of sexual morality and will discuss a range of legal

³¹ See (n 29)

demarcations of the moral limits of the internal market that would be incompatible with the political value of equal respect.

IV. The Risk of Denigration in the Internal Market: An Illustration through Sexual Morality

There are many different accounts of why certain goods or activities may be regarded as morally objectionable, and why they should be blocked from markets, i.e. not be exchanged for money on the market.³² Although a separate question, these normative accounts often resonate with the justifications offered for legal measures that block certain types of exchange from the market, or to withhold collective support for the recognition and enforcement of those exchanges through contractual immorality. To the extent that these accounts are, however, based on comprehensive conceptions of the good, they ought not be endorsed and put forward by the state as demarcating accounts of the moral limits of the internal market. This section briefly outlines a range of accounts on the legal demarcation of sexual morality to illustrate how the EU approach risks denigration of some of its citizens in the internal market.³³

The Case of Exchanges of Money for Sex

National conceptions of sexual morality, expressed for instance in the legal treatment of prostitution, vary greatly across the EU. While some Member States recognize exchanges of money for sex as legally binding contracts, many others do not, either because certain activities associated with prostitution are criminalized (e.g. consumption, solicitation, procurement) or because standards of contractual morality deem them morally

³² See (n 4).

³³ Sexual morality provides a relevant illustration as it figures as a central example in national doctrines of contractual immorality and is subject to broad national variance across the EU.

unacceptable.³⁴ On what normative grounds could national legal standards regard exchanges of money for sex morally objectionable?

First, there are accounts that rely on particular religious traditions to inform a morality objection to market exchanges of money for sex. These accounts invoke a comprehensive (religious) conception of the good to justify the moral limits of the internal market. For instance, the laws of Member States with a strong Catholic tradition have long been influenced by comprehensive doctrines that regard all forms of sexual activity outside a heterosexual monogamous marital relationship as immoral, i.e. sinful.³⁵ The endorsement by the state of such a comprehensive conception of the good would however be incompatible with the political value of equal respect. In so doing, the state would disrespect and denigrate individuals who hold different conceptions of the good.

Second, legal standards that are informed by a conception regarding the true value of sex are incompatible with equal respect, as the state would express and endorse an authoritative view of the 'essential' value and meaning of sexual activity, which would inevitably burden those who hold reasonable conceptions of the good that run counter to it. Justifications of this sort are often expressed as arguments from corruption or intimacy, which point to the idea that sex is an intimate activity that would be inappropriately valued if and once exchanged for money on the market.³⁶ In this view, exchanges of money for sex reduce very intimate activities to their monetary value, potentially corrupting to real value of sexual activity outside of its commercial manifestation.³⁷

Third, legal restrictions on commercial sexual activity can be informed by arguments from harm that point to the potential of physical and mental diseases, drug addiction and loss of

³⁴ See L Tjon Soei Len, 'Consumer Protection, Sexual Services and Vulnerability: Exploring Social Justice in European Contract Law' (2015) 11 *European Review of Contract Law* (2) 127–147.

³⁵ See for instance A McCann, 'Ireland' in A Colombi Ciacchi, C Mak and Z Mansoor (eds) *Immoral Contracts in Europe* Forthcoming. See discussion by M Nussbaum, 'Whether from Reason or Prejudice. Taking Money for Bodily Services' in *Sex and Social Justice*, (Oxford University Press, 2000) 286.

³⁶ See for instance MJ Sandel, 'What Money Can't Buy: The Moral Limits of Markets.' *The Tanner Lectures on Human Values* 1998.

³⁷ This view has been debunked by the lack of empirical evidence for the claim that intimate sexual relations cannot coexist alongside commercial sexual services, see A Lucas, 'The Currency of Sex: Prostitution, Law and Commodification' in M Ertman and J Williams (eds), *Rethinking commodification: cases and readings in law and culture* (New York: New York University Press, 2005) 253; MJ Radin, 'Market-Inalienability' (1987) 100 *Harvard Law Review* (8): 1912–1913.

self-respect for those engaged in these market exchanges.³⁸ This view relies on the idea that the moral limits of market exchange reflect an unacceptable risk of harm for transacting parties. However, to the extent that these views would be offered as decisive justifications for the moral limits of the market, one would expect that many other risky market activities, for instance many forms of professional sports such as football, racing a car or kick-boxing, would be similarly regarded as morally problematic and at least morally suspicious. Concerns regarding harm do not seem to support the legal demarcation of the moral limits of the internal market, unless a wide range of other risky market activities would also be subject to it. A commitment to equal respect in the internal market would preclude that its citizens would be subject to the arbitrary application of legal standards of morality.

Fourth, legal demarcations of moral limits of the market can be informed by concerns regarding gender inequality.³⁹ Market exchanges of money for sex are gendered phenomena, with an enormous majority of service providers being women, while consumers are predominantly male. Prostitution has therefore been described as 'a theatre of inequality' that reflects a practice of male dominance,⁴⁰ and as a practice that is degrading to women reflecting female subordination to male sexual desire.⁴¹ In this light, moral limits of the internal market could be grounded in an aspiration to ameliorate the general socially inferior status of women and could be compatible with a commitment to the political value of equal respect. However, similar to the case of risk and harm, gender inequality is a pervasive factor in society that affects a wide range of market exchanges, which are not similarly marked as exchanges that ought to be considered beyond the moral limits of the market.

A capabilities-oriented interpretation of justice regards these accounts incompatible with a core commitment to the political value of equal respect. Notably, to the extent that the moral limits of the internal market can be and are demarcated (in part) by national standards that are based on comprehensive (and thus controversial) conceptions of the

³⁸ See P de Marneffe, *Liberalism and Prostitution* (Oxford University Press, 2012).

³⁹ See European Parliament Committee on Women's Rights and Gender Equality, 'Draft Report on sexual exploitation and prostitution and its impact on gender equality' 2013/2103(INI)

⁴⁰ See D Satz, *Why Some things Should Not Be for Sale: The Moral Limits of Markets* (New York: Oxford University Press, 2010) 147.

⁴¹ See C Pateman, *The Sexual Contract* (Stanford: Stanford University Press 1988).

good the EU fails to safeguard (some of) its citizens from denigration in the internal market. If we understand the European (neutral) approach to the moral limits of its internal market as an aspiration to justice in the politically liberal sense, the EU should ensure that the applicable (national) legal standards do not denigrate (some) European citizens. This means that legal standards that demarcate the moral limits of the internal market should be compatible with moral reasons of equal respect. Moreover, a capabilities-oriented interpretation connects the legal standards that demarcate the moral limits of the internal market to the EU's central task to improve the lives that its citizens are able to live. The moral limits of the internal market should strive to advance the substantive freedom of individuals to pursue their reasonable conceptions of the good when participating in the internal market.

V. Conclusion

The European approach to the moral limits of its internal market currently fails to ensure that European citizens are treated with equal respect when engaging in exchange. Currently, even if national legal standards of morality would be explicitly incompatible with the political value of equal respect the EU approach ensconces no opportunity for substantive scrutiny. As long as Member States apply national standards in a non-discriminatory and proportional manner, the endorsement of a comprehensive conception of the good encounters no objection within the foundational legal framework that governs the EU's internal market. This approach thus leaves open the possibility that legal standards would denigrate (some) European citizens, which constitutes an injustice in light of the political value of equal respect. If justice matters within the EU, it is important to explore the ways in which the internal market and its underlying legal structures advantage some over others, and to work towards ameliorating the position of those who are least advantaged in terms of the abilities they have to do and be what they regard as valuable.

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