Brooklyn Law Review

Volume 72 | Issue 3 Article 5

2007

Planning Disaster: Price Gouging Statutes and the Shortages They Create

Michael Brewer

Planning Disaster

PRICE GOUGING STATUTES AND THE SHORTAGES THEY CREATE

I. INTRODUCTION

In the early months of 2005, the world was still reeling from the massive tsunami which devastated large stretches of eastern Asia, killed more than 200,000, and rendered millions more homeless.[1] Later that same year, a devastating 7.6 magnitude earthquake struck Pakistan, killing at least 87,000 people—and left three million to face winter in the Himalayan foothills without adequate shelter.[2] Domestically, residents of the gulf coast faced three immense hurricanes in the most active hurricane season on record.[3] Katrina, the most destructive, inundated New Orleans, damaged property and displaced residents throughout Louisiana and Mississippi.[4]

Natural disasters are unavoidable, but enlightened policies directing our response to them can have a critical impact in easing their costs. Desperate situations often dramatically illustrate the best in human nature, yet unfortunately they also sometimes show us at our very worst. Usually relegated to the latter category are those accused of "price gouging,"[5] the accusation that suppliers of goods take advantage of the victims of disaster and, knowing their need, charge excessively high prices, understanding that their customers have no choice but to meet their demands. The culmination of this distaste can be found in a number of state laws criminalizing the practice, notably in many of the gulf

---

[1] Carol J. Williams & Maggie Farley, *Disasters Taxing Aid Capacity, U.N. Says; In Pakistan, Relief Efforts Shift from Rescue to Providing Supplies for Isolated Quake Victims*, L.A. TIMES, Oct. 15, 2005, at A1.

[2] *Earthquake at a Glance*, DALLAS MORNING NEWS, Nov. 24, 2005, at 6A.

[3] Ken Kaye, *Biggest, Costliest Hurricane Season Yet*, PITTSBURGH POST-GAZETTE, Nov. 30, 2005, at A1.

[4] *After the Flood; Hurricane Katrina*, ECONOMIST, Sep. 3, 2005.

[5] The term "gouging," much like the term "murder," has certain negative connotations, so I will attempt to use the phrase sparingly.

states,[6] as well as in calls by members of Congress to institute federal price gouging laws.[7]

It is not contradictory to hope and expect that fellow citizens will aid each other in their time of need and still argue that implementing price ceilings is likely to have no better effect than to prolong that need. This Note argues that price gouging laws, though aimed at correcting a widely perceived ill, actually exacerbate shortages of emergency goods following disasters, when want is greatest. This Note recommends the repeal of state price gouging laws and, recognizing the potential difficulties state legislators might face in doing so, proposes a system of federal emergency relief that is, in part, more responsive to the price mechanism. Such a system would have the benefits of signaling need more accurately, would encourage states to abandon artificial price ceilings, and would provide competitive incentives for sellers to restrain price levels.

Part II of this Note briefly describes some of the historical, ethical, and religious prohibitions against price gouging that demonstrate the longstanding antipathy towards the practice. This section also examines how these longstanding moral concerns with "fair" prices have survived in modern law, primarily in the form of antitrust laws and price gouging statutes. This section will also distinguish price gouging from antitrust laws and will describe how the antitrust laws already prohibit the most damaging behavior contemplated by price gouging statutes. Part III examines the economic effects of price gouging statutes, such as the exacerbation of shortages and the misallocative effects of artificially low prices. This section will also discuss some of the benefits of supporting a free market following a disaster, including the increased likelihood of storing necessary goods before a disaster, as well as the greater likelihood that necessary goods will be transferred to the disaster area by private, self-interested actors seeking to take advantage of higher prices. Finally, Part IV of this Note concludes by arguing that the most sensible way to avoid the harms of price

---

6 *See*, *e.g.*, ARK. CODE ANN. §§ 4-88-301 to -305 (LexisNexis 2001); FLA. STAT. ANN. § 501.160 (West 2006); LA. REV. STAT. ANN. § 29:732 (West 2005).

7 *See* Press Release, U.S. Sen. Ken Salazar, Sen. Salazar Targets Super-SUV Gas Guzzling Loophole & Gas Price Gouging (Oct. 9, 2005), *available at* http://salazar.senate.gov/news/releases/051009gasprc.htm; *see also* Treat Emergency Victims Fairly Act of 2005, S. 1854, 109th Cong. (2005).

ceilings is for states to repeal their harmful price gouging legislation. In conjunction with such action, this Note also recommends as a possible solution that the federal government direct extra relief aid to areas where the price mechanism suggests it is most in need. This last point draws upon the economic and legal arguments presented in opposition to current price gouging statutes to support a program that could result in a more efficient and effective post-disaster recovery.

II. BACKGROUND OF PRICE GOUGING STATUTES

Sellers who charge higher prices for goods that are in short supply after a disaster face what sometimes seems like almost universal condemnation.[8] The best evidence of popular distaste for the practice is perhaps found in the pejorative name: "price gouging." As a verb, "gouge" can rarely have a positive connotation.[9] Intrinsic in the term is the suggestion that, by selling the desired goods at a higher than usual price, the seller unnecessarily and unfairly harms the buyer; essentially, that the seller is not playing fair. The idea that sellers should deal fairly with their customers is hardly a new one; indeed, notions of fair dealing in the marketplace underlie some of the world's earliest law.[10]

---

[8] In the days following Katrina, gas prices spiked in states located far from the eye of the storm, leading to calls for price gouging legislation. For example, both of Oregon's senators independently introduced bills to prohibit perceived price gouging, the governor of Oregon joined seven other governors in demanding a congressional investigation into possible post-disaster price gouging, and Oregon state legislators urged the governor to call a special legislative session to pass a state anti-gouging bill. Editorial, *Gouging Consumers at the Gas Pump*, OREGONIAN, Sept. 22, 2005, at D10; *see also* H.R. Res. 238, 107th Cong. (2001) (passing a resolution condemning price gouging in the wake of the September 11th attacks and urging "the appropriate Federal and State agencies to investigate any incidents of price gouging with respect to motor fuels during the hours and days after the terrorist acts of September 11, 2001, and to prosecute any violations of law discovered as a result of the investigations").

[9] Among the literal meanings of the term is "to force out the eye of a person with one's thumb." AMERICAN HERITAGE COLLEGE DICTIONARY 600 (4th ed. 2002). By comparison, the definition of "extort" is tame. *Id*. at 629 ("To obtain from another through coercion or intimidation.").

[10] Hon. Sheldon Gardner & Robert Kuehl, *Acquiring an Historical Understanding of Duties to Disclose, Fraud, and Warranties*, 104 COM. L.J. 168, 170 (1999).

A. *History of the Fair Price*

From ancient times, societies have enacted systematic rules imposing a duty on merchants to sell in good faith.[11] Though evidence exists of such rules among the Babylonians, Mesopotamians, Assyrians, and Egyptians, it was in Hebrew culture that strong concepts of fair dealing were first strictly enforced as essential ethical tenets.[12] The Hebrew Talmud, for example, provides that "if thou sell [ought] unto your neighbour, or buyest ought of thy neighbour's hand, ye shall not oppress one another."[13] Talmudic scholars interpreted this verse to prohibit overcharges and undercharges,[14] and ruled that in any transaction in which the profit exceeded one-sixth, the transaction would be null and void.[15] Jewish law was skeptical that self-regulating markets could ensure fair prices, and accordingly intervened to adjust prices that, at least in legal terms, it deemed "unfair."[16] Aspects of Jewish law, at least those touching on good faith dealing and full disclosure, found their way into Roman law, where they had a significant influence on Roman jurists,[17] and consequently, on the Civil Code countries of France, Germany, and others.[18]

The major Western religious traditions also address the issue of "fair" prices. The Catechism of the Catholic Church prohibits merchants from making pricing decisions that take unfair advantage of those in need.[19] Essentially the same

---

[11] *Id*.

[12] *Id*.

[13] *Leviticus* 25:14.

[14] Hershey H. Friedman, *Biblical Foundations of Business Ethics*, 3 J. MARKETS & MORALITY 43, 48 (2000).

[15] *Id.* at 49 (citing the Babylonian Talmud, *Bava Metzia*, 50b). Interestingly, Talmudic scholars seemed to have a relatively sophisticated understanding of the workings of the law of supply and demand. Professor Friedman relates the story of Shmuel, the Talmudic sage, who was concerned with sellers raising the prices of myrtle branches prior to Sukkot. *Id*. He warned the myrtle branch merchants that unless they maintained stable prices, he would allow holiday observers to use myrtle branches with broken tips. *Id*. (citing Babylonian Talmud, *Sukkah*, 34b). Clearly Shmuel understood the role of increased supply as a moderating influence on price.

[16] MEIR TAMARI, "WITH ALL YOUR POSSESSIONS": JEWISH ETHICS AND ECONOMIC LIFE 87, 87-88 (1987).

[17] Gardner & Kuehl, *supra* note 10, at 170-71.

[18] Saul Litvinoff, *Good Faith*, 71 TUL. L. REV. 1645, 1651-55 (1997).

[19] Catechism of the Catholic Church, pt. 3, § 2, ch. 2, art. 7, *available at* http://www.usccb.org/catechism/text/pt3sect2chpt2art7.htm (last visited Apr. 3, 2007) ("Even if it does not contradict the provisions of civil law, any form of unjustly taking and keeping the property of others is against the seventh commandment: thus, deliberate retention of goods lent or of objects lost; business fraud; paying unjust

prohibition found its way into the secular norms of early European markets, where merchants and their customers believed that there was indeed an intrinsically fair price which could be objectively determined.[20] Market actors believed that the sin of unfair pricing could best be avoided by trading in an open, transparent market.[21] Similarly, Islamic law prohibits both *Bay' al-mudtarr*, the exploitation of need by, for example, charging an exorbitantly high price,[22] and *Ihtikar*, which is hoarding, or withholding supplies of essential goods and services with a view to raising prices.[23]

Hoarding, or otherwise restricting supply to increase prices, was understandably repugnant, and in the context of antitrust law, is still a criminal act today.[24] Recognizing the deeply rooted sense of unfairness associated with restricting the supply of goods with the aim of raising prices, commentators have imagined a situation where "a man owned one-half of the wheat in the country and announced his intention to burn it, such abuse of ownership would not be permitted. The crowd would kill him sooner than stand it."[25] Of course, shortages that follow a disaster are not comparable to purposeful destruction by a monopolist of his own property, but the statement does reflect a strong moral conviction that social obligations exist which trump private property rights.

Common to each of these religious or ethical mandates is the idea that the merchant must deal fairly with buyers and that he must be prohibited from unjustly forcing up prices to

---

wages; forcing up prices by taking advantage of the ignorance or hardship of another."); *see also Deuteronomy* 25:13-16.

20 EDWARD CAHILL, FRAMEWORK OF A CHRISTIAN STATE 43 (1930) ("According to medieval teaching on the other hand, the price of a commodity was supposed to be determined by objective value alone; and could not be justly influenced by the special need or ignorance of buyer or seller.").

21 JEAN FAVIER, GOLD & SPICES: THE RISE OF COMMERCE IN THE MIDDLE AGES 103 (Caroline Higgitt trans., 1998) ("[T]o the medieval mind, price gouging . . . [was a] sin of greed, which was to be warded off by trading in an open market, observable by all.").

22 Mohammad Nejatullah Siddiqi, Lecture to the UCLA Int'l Inst., Islamic Banking and Finance (Fall 2001) (transcript available at http://www.isop.ucla.edu/article.asp?parentid=15056).

23 MISHKAT, book xii, ch. viii. ("Those who bring grain to a city to sell at a cheap rate are blessed, and they who keep it back in order to sell at a high rate are cursed.").

24 *See infra* Part II.B. The assumption is that in order for a firm to successfully restrict output and raise prices, there must either be collusion or some other barrier that restricts market entry.

25 OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 280 (Harcourt, Brace and Co. 1920).

derive an advantage at the expense of the buyer. Central to the logic of the discussion is that there is indeed some price which is objectively "fair" and reflects the true value of the good in question. The general rule at common law has long been that the courts should avoid questioning the propriety of prices upon which parties agree, except in cases where prices are so disparate with value that they suggest the perpetration of a fraud.[26] On the other hand, as the cases since *Lochner*[27] suggest, the state has long had the power to interfere with private contract rights in support of social welfare.[28] In unraveling the tension between the right of parties to determine prices in the marketplace and the social obligations of those parties, a useful place to start is with an examination of the antitrust laws. Not only are the antitrust laws some of the oldest and most firmly established consumer protection legislation,[29] but the cases interpreting the act are valuable for the light they shed on such notions as what constitutes a "fair" price.[30]

B. Antitrust Laws

The Sherman Antitrust Act codified at the federal level much of the judge-made and state law that had begun to develop in response to the monopolies of the late 19th century.[31] The rapid industrialization of the period required a new corporate form, one which would allow the new industrialists to

---

26 *See* 2 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 5.15 (Joseph M. Perillo & Helen Hadjiyannakis Bender eds., 1995).

27 Lochner v. New York, 198 U.S. 45, 52-53 (1905) (holding that a New York statute forbidding bakers to work more than 60 hours a week interfered with the freedom of contract, and therefore the right to liberty protected by the Fourteenth Amendment), *abrogated by* West Coast Hotel v. Parrish, 300 U.S. 379, 392-93 (1937).

28 *See*, *e.g.*, FLA. STAT. ANN. § 501.160 pmbl. (West 2005) ("[C]ontrol over pricing of these commodities represents a permissible power of the state . . . .").

29 *See generally* Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966) (describing the legislative history of the Sherman Act and arguing that it displays the clear and exclusive policy intention of promoting consumer welfare).

30 *See*, *e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 342 (1979) ("The essence of the antitrust laws is to ensure fair price competition in an open market."). There is no evidence in the antitrust jurisprudence that antitrust analysis contemplates an objectively "fair" price.

31 *See* 21 CONG. REC. S2457 (1890) (remarks of Sen. Sherman) (noting that the proposed Act was meant to "supplement the enforcement of the established rules of the common and statute law by the courts of the several states").

limit liabilities and to pool capital on an unprecedented scale.[32] It is no coincidence that the new corporate form grew in popularity along with capital intensive industries such as the new railroads.[33] The new capital markets were, if anything, too good at their job, providing more than ample capital for new industry and in some cases leading to over-investment.[34] Despite the extraordinary costs of railroad construction,[35] both the number of railroads and the territory they covered exploded.[36] Competing railroads soon found themselves engaged in ruinous price-cutting wars as they struggled to attract a volume of business sufficient to make their ventures profitable.[37] Recognizing the harm of this competition to potential profits, the railroad operators formed pools or cartels to control output and prices.[38]

In contrast to the cartels of the day which limited competition in order to enable increases in price, most people in the late nineteenth century came to believe that it was free competition that was essential to a healthy economy.[39] Through vigorous competition, the most efficient producers naturally rose to the top, and attempts to interfere with the workings of competitive markets by imposing artificial restraints would only hinder progress.[40] Cartels were, of course, anathema to the idea of competition, and as the public

---

[32] Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875-1890*, 38 J. ECON. HIST. 631, 637-41 (1978).

[33] Christian C. Day, *Investor Power & Liquidity: Corporations, Capital Markets and the Industrialization of America*, 5 J. SMALL & EMERGING BUS. L. 345, 376 (2001) (noting that the "emergence of capital markets neatly coincided with the voracious demands of capital-intensive railroads").

[34] *See generally* JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW (2002) (relating stories of rampant speculation, imprudent overinvestment, and shockingly generous government largesse).

[35] In the early days of the industry, costs ran as high as $36,000 a mile, at a time when $1000 was a solid middle-class income. *See* JOHN STEELE GORDON, AN EMPIRE OF WEALTH 149 (2004).

[36] *Id.* at 235 (noting that between 1860 and 1900 the number of miles of track laid increased six-fold and that by the turn of the century "nearly every town of any size was served by a railroad").

[37] For a discussion on the railroad price wars preceding the Sherman Act, see generally Elizabeth Granitz & Benjamin Klein, *Monopolization by "Raising Rivals' Costs": The Standard Oil Case*, 39 J.L. & ECON. 1, 28-30 (1996).

[38] ELEANOR M. FOX ET AL., CASES AND MATERIALS ON U.S. ANTITRUST IN GLOBAL CONTEXT 4-5 (2d ed. 1989) (describing cartels as "horizontal, loosely structured combinations of competitors that joined forces to create large, regionally dominant systems").

[39] SIDNEY FINE, LAISSEZ-FAIRE AND THE GENERAL WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865-1901, at 289 (1956).

[40] *Id*.

grew increasingly concerned with the power of these new combinations[41] ameliorative legislation became inevitable.[42]

In response, Senator John Sherman introduced the Sherman Antitrust Act[43] in 1889, which was ultimately passed by Congress on July 2, 1890.[44] Though the question of the precise meaning of a prohibition on any "restraint of trade" has been debated ever since,[45] it is fairly clear that Congress had in mind a fairly precise meaning for the term "monopoly."[46] The Act protected, more than anything, the right of producers to compete on their merits, and, in turn, the right of consumers to enjoy the lower prices that must result from that competition.[47] The legislative history surrounding the Act indicates congressional concern for both the welfare of the consumers and the protection of small businesses—values that some have argued must at times inevitably come into conflict.[48] What is clear is that the Sherman Antitrust Act reflected a legislative determination that when businesses combine in such a way as to reduce competition, consumers suffer, and legislative bodies

---

[41] Public concern over the increasingly concentrated power of the trusts and cartels of the day was no doubt fueled by statements such as this by James B. Dill to the famous muckraking journalist Lincoln Steffens: "Trusts are natural, inevitable growths out of our social and economic conditions. . . . You cannot stop them by force, with laws. They will sweep down like glaciers upon your police, courts, and States, and wash them into flowing rivers." LINCOLN STEFFENS, THE AUTOBIOGRAPHY OF LINCOLN STEFFENS 196 (Heyday Books 2005) (1931).

[42] *Id*.

[43] 15 U.S.C. §§ 1-2 (2000).

[44] FOX ET AL., *supra* note 38, at 11.

[45] *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 278-302 (6th Cir. 1898) (collecting cases defining "restraint of trade" at common law), *modified* and *aff'd*, 175 U.S. 211 (1899).

[46] In the legislative debates, questions as to what constituted a monopoly appeared to be resolved in a manner consistent with the common law understanding of the term. For example, Senator George Hoar expressed that he and members of the committee agreed that the term "'monopoly' is a merely technical term which has a clear and legal signification, and it is this: It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him." 21 CONG. REC. 3, 152 (1890). It was equally clear to them what it is not: "a man who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well as he could was not a monopolist." *Id*. This distinction has remained an important part of antitrust law since.

[47] *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 20 (1993) (quoting an early draft of the Sherman Antitrust Act which would have outlawed arrangements "designed, or which tend, to advance the cost to the consumer").

[48] *See id.* at 50-53 (arguing that a policy which protects smaller but less efficient producers will always have the effect of raising prices, to the detriment of consumers).

have both a right and duty to intercede on behalf of those vulnerable consumers.[49]

What the Sherman Act does not guarantee, and was never intended to guarantee, is a particular price for consumers.[50] Often times when charged with a violation of the antitrust laws, defendants would argue that their conduct should fall outside the scope of the Sherman Act prohibitions because the price the alleged cartel charged was "reasonable."[51] In the landmark case *Addyston Pipe & Steel*,[52] the government accused six cast-iron pipe manufacturers of agreeing to fix prices, in part, by dividing sales regions amongst themselves.[53] The manufacturers argued that the common law upon which the Sherman Act was based imposed nothing more than a "reasonable-price" test.[54] Future President and Chief Justice of the Supreme Court William Howard Taft, at the time a judge on the Sixth Circuit Court of Appeals, rejected that argument altogether, holding that under either the common law or the new statute, the defendants' behavior violated the law.[55]

Taft's opinion is important in that it implicitly rejected the notion that courts can or should utilize a reasonable price standard, noting that "the manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it."[56] Allowing courts to arbitrarily decide whether a particular naked restraint of competition was damaging or not was to "set sail on a sea of doubt," since it

---

[49] *Id*.

[50] Or at least any price other than the competitive price.

[51] *See*, *e.g.*, United States v. Addyston Pipe & Steel Co., 85 F. 279 (6th Cir. 1898), *modified* and *aff'd*, 175 U.S. 211 (1899).

[52] *Addyston Pipe*, 85 F. at 271. Defendants appealed the judgment against them to the Supreme Court. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 211 (1899). The lower court's opinion was upheld, with Justice Peckham's decision quoting from Judge Taft's lower court opinion approvingly. *Id*. at 226, 248.

[53] *Addyston Pipe*, 85 F. at 291-93.

[54] *Id*. at 279.

[55] *Id*. at 291 ("Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending toward a monopoly.").

[56] *Id*. at 284.

would be nearly impossible for the courts to set any reasonable standard of what measure of protection parties required.[57]

It is no cause for wonder that the Court was skeptical of a monopolist's desire or ability to charge only a fair or reasonable price, and accordingly that the Court was unwilling to consider whether a monopolist's price was objectively fair.[58] What is truly remarkable is that the antitrust laws prohibit fixing *maximum* prices as well.[59] The Supreme Court has held that:

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces.[60]

In *Arizona v. Maricopa County Medical Society*,[61] the Court specifically rejected the defense that setting a maximum price sellers could charge for a service could only help consumers.[62] The clear import of the Court's reasoning in these cases is that the antitrust laws do not necessarily guarantee low prices, only the conditions that could lead to them.[63]

Antitrust law has undoubtedly worked to maintain competition and consequently, to enhance consumer welfare.[64] As is made clear by antitrust jurisprudence, however, the Supreme Court has long recognized that the workings of a liberal market are better able to allocate goods to consumers at

---

[57] *Id.* at 283-84 (commenting that there existed "no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition").

[58] A monopolist, like a competitive firm, seeks to maximize profits. The monopolist accomplishes this through setting marginal revenue equal to marginal cost. JOSEPH E. STIGLITZ, ECONOMICS 343 (2d ed. 1997).

[59] Given that the primary policy of antitrust law is to protect consumers through ensuring that producers charge fair (usually understood to mean low) prices, *see* BORK, *supra* note 47, it is notable that the Supreme Court also considers agreements that fix *maximum* prices to be in violation of the Sherman Act.

[60] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940). *Socony-Vacuum* reaffirms the principle first laid down in *Addyston Pipe* that the purported reasonableness of prices is of no moment in determining whether an agreement violates the law. *Id.*

[61] Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982).

[62] *Id*. at 349.

[63] *Id.* at 347 ("We have not wavered in our enforcement of the *per se* rule against price fixing.").

[64] RICHARD POSNER, ANTITRUST LAW 14 (2d ed. 2001).

the "fair" price.[65] Prices are really nothing more than a snapshot, a fleeting impression of all the relevant factors in one moment that inform buyers' and sellers' market decisions at that time.[66] The Court recognized the futility, and indeed the potential harm, of arbitrarily fixing prices: "The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions."[67] This is not to say that antitrust law does not or should not play a role in a post-disaster market—it can and does.[68] It is simply important to note that, in the world of antitrust at least, the Court has recognized and reaffirmed the idea that consumer welfare is best served by allowing markets to operate unencumbered by "the vague and varying opinion" of judges and well-meaning legislators.[69]

Antitrust laws are already well equipped to address the genuinely manipulative behavior that price gouging statutes purport to address. But the justification that supports interventions in antitrust cases, the creation of artificial scarcity by reducing output, does not hold with the same force in situations of natural scarcity. Holmes imagined the hostile public reaction that would no doubt result should a monopolist decide to burn half of his crop with a view to raising prices.[70] Antitrust laws address the root of the problem, by preventing the formation or maintenance of monopolies through anticompetitive acts from the outset.[71] Holmes's thought experiment would take on an entirely different dimension had he asked how the public should react were it instead a wildfire

---

[65] *Id.* at 24.

[66] *See* STIGLITZ, *supra* note 58, at 72-73.

[67] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940).

[68] Incidentally, the federal government might conceivably have some power to regulate price gouging through the Robinson-Patman Act, which prohibits price discrimination.

[69] United States v. Addyston Pipe & Steel Co., 85 F. 271, 283-84 (6th Cir. 1898), *modified* and *aff'd*, 175 U.S. 211 (1899).

[70] *See supra* Section II.A.

[71] Recall that monopolies that grow out of the superior skill or efficiency of a producer are not the target of antitrust law. It is said that U.S. antitrust law has a favorite epithet: Antitrust law protects competition and consumers, not competitors; it is not a proscription against unfairness. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977). It seems quite likely that a producer, whether a monopolist or not, could not long maintain their dominant position by destroying half their crop.

that destroyed half the wheat crop.[72] Absent some act of negligence, it would hardly be fair to lay the blame on the producer. Scarcely better from a moral standpoint, and certainly worse for everyone who needs wheat, is to address the problem by instituting a price ceiling on the product demanded, thereby exacerbating the shortage.[73] Yet this is precisely what modern price gouging statutes tend to do.

C. Modern Price Gouging Statutes

Like the cases interpreting the Sherman Act, price gouging statutes often explicitly recognize the superiority of the marketplace in pricing consumer goods.[74] Nonetheless, citing the extraordinary impacts of disasters on the workings of the market system, many state legislatures reasoned that the public interest required laws to protect consumers from excessive prices.[75] New York's legislature, for example, worried that "during periods of abnormal disruption of the market . . . some parties within the chain of distribution of consumer goods have taken unfair advantage of consumers by charging grossly excessive prices for essential consumer goods and services."[76] Other states emphasize that "the health, safety, and welfare of the citizens . . . depend on the availability and affordability of certain essential commodities."[77] The justification, then, for interfering with the right of sellers to set

---

[72] If half the wheat crop in Holmes's thought experiment were to burn as a result of a natural wildfire, prices would presumably need to rise in order to induce sellers in other countries to export wheat. If an artificial price ceiling were placed on wheat sales, sellers and exporters would have little economic motivation to shift supplies to this market, and shortages would almost certainly result.

[73] See *infra* Section III for a description of the economic reasoning behind price ceiling induced shortages.

[74] *See*, *e.g.*, TENN. CODE ANN. § 47-18-5101(3) (West 2006) ("Pricing of consumer goods and services is generally best left to the marketplace under ordinary conditions, but when a declared state of emergency results in abnormal disruptions of the market, the public interest requires that excessive and unjustified increases in the prices of consumer goods and services should be discouraged."); *accord* ARK. CODE ANN. § 4-88-301 (2001); W. VA. CODE § 46A-6J-1 (2006). *See also* Press Release, Off. of the N.Y. State Att'y Gen., Fifteen Gas Stations Fined in Hurricane Price Gouging Probe (Dec. 19, 2005), *available at* http://www.oag.state.ny.us/press/2005/dec/dec19a_05.html (statement of New York Att'y Gen. Eliot Spitzer announcing the results of a three-month probe against suspected price gougers: "No one begrudges a business the right to make a profit and under normal circumstances business owners may charge whatever price they think is appropriate. But when disaster strikes, state law requires that price increases be linked directly and proportionately to increased costs.").

[75] *See*, *e.g.*, TENN. CODE ANN. § 47-18-5101(3).

[76] N.Y. GEN. BUS. LAW § 396-r (McKinney 2003).

[77] FLA. STAT. ANN. § 501.160 pmbl. (West 2005).

their own prices centers both on protecting the public from the unscrupulous and ensuring the reasonable availability of essential goods in the wake of a disaster. The price ceilings these statutes create are unlikely to result in the realization of either goal.

Price gouging laws respond to disaster, and consequently most statutes require some sort of market disrupting event: anything from a terrorist attack to a hurricane, earthquake, or other natural disaster.[78] Usually, the President of the United States, the governor of a state, or some other authorized local official must declare a state of emergency.[79] In addition, most statutes limit, with differing degrees of specificity, the categories of goods subject to a statutory price ceiling.[80] Sellers have no obligation to maintain prices on goods not covered by the relevant statutes, though overbroad language in some statutes could conceivably cover a wide variety of goods and services.[81]

The principal differences in the various statutes enacted by the states center on what constitutes the "unfair" price. States have adopted a number of different approaches for

---

[78] Tennessee's statute frequently referenced the terrorist attacks of September 11th and specifically noted that "[t]errorist attacks can dismantle the stability of markets and free trade." TENN. CODE ANN. § 47-18-5101. Louisiana's statute was amended in 2005 to prohibit price gouging not only in the event of a declared emergency, but also "during a named tropical storm or hurricane in or threatening the Gulf of Mexico." LA. REV. STAT. ANN. § 29:732(a) (West 2007). New York's legislature, guided by experience, worried about "strikes, power failures, severe shortages or other extraordinarily adverse circumstances." N.Y. GEN. BUS. LAW § 396-r.

[79] *See*, *e.g.*, ARK. CODE ANN. § 4-88-303 (LexisNexis 2001) ("Upon the proclamation of a state of emergency . . . declared by the President of the United States or the Governor, [or] upon the declaration of a local emergency . . . by the executive officer of any city or county . . . it is unlawful . . . for any person . . . to sell or offer to sell [certain goods and services] for a price more than ten percent (10%) above the price charged immediately prior to the proclamation of emergency.").

[80] *See*, *e.g.*, IND. CODE ANN. 4-6-9.1-2 (LexisNexis 2002) (limiting statute to prohibit charging excessive prices for fuel alone); S.C. CODE ANN. § 39-5-145(A)(2) (West 2006) (prohibiting price gouging of any "commodity" defined as "goods, services, materials, merchandise, supplies, equipment, resources, or other articles of commerce, and includes, without limitation, food, water, ice, chemicals, petroleum products, and lumber essential for consumption or use as a direct result of a declared state of emergency"); TENN. CODE ANN. § 47-18-5103 (providing that statute applies to overcharges on "any consumer food item; repair or construction services; emergency supplies; medical supplies; building materials; gasoline; transportation, freight, and storage services; or housing").

[81] *See*, *e.g.*, Treat Emergency Victims Fairly Act of 2005, S. 1854, 109th Cong. § 3(2) (2005) (defining "goods or services" to mean "goods or services of any type, including food, transportation, housing, and energy supplies"). It is difficult to see how subjecting every conceivable good or service to a price ceiling in a disaster can serve any useful purpose.

determining whether a price is "unconscionable," which can be broken into three basic categories: those that limit price increases to a fixed percentage over pre-disaster prices, those that prohibit price increases that are deemed excessive, and those that prohibit price increases absolutely.[82]

Several state statutes prohibit price increases above a certain proportion of the pre-disaster price.[83] Arkansas law, for example, penalizes sellers for any price increase of "more than ten percent (10%) above the price charged by that person for those goods or services immediately prior to the proclamation of emergency."[84] Other states allow for increases of up to twenty-five percent.[85] Proportional increase price gouging statutes present at least some pricing flexibility, but will still result in an effective price ceiling any time the market clearing price increases by more than the amount the statute will allow sellers to raise prices. Sellers may also have some ability to raise prices *before* a state of emergency is formally declared, which may induce sellers to anticipate future supply constraints by raising prices before a disaster strikes.

Other states prohibit the sale of goods at prices which are "unconscionable,"[86] reflecting the common law exception to the rule that law will generally not look to price.[87] The statutes in these cases provide little guidance as to what price level can be considered unconscionable, sometimes leaving it to the courts to determine as a matter of law.[88] Many states follow the example of the New York statute, which provides the court with guidelines of what constitutes an "unconscionably excessive" price.[89] For example, New York courts look to

---

[82] The slight differences among the various statutes should not be overemphasized. All statutes implementing effective price ceilings cause the same harm, the question is only one of degree.

[83] *See*, *e.g.*, ARK. CODE ANN. § 4-88-303(a)(1); CAL. PENAL CODE § 396 (West 2005).

[84] ARK. CODE ANN. § 4-88-303(a)(1). The statute does allow for price increases "directly attributable to additional costs for labor or materials used to provide the services." *Id*. § 4-88-303(a)(2).

[85] *See* ALA. CODE § 8-31-4 (LexisNexis 2002).

[86] *See*, *e.g.*, FLA. STAT. ANN. § 501.160(2) (West 2005); N.Y. GEN. BUS. LAW § 396-r (McKinney 2003); VA. CODE ANN. § 59.1-527 (LexisNexis 2006).

[87] *See infra* Part II.D.

[88] *See*, *e.g.*, N.Y. GEN. BUS. LAW § 396-r.3 (providing that the question of "[w]hether a price is unconscionably excessive is a question for the court").

[89] *Id.*; *accord* FLA. STAT. ANN. § 501.160(1)(b) (providing that prima facie evidence of unconscionable pricing exists where there is a "gross disparity" between the price charged for a good in a time of emergency and the price charged in the usual course of business in the thirty days preceding the emergency, or when the price

whether there was a "gross disparity" between the price charged by a seller post-disaster and the price charged immediately prior to the disaster,[90] as well as whether the price charged by a seller "grossly exceeded" the average price in the trade area prior to the disaster.[91] Like other variations on the theme, most statutes do allow defendants to argue that their increased prices are directly attributable to increased costs.[92] Of course, defining an "unconscionable" price as any price which grossly exceeds the former price is hardly a model of clarity, but it does have the virtue of allowing some room for judicial flexibility not available in other iterations of price gouging statutes.

Declining to adopt a vague "unconscionability" standard or a prohibition of price increases above a certain percentage, some states have adopted price gouging statutes which simply provide that price increases must, as a rule, be disallowed.[93] These statutes provide no room for market flexibility and fail to recognize any change in supply relative to demand. It is difficult to condemn this particular iteration of price gouging statute with too much force, however, as it is only the worst in a crop of laws which have the same essentially harmful effect.

As a group, the various state price gouging statutes impose a wildly varying array of fines and sanctions on

---

charged "grossly exceeds" the average price charged in the trade area in the thirty days preceding the emergency).

[90] N.Y. GEN. BUS. LAW § 396-r.3.

[91] *Id*.

[92] *Id*. *But see* People v. Beach Boys Equip. Co., 709 N.Y.S. 2d 729 (App. Div. 2000). Defendant retailers sold generators for $1200 while other retailers in the trade area charged less than half that price. *Id*. at 730. The defendant argued that his price was attributable to additional costs imposed by its suppliers, who sold the generator to it for $1,000. *Id*. The court held that the defendant had not established that the price increase was warranted or that the bargain with the supplier was an "arms length transaction." *Id*. at 731. Though the case law is scarce, the safe-harbor provided by justifiable price increases attributable to increased costs does not appear to afford much protection.

[93] *See*, *e.g.*, LA. REV. STAT. ANN. § 29:732(A) (West 2007) ("the value received for goods and services sold within the designated emergency area may not exceed the prices ordinarily charged for comparable goods and services in the same market area at, or immediately before, the time of the state of emergency"); GA. CODE ANN. § 10-1-393.4(a) (Lexis 2000) ("It shall be an unlawful, unfair, and deceptive trade practice for any person . . . to sell or offer for sale at retail any goods or services necessary to preserve, protect, or sustain the life, health, or safety of persons or their property at a price higher than the price at which such goods were sold or offered for sale immediately prior to the declaration of a state of emergency"); MISS. CODE. ANN. § 75-24-25(2) (2005).

offenders. Penalties include injunctive relief,[94] fines and penalties,[95] restitution,[96] revocation of licenses,[97] and even significant prison sentences.[98] In many states, residents are encouraged to report fellow citizens suspected of possible price gouging violations through hotlines set up by state attorneys general or departments of consumer protection.[99] It is clear from both the severity of the potential punishments as well as states' willingness to police and enforce the statutes that the price gouging statutes are likely to ensure that merchants comply when making pricing decisions.

The various price gouging statutes, at least where state legislators indicated intent, reflect a general notion that social welfare will be most enhanced by ensuring a fair price for consumers. The means of doing so, in this case essentially fixing a price for the duration of the disaster, has no precedent in antitrust law. The courts interpreting the Sherman Act expressly declined, largely for jurisprudential reasons, to fix prices, choosing instead to rely on competitive markets to set welfare-enhancing prices.[100] Price gouging statutes instead appear to invoke principles of the common law prohibitions on duress and unconscionable pricing. As with the antitrust laws, however, the common law prohibitions genuinely enhance consumer welfare and therefore are easily distinguishable from price gouging statutes.

---

[94] IND. CODE ANN. § 4-6-9.1-3(2) (LexisNexis 2002); N.Y. GEN. BUS. LAW § 396-r.4.

[95] ALA. CODE § 8-31-5 (LexisNexis 2002); IND. CODE ANN. § 4-6-9.1-3(4); N.Y. GEN. BUS. LAW § 396-r.4; TENN. CODE ANN. § 47-18-5104(a) (West 2006).

[96] IND. CODE ANN. § 4-6-9.1-3(3); LA. REV. STAT. ANN. § 29:734(4).

[97] ALA. CODE § 8-31-5.

[98] MISS. CODE ANN. § 75-24-25 (providing for between one and five years in prison when violation is willful and markup is in excess of $500); S.C. CODE ANN. § 39-5-145 (West 2006) (providing for up to 30 days imprisonment for willful or knowing violations).

[99] *See*, *e.g.*, Florida Dep't of Agric. and Consumer Servs., Div. of Consumer Servs., *Price Gouging Is Illegal*, http://www.800helpfla.com/price_gouging.html (last visited Jan. 29, 2006); Louisiana.gov, Hurricane Information, http://katrina.louisiana.gov/faq.htm#gouging (last visited Jan. 29, 2006); Press Release, Off. of the N.Y. State Att'y Gen., Attorney General Cuomo Issues Warning Against Price Gouging in Wake of Severe Winter Storms (Feb. 14, 2007), *available at* http://www.oag.state.ny.us/press/2007/feb/feb14a_07.html.

[100] *See supra* note 57 and accompanying text.

D. Fair Pricing Under the Common Law

Under the common law, courts generally decline to question the adequacy of consideration in voluntary exchanges—which is to say that they leave prices up to buyers and sellers.[101] Inadequacy of consideration "such as shocks the conscience" may, however, serve as evidence indicating mistake, misrepresentation, duress or undue influence.[102] Fraud and misrepresentation, of course, are always proper focuses of our system of law and appear to have similarly been the focus of commercial morality from the earliest times.[103] Likewise, an agreement secured through duress by physical compulsion or threat of physical compulsion is voidable.[104]

The situation consumers face following a disaster is often described as one of duress, where the consumer is "forced" into a transaction in which they would otherwise not engage.[105] Charging a high market price post-disaster differs in the important respect that the seller charging the price played no role in bringing about the circumstances leading to the supply constraint.[106] For example, if an individual threatens to shoot another unless she is paid $100, it may indeed increase both parties' welfare if the put upon party purchases the "safety" she offers, but because the extortionist created the artificial scarcity in safety, the law does not respect the transaction.[107] Any policy to the contrary would actually *encourage* the thuggish behavior.[108] The compelling logic behind voiding a contract formed under duress is to remove the incentives to create the situation in the first place, a justification which

---

[101] *See supra* Part II.A; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981) ("If the requirement of consideration is met, there is no additional requirement of . . . equivalence in the values exchanged.").

[102] RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. e (1981).

[103] *See supra* Part II.A.

[104] RESTATEMENT (SECOND) OF CONTRACTS § 175-76 (1981). "If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim." *Id.* § 175(1).

[105] *See*, *e.g.*, William Hermann, *Drivers Alter Lifestyles to Deal with Gas Prices*, ARIZ. REPUBLIC, Aug. 30, 2005, at 10A (quoting a consumer who likened purchasing gasoline to "highway robbery," stating that "we have to pay, we have no choice").

[106] See DAVID D. FRIEDMAN, LAW'S ORDER 152-53 (2000) for a discussion of the economics of duress.

[107] *Id*. at 152.

[108] *Id*.

plainly does not hold when the circumstances dictating the terms of the parties' exchange are beyond their control.

Unlike in the duress hypothetical, in a rescue situation, the rescuer is not responsible for the circumstances that necessitate the rescue.[109] In that sense, the situation is more similar to a market for post-disaster necessities.[110] In a rescue situation, the party providing the service can ask any price up to the full utility value the goods can provide, a set of circumstances economists call "bilateral monopoly."[111] The buyer, who must have the good and has no other alternatives, must pay whatever the seller asks, up to the full benefit of the good to him. In a situation where the buyer's life is at stake—say where he is dying of a rare disease while the seller holds the only cure—that price might be extraordinarily high.[112] Where, as here, the buyer's agreement to the exchange was extracted solely through his distress, neither fairness nor efficiency supports the application of the bargain principle.[113] Courts in these situations generally award a judicially determined "fair" price for the rescue, ignoring any bargain independently reached by the parties.[114]

Though the above example might superficially appear to support a regime of price ceilings in disaster scenarios, post-

---

[109] See *id.* at 153-56 for a discussion of the economics of rescue. Professor Eisenberg instead uses the term "distress" to describe a situation where "party A makes a bargain with B at a time when, through no fault of B, A is in a state of necessity that effectively compels him to enter into a bargain on any terms he can get." Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 754 (1982).

[110] *See* FRIEDMAN, *supra* note 106, at 153.

[111] *Id*. at 155.

[112] Eisenberg gives the following example:

> *The Desperate Traveler*. *T*, a symphony musician, has been driving through the desert on a recreational trip, when he suddenly hits a rock jutting out from the sand. *T*'s vehicle is disabled and his ankle is fractured. He has no radio and little water, and will die if he is not soon rescued. The next day, *G*, a university geologist who is returning to Tucson from an inspection of desert rock formations, adventitiously passes within sight of the accident and drives over to investigate. *T* explains the situation and asks *G* to take him back to Tucson, which is sixty miles away. *G* replies that he will help only if *T* promises to pay him two-thirds of his wealth or $100,000, whichever is more. *T* agrees, but after they return to Tucson he refuses to keep his promise, and *G* brings an action to enforce it.

Eisenberg, *supra* note 109, at 755.

[113] *Id*. at 755-56.

[114] Post v. Jones, 60 U.S. 150, 159 (1856) ("The contrivance of an auction sale, . . . where the master of the Richmond was hopeless, helpless, and passive—where there was no market, no money, no competition . . . is a transaction which has no characteristic of a valid contract.").

disaster markets are critically different in a number of respects. The primary difference between a distress situation and a market for post-disaster goods centers on the number of suppliers. Distress scenarios are premised on the concept of bilateral monopoly.[115] Recasting a traditional distress scenario with even as few as two rescuers fundamentally limits the bargaining power of either seller. The rescuer may still hope to profit from the transaction, but any excessive gains will be limited by the competing bid of her competitor.[116] A rational bidding process should result in a rescue price equal to cost plus a reasonable profit.[117] Any collusive agreement, express or implied, between the two rescuers to charge a higher price is, of course, a violation of the antitrust laws described in Part II.B.[118] True examples of bilateral monopoly are rare, and most post-disaster markets will be served by multiple sellers, negating the applicability of the doctrine for the purposes of price gouging statutes.

Price gouging statutes are by no means a logical extension of common law principles or even of other consumer oriented legislation such as antitrust and antifraud laws. They draw their moral weight from the goals they articulate, rather than from their ability to achieve them.[119] The aims of the statutes are uniformly to protect the consumer from unfairness and to ensure that they will be able to secure essential goods at fair prices.[120] "Fair" prices under the common law, as we have seen, are usually the competitive prices. This is not because of

---

[115] Bilateral monopoly is defined as the situation where the wealth-maximizing transactions fail due to the fact that each party has only one potential trading partner and each engages in strategic behavior to appropriate the full gains of the trade. *See* JEFFRIE G. MURPHY & JULES L. COLEMAN, THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 258-62 (1984).

[116] *Id.*

[117] *Id.*

[118] *See* Eisenberg, *supra* note 109, at 756 ("When a commodity is sold under perfect competition, the doctrine of distress would usually have no application, even to contracts for necessities."). Two competitors by no means ensures "perfect competition," but the ability of one rescuer to extract extraordinary surplus gains would be severely limited, provided there is no illegal collusion between the two parties.

[119] Price gouging statutes express a desire to protect consumers, but by simply fixing prices by governmental fiat, they are unlikely to help consumers in practice.

[120] The Arkansas law states that "some merchants have taken unfair advantage of consumers by greatly increasing prices for essential consumer goods or services." ARK. CODE ANN. § 4-88-301 (2005). New York's and Florida's statutes express similar concerns regarding the "unfair advantage" merchants might take of consumers in need. N.Y. GEN. BUS. LAW § 396-r (McKinney 2003); FLA. STAT. ANN. § 501.160 pmbl. (West 2005).

some sort of laissez-faire, libertarian fetishism, but because the common law has often recognized the market's extraordinary ability to operate as an instrument of consumer welfare. Price gouging statutes interfere with that process and palpably harm consumers in the days and weeks following a disaster, as the following analysis of the economics of shortages demonstrates.

III. THE TRADITIONAL ECONOMIC VIEW

Most price gouging statutes do not provide for prohibitions on price adjustments unless there is some sort of triggering event which results in an "abnormal disruption" of the market.[121] New York's statute specifically defines the phrase "abnormal disruption" as:

> [A]ny change in the market, whether actual or imminently threatened, resulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor.[122]

Such a definition fundamentally misunderstands both the functioning and the capability of a market. Markets are notable for their ability to respond to changed circumstances and, based on those circumstances, to rationally allocate goods to their most valued users.[123] Statutes which interfere with market operations based on nothing more than "any change . . . resulting from stress" have created a perverse situation that handicaps markets just when the need for a mechanism to rationally distribute goods is in greatest need.[124] This section will explain how markets do that under normal conditions, as well as what happens to supply when poorly reasoned laws interfere with those workings.

---

[121] *See*, *e.g.*, Zeke Minaya, *World Series Parking Takes Big League Bucks*, HOUS. CHRON., Oct. 26, 2005, at A6 (reporting that although sports enthusiasts accused parking lot owners who quintupled parking prices during the World Series of price gouging, "[a]ccording to the Texas Deceptive Trade Practices Act, price-gouging prohibitions are only triggered after a disaster to prevent businesses from charging excessive prices during times of dire need").

[122] N.Y. GEN. BUS. LAW § 396-r.

[123] *See* H. PEYTON YOUNG, EQUITY: IN THEORY AND PRACTICE 161 (1994) ("Competitive markets allocate property both efficiently and equitably provided the goods were equitably allocated to begin with.").

[124] N.Y. GEN. BUS. LAW § 396-r.

A. Why Do Prices Rise After a Disaster?

The standard price gouging statute suggests that large increases in prices following a disaster are indicative of a kind of breakdown in the market system which, absent the abnormal shock, tends to operate very well.[125] That view is mistaken; large post-disaster increases in price are a rational, predictable, and useful response to the new circumstances of reduced supply relative to demand, not a market failure because of it.[126] The traditional argument for why prices rise in the wake of a disaster is a simple case of a market response to shortages.[127] The catastrophic event, whether hurricane or terrorist attack, causes a reduction in the supply of an available good.[128] Consumers, whose need for the good has not necessarily changed as a result of the disaster,[129] bid against one another in order to purchase the quantity of goods each desires.[130] This competitive bidding for limited supply leads to price increases, which will continue until the market price reaches equilibrium—that point where consumers and suppliers have no incentive to change either price or quantity.[131]

Higher prices, then, are evidence of a functioning market, not of an abnormal disruption in market operations requiring governmental intervention. High prices reflect the simple fact that people need things which they cannot get, and that they want them enough that they are willing to pay a higher price in order to get them.[132] Sellers, of course, would happily set the price as high as buyers would willingly pay, disaster or not.[133] The ability of sellers to raise prices is

---

[125] *See supra* Part III.

[126] *See* YOUNG, *supra* note 123, at 120.

[127] *See* STIGLITZ, *supra* note 58, at 110 (defining a "shortage" as a situation when "people would like to buy something, but they simply cannot find it for sale at the going price").

[128] *Id*.

[129] Catastrophes will affect consumer demand for different goods in different ways. Demand for basic goods such as food and potable water should remain the same, although the supply of those goods might be severely constrained. Demand for goods related to repair and response to the disaster would presumably increase, while demand for luxury goods could be expected to decrease.

[130] *See* STIGLITZ, *supra* note 58, at 89.

[131] *Id.*

[132] *Id*.

[133] *See* E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 9 (1994) (noting that sellers will seek to maximize prices by selling their goods at the highest competitive price while

restricted by competition with other sellers, who will try to earn the business of buyers by offering the best price consistent with a profit.[134] Setting an arbitrary price for the goods people wish, which is precisely what price gouging statutes do, does not change the fundamental nature of the supply and demand relationships just described.[135] Price ceilings can, however, result in a number of predictable harms, including shortages and misallocation of existing supply.[136]

In the short run, price gouging statutes do not *create* shortages so much as they prevent their remedy. The initial shortages will normally stem from the disaster itself, perhaps through causing increased demand for items in short supply, by destroying stockpiled supplies of certain items, or by preventing their re-supply. Shortages can really only be addressed effectively through some combination of two methods: increasing supply or allocating existing supplies more efficiently.[137] The most obviously useful method, as recognized by the Talmudic Sage Shumuel,[138] is to increase the supply of the good in question as quickly as possible. The second option, which becomes increasingly more important as the ability to increase supply diminishes, is to allocate limited supplies in such a way as to gain the most utility from their use. Price ceilings are extraordinarily poor at doing either, and virtually assure a third, less attractive, option: that the victims of natural disasters will go without.

B. Increasing Supplies

Shortly after Hurricane Rita swept through Broward County, Florida, David Bercovicz began selling bottled water

---

maintaining the lowest cost possible per unit). However, there are exceptions to the general rule that sellers will seek to maximize utility only through price. *See infra* Part III.D.1.

134 *See* SULLIVAN & HARRISON, *supra* note 133.

135 *See* STIGLITZ, *supra* note 58, at 113-14.

136 *See generally* Edgar O. Olson, *An Econometric Analysis of Rent Control*, 80 J. POL. ECON. 1081 (1972).

137 The assertions are self-evident. For example, when faced with a shortage of nurses, a hospital is necessarily faced with a limited range of options. It might choose to hire more nurses or some close substitute who can provide the same services. The hospital might also try to stretch its existing staff to cover its needs, perhaps by requiring longer hours or utilizing the staff more efficiently. There is, of course, a third option: the hospital and its patients may simply accept the shortages and go without, an option that becomes less attractive as the service the nurses would provide becomes more critical.

138 *See supra* note 15 and accompanying text.

out of the back of a U-Haul for $10.00 per case of twenty-four one-liter bottles.[139] Sheriff's deputies, after learning that a nearby Publix grocery store was selling the same cases for half the price, arrested him for price gouging.[140] Bercovicz had driven the water-filled truck to Broward County from the relatively untouched city of Tampa, Florida,[141] a distance of over 200 miles.[142] In so doing, Bercovicz almost certainly violated Florida's price gouging statute, which prohibits charging any price which "grossly exceeds the average price" at which the commodity was available before the storm.[143] An analysis of the social benefit of his actions, however, no matter how self-interested the impetus, provide a useful starting point for a discussion of the utility of a liberal post-disaster market.

Some may disapprove of what they consider Bercovicz's excessive avarice, especially when his gain comes at the expense of those suffering through no fault of their own. The assumption that the seller's gain must come at the buyer's expense is, however, incorrect. No matter what one may personally think of Bercovicz or his motives, it is clear that the net social benefit of his actions is positive. His foray into the retail water business is exactly the type of behavior we should expect and, indeed, encourage. He purchased water, an essential post-disaster good, from Tampa, where prices were presumably low, representing its relative abundance. He then drove them to Broward County where he was able to sell them at a much higher price, indicative of water's relative scarcity at that locale.[144] Nobody was required to buy his water, indeed, the identical product was for sale at a nearby grocery store at half the price.[145] The fact that anyone was willing to purchase Bercovicz's water indicates that either: (1) the supply of lower priced water was depleted, or (2) purchasing water from the grocery store involved other costs, such as waiting in line or

---

139 Abhi Raghunathan, *South Florida Shortages Fuel Black Market*, ST. PETERSBURG TIMES, Oct. 29, 2005, at 1B.

140 *Id.*

141 Posting of Bonnie Gross to Sun-Sentinel Hurricane Weblog, http://www.sun-sentinel.com/news/weather/weblog/hurricane/archives/2005/10/entrepeneur_or.html (Oct. 27, 2005, 21:07 EST).

142 About: Florida for Visitors, Florida Driving Distances, http://goflorida.about.com/library/bls/bl_driving_distances.htm (last visited Feb. 26, 2007).

143 FLA. STAT. ANN. § 501.160 (West 2005).

144 Raghunathan, *supra* note 139.

145 *Id.*

traveling a greater distance.[146] In either case the consumer is better off than if the water they needed had stayed in Tampa, which is no doubt where it would have remained had Bercovicz been unable to charge more than the pre-disaster price.[147]

The relocation of goods from locations of relatively high prices to those where prices are relatively low is known as arbitrage.[148] It is possible that the arbitreurs have positive social motivations, but it is certainly not necessary. The simple act of moving goods from where they are abundant to where they are scarce has the beneficial effect of equalizing the prices between the two locations.[149] This is important in post-disaster scenarios in which high prices are the result of shortages. Arbitreurs taking advantage of the high prices will move supplies into the areas where supplies are low, and in so doing will increase supply and lower prices, moving the market closer to the pre-disaster situation.[150] This is especially important in situations where government action may be considered inadequate.[151]

Local suppliers—those who are not simply relocating goods from locations of abundance to locations of scarcity—respond to a similar set of incentives. Provided the proper incentive scheme is in place, local suppliers arbitrage by purchasing essential goods at a *time* of relative abundance and sell at a time of relative scarcity, storing the good in the meantime. Suppliers have little incentive to store excess goods

---

[146] *See Floridians Frustrated by Lack of Relief Supplies; Authorities Raise State's Death Toll to 10 as Hurricane Wilma Cleanup Continues*, RECORD (Kitchener-Waterloo, Ontario), Oct. 27, 2005, at A6 [hereinafter *Floridians Frustrated*] (reporting that basic commodities required hours of waiting in line, up to five hours for fuel and nine hours for water and ice).

[147] This is true whether the consumer benefited indirectly from the decreased competition for the water as a result of the removal of all the buyers who purchased from the alternative sources, or because the consumer benefited actually purchased the water directly from Bercovicz and thus avoided whatever alternative the consumer decided was less attractive.

[148] "Arbitrage" is defined as trading a good in different markets in which it commands differing prices. WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATIONS AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 297-300 (3d ed. 1988).

[149] *Id*.

[150] Arbitrage opportunities offer the chance for high returns at little or no risk. *See* STIGLITZ, *supra* note 58, at 241. In competitive markets, these opportunities will quickly disappear as savvy investors purchase the relatively low priced item and sell the relatively high priced item. *Id*. The process ends when the prices are essentially the same. *Id*.

[151] *See* Audrey Hudson, *Storm Victims Praise Churches; Rate Response Efforts Highest*, WASH. TIMES, Dec. 2, 2005, at A1 (reporting that Louisiana residents gave government agencies consistently low ratings for their response to Hurricanes Katrina and Rita).

in anticipation of increased demand at a later date unless they can sell those goods at a price that reflects that demand and covers their costs of interim storage. Most businesses must keep some amount of inventory in stock at all times, the storage of which represents a significant cost. Profit-maximizing firms face a trade-off between the costs of holding inventory and the risk of being unable to satisfy consumer demand if inventories are insufficient;[152] this cost-benefit analysis continues all the way up the supply line.[153]

Gasoline is a prime example of a commodity where demand is price-inelastic in the short term; that is the demand for gasoline is not immediately sensitive to price.[154] Some researchers have suggested that in situations where consumers are unable to shift their demand significantly in the short term, storage of the commodity might play a role in reducing price volatility.[155] The benefits of storage capacity, however, are necessarily limited by the availability and costs of that capacity.[156] Basically, if it costs suppliers more to store commodities than they can be re-sold for, suppliers will have no incentive to store.[157]

The common argument against both types of arbitrage—that speculators keep goods off the market, creating shortages and price instability—is entirely wrong.[158] Indeed, the opposite is true: the speculator wishes to buy low and sell high, but the effect of his actions is to place upward pressure on prices when goods are abundant and downward pressure on those same goods when they are scarce, in effect leading to less price volatility overall.[159] It is conceivable that a single supplier could "corner the market" by controlling all the supplies in a given market, but in such an eventuality consumers can always look to the antitrust laws for recourse.[160]

---

[152] C. Erik Larson, Lars J. Olson & Sunil Sharma, *Optimal Inventory Policies When the Demand of Distribution Is Not Known*, 101 J. ECON. THEORY 281, 286 (2001).

[153] *Id*.

[154] SEVERIN BORENSTEIN, JAMES BUSHNELL & MATT LEWIS, UNIV. OF CAL. ENERGY INST., MARKET POWER IN CALIFORNIA'S GASOLINE MARKET 8 (2004), http://www.energy.ca.gov/reports/2004-05-28_600-04-004.pdf.

[155] *Id.* at 11.

[156] *Id*.

[157] *Id*. at 13.

[158] FRIEDMAN, *supra* note 106, at 169.

[159] *Id*.

[160] *See supra* Part II.B.

In conclusion, a market with a floating price indicative of true supply and demand should result in increased goods delivered from outside the region, as well as increased goods as a consequence of speculative storage by local suppliers.[161] The consequence of increased supply will usually be to lower prices, as suppliers compete on price in order to unload inventories.[162] Increased supply, besides leading to lower prices through competition, leads to lower costs for consumers through shorter lines. With twice the number of suppliers, one could assume that the time spent waiting in line would be halved. The savings could be significant considering that some Floridians reported spending up to nine hours in line for basic commodities after Hurricane Wilma.[163]

C. Allocating Supplies More Efficiently

Any disaster response policy hoping to increase social welfare by ensuring adequate supplies of emergency goods should also consider the role the price mechanism has in efficiently allocating existing supplies. The price ceilings created by gouging statutes inevitably result in the misallocation of goods, both among consumers in the market competing for goods, and between markets regulated by the price ceiling and liberal markets.[164] It is possible that some goods, such as lodging, will not as readily lend themselves to increased supply in the short term.[165] When supply is limited in the short term, the price mechanism provides an efficient method of allocating goods to the most valued user.[166] There are, of course, other ways of distributing goods besides relying on price. Indeed, when price is controlled, some other form of allocation *must* play a role in distributing goods.[167] Rationing of

---

161 BORENSTEIN, BUSHNELL & LEWIS, *supra* note 154.

162 *Id.*

163 *Floridians Frustrated*, *supra* note 146.

164 Paul W. MacAvoy, *The Regulation-Induced Shortage of Natural Gas*, 14 J.L. & ECON. 167, 169 (1971) (noting that interstate price ceilings caused "substantial misallocations of new supplies away from the consumers the [Federal Power Commission] was seeking to favor").

165 The supply of lodging might not increase in response to price immediately after a disaster, but it is possible that at least some lodging suppliers might increase supply prior to a disaster in anticipation of the higher post-disaster price they might expect to charge.

166 *See* FRIEDMAN, *supra* note 106, at 181.

167 Stephen Martin & Peter C. Smith, *Rationing by Waiting Lists: An Empirical Investigation*, 71 J. PUB. ECON. 141, 142 (1999).

some sort usually plays a role, the most familiar form of rationing is queuing, essentially allocating goods to those most willing to stand in line for them.[168]

Queuing describes the process where buyers physically join and wait in a line to gain access to the goods they desire.[169] Of course, waiting in line imposes opportunity costs to the extent that the time spent waiting in line could be put to productive use elsewhere.[170] The addition of opportunity costs to the nominal costs that the buyer will actually pay when he exchanges cash for the goods he seeks plays a role in ensuring that high value users will receive the goods.[171] The concern, however, is with the efficiency of the queuing method. Besides the potentially tremendous expense,[172] the high costs consumers pay are essentially wasted. Neither consumers nor suppliers benefit from the long lines. Consumers obviously suffer, as they pay a higher price for goods. Sellers do not benefit, since the opportunity costs of time consumers pay do not accrue to the sellers. In short, time spent waiting in line is wasted.

Allocating goods through queuing imposes other costs as well. Speculators reallocate goods sold by the seller on a first-come, first-served basis at a set price to those who are willing to pay the most for them.[173] In Florida, for example, motorists who were unwilling to wait in line paid those who were willing to do it for them.[174] Again, allocative efficiency is enhanced in

---

168 *Id*.

169 *Id.*; *see also* Robert T. Deacon & Jon Sonstelie, *The Welfare Costs of Rationing by Waiting*, 27 ECON. INQUIRY 179 (1989) (describing motorists confronted with a choice between waiting in line for low priced gasoline or purchasing higher priced gasoline without waiting).

170 Opportunity costs are the benefits sacrificed when a resource such as time is employed for one purpose that prevents its use for another purpose. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 6-7 (2d ed. 1977).

171 Martin & Smith, *supra* note 167, at 146.

172 For example, a Florida woman reported waiting in line for nine hours at one designated relief-supply station. She left with thirteen kilograms of ice and six liters of bottled water. *Floridians Frustrated*, *supra* note 146. Assuming the value of Ms. Aristil's time is at least five dollars per hour, she essentially paid in excess of forty-five dollars for basic supplies, a price that under Florida law is unconscionable. *See* FLA. STAT. ANN. § 501.160 (West 2005).

173 *See generally* James L. Swofford, *Arbitrage, Speculation, and Public Policy Toward Ticket Scalping*, 27 PUB. FIN. REV. 531 (1999) (analyzing the "scalping" markets that arise from allocation by queuing in ticket markets).

174 *See* Raghunathan, *supra* note 139. In post-Wilma Florida, "instant entrepreneurs" waited (or were paid to wait) in long lines to buy gasoline which they would then resell at much higher prices. *Id*. (As one man, who had been paid ten dollars to wait in line plus whatever it cost to fill a bucket with gas, said, "They didn't want to wait, but I'm a very patient man.").

that gasoline went to those who were willing to pay the most for it. More problematic is the fact that the suppliers, those in a position to get and distribute more of the product if it is valuable to do so, share in none of the benefit. Because the sellers do not benefit from the market transactions, the sellers have little or no incentive to work to increase supplies.

Non-price rationing also tends to result in the creation of illegitimate markets. The most obvious way market actors might avoid price controls is to create black markets in the goods they need.[175] Suppliers obviously have incentives to raise prices; and when faced with the alternative of going without required goods, consumers in the greatest need have the incentive to pay them.[176] The predictable result is that some consumers will pay bribes to secure the goods they need—transactions which, if frequent enough, result in fully developed black markets.[177] Prices in the black market will usually be higher not only than those in the regulated market, but than the prices that could be expected in a free market, since the costs and risks of engaging in illegal activity further limit supplies and the only buyers will be the most desperate.[178]

Relying on price to allocate goods will normally result in a more efficient allocation of existing supplies. Imagine a situation in which a limited supply of potable water is available post-disaster, say fifty gallons. Pricing based on market demand normally has the advantage of assuring that a good will go to the user who places the most value on its use. In a market with an artificially low price, users who happen to be in a position to purchase the water (perhaps because they were first in line, or, in a rationing situation, were simply assigned a quantity greater than their need) have no economic incentive to limit the amount of their purchases. If water can be obtained inexpensively, users might purchase water not only for drinking, but for less valued activities, like doing the dishes or watering a favorite plant. Allowing the price to reflect the new realities of supply and demand ensures that the water will end up in the hands of those that value it the most, presumably

---

[175] Hugh Rockoff, *Price Controls*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS, http://www.econlib.org/library/Enc/PriceControls.html (last visited Jan. 16, 2005).

[176] *Id.*

[177] *Id*.

[178] *Id*.

those who are most in need of it.[179] This arguably favors those with the means to purchase the water at the higher price, but at least such a system minimizes potential waste which, when combined with the other benefits of liberalization, results in the greatest good for the greatest number of people.[180] Selling at competitive prices allocates goods to the buyers who place the greatest value on them and encourages the channeling of goods to that end.[181]

Even in markets where supply is inelastic in the short term, the price mechanism plays an important allocative function. In the market for lodging, for example, increased prices in the short term are less likely to lead to an increase in supply.[182] Hotels take time to build, and though the prospect of being able to charge a high price in the future might induce some amount of additional construction pre-disaster, increased prices resulting from an unanticipated catastrophe is unlikely to change absolute supply significantly. What the price mechanism does encourage, however, is the efficient use of existing supplies.[183] High prices are likely to induce those who have alternatives to renting a room, such as staying with family, to do so. High prices might also induce individuals to pool resources and to share rooms, leaving more capacity open to others. It is clear, then, that even when supply is fixed in

---

179 *Id*.

180 *See* Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1547 n.223 (1999). Kades gives the following example:

> [C]onsider another context giving rise to frequent complaints of windfalls: hardware stores charging high prices for everything from flashlights to shovels in the wake of a natural disaster such as a hurricane. If the store owner cannot raise prices in the short run (before additional supplies can arrive), then someone may wander in and buy the last flashlight to use as a nightlight for a mildly scared child, while the next person to rush in may need one to search for survivors in a collapsed building. A higher price signals less needy users to forgo consumption in favor of those in greater need. Contrary to popular belief, then, raising prices in the wake of a disaster is not price gouging—indeed, it may save lives.

Id.

181 *See* Eisenberg, *supra* note 109, at 757.

182 This holds at least in terms of arbitrage over space. No matter how attractive lodging prices become to hotel developers, they will be unable to create additional capacity in the short term.

183 *See*, *e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1096-97 (1972); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 502-08 (1961) (arguing that efficient resource allocation and informed economic decision-making require that the actual and full costs of goods or services be known and accounted for).

the short term, maintaining free post-disaster markets is likely to result in a more efficient allocation of existing supplies.

D. Economically Vulnerable Populations and the Price Mechanism

The primary critique levied against the liberal approach to post-disaster markets is that a reliance on price to allocate goods will leave the most economically vulnerable unable to obtain the goods they need if they are forced to compete against wealthier buyers on the basis of price.[184] There are a number of reasons why this seemingly valid concern is unfounded: (1) many sellers maintain stable-price policies as a way of gaining community good-will; (2) increased supply brought about by flexible prices will reduce the proportion of emergency goods that move through the black-market, where the poor are least likely to compete; and (3) disaster relief programs complementary to the economic aid available in the absence of a disaster could easily and efficiently be made available to those most in need. An open-market approach should also result in net gains for those most in need.

1. Voluntary Price Stabilization

Even if the states were to repeal price gouging statutes, it seems clear that a significant number of retailers would not change their pricing decisions.[185] If at least some suppliers maintain prices at pre-disaster levels, consumers who are unable to afford the market price will still be in at least as good a position as when retailers were subject to the artificial price ceilings. While many retailers voluntarily maintain stable

---

[184] *See*, *e.g.*, Anita Ramasastry, *Assessing Anti-Price-Gouging Statutes in the Wake of Hurricane Katrina: Why They're Necessary in Emergencies, but Need to Be Rewritten*. FINDLAW, Sept. 16, 2005, http://writ.news.findlaw.com/ramasastry/20050916.html ("[W]hen people are poor—as so many affected by Katrina were—ability to pay is a poor proxy for need. Those who cannot afford to pay inflated prices, may find themselves in desperate straits—without milk for babies, or the drinkable water, minimum food, or important medicine needed to stay alive. We have rightly decided, in our society, not to let people suffer this way. And in an emergency, those who are most vulnerable need to be priced in, not priced out.").

[185] *See* Justin Gillis & Michael Barbaro, *Revenue, the Second Flood; Retail Sales Skyrocket as Storm Survivors Buy Generators, Gas Cans*, WASH. POST, Sept. 7, 2005, at D1 ("The big national chains . . . [are] also enforcing strict policies against price gouging."); Don Nelson, *Some Athens Businesses Feeling the Effects of Katrina*, ATHENS BANNER-HERALD (Georgia), Sept. 25, 2005 ("Lowe's has a policy against price gouging, and actually froze prices to pre-Katrina levels.").

prices even in the wake of a disaster, there is unfortunately no empirical evidence describing either the type or number of businesses that typically refuse to adjust their prices upward. Intuitively, we can assume that businesses for which the goodwill of the communities in which they operate are an important part of the value of their enterprise will be careful to balance short term profits available from disaster pricing with the long term benefits of community goodwill. Home Depot, for example, has a policy of freezing prices during a declared emergency, even if wholesale prices rise above the retail price.[186] Of course, we cannot know whether Home Depot's decision is based on a rational calculation that the goodwill of the community is worth more than the short term profits to be had, or whether the company is simply observing the state price gouging statutes.[187] It seems likely, however, that at least some retailers will maintain prices at the pre-disaster level, benefiting consumers willing or able to wait in line long enough to buy desired merchandise.[188]

Further, some of the most effective post-disaster responses to the 2005 hurricanes came from non-market actors such as churches and non-profits.[189] There is no reason to expect that free-market prices would reduce the response of non-market actors in providing goods, as the need for relief will still be acute. Victims of disaster who are unable to compete on price would still have recourse to retailers who maintain stable prices as well as to non-market actors who provide goods at little or no cost. Introducing additional sellers, regardless of the price they charge, will have a beneficial effect on even the poorest of consumers because the competition for the remaining goods will be less keen. Every person who has the means and the will to purchase water from the back of a U-

---

[186] Gillis & Barbaro, *supra* note 185.

[187] It seems clear from the statutes that Home Depot, depending on the state in which it is doing business, would not be able to raise the price of items currently in stock to a price significantly above the pre-disaster level. However, if on re-ordering merchandise the company faced increased wholesaler costs, it is equally clear that most state statutes would allow the retailer to pass those prices on to consumers.

[188] *See* Gillis & Barbaro, *supra* note 156 (reporting that the line for generators at a Home Depot store began before five in the morning and grew to 600 customers by the afternoon).

[189] Hudson, *supra* note 151 (quoting a Louisiana State University study which reported that "Louisiana residents were not particularly charitable when it came to evaluating government response [to Hurricanes Katrina and Rita] . . . but were considerably more favorable of the efforts of faith-based organizations and nonprofits, including local community foundations and the Red Cross").

Haul truck is one less person in line at the price-stabilized grocery store or aid station, and shorter lines mean that more goods will be available at effectively lower prices to those who must wait.

2. Avoidance of Black Markets

Disconnects between market prices and official prices of goods very often lead to black market operations. In these situations, sellers recognize that there are buyers who, for whatever reason, are willing to pay a higher price to ensure access to their desired goods. The higher prices on the black market will cause the seller to divert goods away from the legitimate market in favor of the higher prices that might be received on the black market. Of course, the opportunities to profit from high black market prices might draw more supply into the market, which would have a net benefit overall, as described above. Markets that only allow for increased supplies in unofficial markets, however, favor primarily those who possess the information necessary to take part in the illegal transactions. Markets characterized by significant imbalance of information are less likely to perform as efficiently as those in which information is relatively well dispersed. Further, buyers and sellers operating on black markets are likely to waste undue resources attempting to avoid detection, an increased transaction cost that benefits no one.

3. Aid Programs

It is important to recognize that the needs of the economically vulnerable do not begin with the declaration that a disaster related state of emergency exists nor do they end with the disaster. The poor are often unable to compete on price for the goods they need, not only during the aftermath of a disaster, but in their everyday lives. For these people, the same aid programs that ensure access to goods throughout the year can be expanded to provide access to goods in times of emergency. For example, the Women, Infants, and Children ("WIC") program provides vouchers that allow recipients to purchase certain enumerated goods at the market price.[190] The

---

[190] *See* U.S. Dep't of Agric., Food and Nutrition Serv., About WIC, http://www.fns.usda.gov/wic/aboutwic/mission.htm (last visited Jan. 29, 2006).

retailer then presents the voucher to the program administrator and collects the retail price that particular retailer charges.[191] A similar program could be instituted for emergency goods. State and federal government agencies could distribute vouchers through existing aid networks allowing the holder to purchase enumerated goods at the prevailing market price.[192] The effective period of the vouchers could be limited to times of declared emergency by local, state, or federal authorities. Such a system would have the added advantage of increasing liquidity in a potentially illiquid post-disaster market.[193]

IV. POLICY APPROACHES

In October of 2005, residents of Mexico, Cuba, and Florida prepared themselves as one of the most powerful storms ever recorded barreled its way across the Caribbean Sea and towards their homes.[194] The storm eventually weakened, but still reached U.S. shores as a dangerous category III hurricane, killing at least twenty-two people and leaving more than five million people without electricity at least two days after the storm.[195] Wilma was remarkable in another respect: it was the third category V hurricane in the 2005 storm season, the highest incidence of storms of such magnitude since record-keeping began in 1851.[196] If the devastation caused by the 2005 season's storms is suggestive of future hurricane seasons, the need to institute policies to respond effectively should be apparent.

---

[191] *See* U.S. Dep't of Agric., Food and Nutrition Serv., WIC and Retail Stores, http://www.fns.usda.gov/wic/WICRetailStoresfactsheet.pdf.

[192] This is only one possible approach of many. *See*, *e.g.*, Posting of Gary Becker to The Becker-Posner Blog, Comment on Price Gouging, http://www.becker-posner-blog.com/archives/2005/10/comment_on_pric.html (Oct. 23, 2005, 05:06PM) (suggesting that in circumstances where the poorest families are unable to pay market prices in times of famine, the government might "become active in buying rice or whatever crop is involved, and reselling that to poor families at lower prices . . . increase income transfers to the poor that would enable them to pay the high market prices").

[193] *See generally* Geoffrey C. Rapp, *Gouging: Terrorist Attacks, Hurricanes, and the Legal and Economic Aspects of Post-Disaster Price Regulation*, 94 KY. L.J. 535 (2006) (describing the potential for the collapse of the electronic payment system on which our economy depends).

[194] Andrew Ward, *Wilma Builds Rapidly into a Category Five Hurricane*, FIN. TIMES (London), Oct. 20, 2005, Americas section, at 9.

[195] *In Wilma's Wake, Frustration Mounts at Strained Relief Efforts in Florida*, FRONTRUNNER, Oct. 27, 2005.

[196] Ward, *supra* note 194.

Few lawmakers can hope to have a constituency with a firm enough understanding of basic economic principles to allow them to pass legislation preventing state and local authorities from interfering with markets in times of disaster.[197] Indeed, popular calls are to increase the number of such laws.[198] Any policy response must therefore address the obvious negative effects the imposition of price ceilings would cause, while still respecting principles of federalism and democracy. Calls by state legislators to repeal price gouging statutes are likely to be met with hostility by constituents.[199] Public opinion certainly must be taken into account in proposing any policy solution. This is even true where, as here, the evidence strongly suggests that public opinion is misinformed about the likely effects of price ceilings, and where the most beneficial policy response is, at first glance, counterintuitive. Recognizing this, proponents of free post-disaster markets must admit that direct repeal of price gouging statutes is unlikely anytime soon.

Price gouging laws do not necessarily create a collective action problem; presumably, the converse is true. States with price gouging laws should have greater difficulty maintaining (and, post-disaster, attracting) supplies of emergency goods than those states with free markets. The reason is clear: if a supplier can either sell his gasoline in Texas' free market for five dollars a gallon or sell it at the statutory maximum of three dollars in Louisiana, he will rationally choose Texas in every instance. The Texas market will draw needed supplies, while in Louisiana consumers will go without. Texan

---

[197] *See* Posting of Richard Posner to The Becker-Posner Blog, Should Price Gouging in the Aftermath of Catastrophes Be Punished?, http://www.becker-posner-blog.com/archives/2005/10/should_price_go.html (Oct. 23, 2005, 05:30PM) (suggesting that calls for price gouging statutes by the general public are prompted by "sheer ignorance of basic economics (a failure of our educational system) and demagogic appeals by politicians to that ignorance").

[198] *See*, *e.g.*, Letter from Rep. Peter DeFazio (D-Ore.) to Governor Ted Kulongoski (Sept. 20, 2005) (urging the governor of Oregon to organize a special session of the state legislature to pass a bill "that would protect Oregonians from price gouging at the pump"); Trip Jennings, *Session to Suspend Gas Tax Possible; Governor Leaning Toward Calling Legislature Back Next Month*, ALBUQUERQUE J. (New Mexico), Sept. 18, 2005, at A1 (reporting that Governor of New Mexico considering calling the legislature into special session to pass legislation "to give New Mexicans relief from painful gasoline and natural gas prices").

[199] A search of recent news articles failed to uncover even a single example of a state politician calling for the repeal of an existing state price gouging statute. From time to time, legislative bodies do manage to defeat the enactment of new legislation, but the trend certainly seems to be toward stronger and more numerous laws creating price ceilings.

consumers are able to buy what they need and are better off, even if the nominal price is higher. However, it is easier for the consumer in Texas to gather information about nominal *price* in Louisiana than it is for her to discover how much of that good is actually *available* at that price. Accordingly, the Texan voter may view the Louisiana price gouging statute as a success in keeping prices down, while the Louisiana voter may have difficulty in seeing the connection between the shortage of gasoline and the harmful economic policy that contributed to it.

Instead of mandating policy or expecting an enlightened state legislator to risk the wrath of her constituency, the federal government should institute an incentive system that rewards state adoption of disaster relief laws that are more in tune with the laws of supply and demand. One aspect of such a program might be to direct relief supplies based on the need for those supplies as indicated by the price mechanism. High prices for goods, as discussed above, indicate a constrained supply relative to demand.[200] The federal government could direct relief supplies to areas where the prices for those goods were highest, presumably those areas where the demand for those goods are greatest. This plan would have a number of important beneficial effects.

First, it would encourage states to abandon artificially low price ceilings. All things being equal, states with free post-disaster markets are likely to have higher prices relative to states that have statutorily imposed price ceilings. Some portion of discretionary disaster aid might be earmarked to respond to the price mechanism, that is, regions with higher prices could be considered to have demonstrated greater need for relief through increased supplies. Under such a plan, states would have an incentive to let the price reflect the true demand for the good. Any complaint by the states that, notwithstanding the low prices, there are few goods to sell at the posted prices would be an implicit admission that price ceilings tend to keep supplies low, and would perhaps play some role in educating the public of the relationship between price ceilings and shortages.

In addition, the possibility of governmental competition will prevent suppliers who truly do possess monopoly power from pricing above the competitive level. The fear of drawing in competition in the form of emergency relief will induce

---

[200] *See supra* Part III.A.

suppliers to charge a lower price than might otherwise be charged. Antitrust jurisprudence has long recognized the role that the threat of potential entry by a competitor has played in compelling monopolists to keep prices down.[201] Responding to needs based on the price mechanism might also help consumers in situations where not even price gouging statutes can reach. Most price gouging statutes only require that the post-disaster price be close to the pre-disaster price in the immediate market for the goods. In situations where a monopolist was legally charging a monopoly price before the disaster, neither price gouging statutes nor antitrust law can address the needs of the affected consumers, yet those consumers are no less deserving of aid. A price-based response is more likely to recognize and address such need.

Finally, the price of goods might aggregate information better than other sources of information.[202] Aid providers, much like any centrally planned system of distribution, face no small difficulty in determining who needs how much of what. Estimates are, at best, likely to be subject to a number of variables which may be quite difficult to predict. Accordingly, the market price of emergency supplies, when adjusted for factors such as local income, might be the most efficient way to allocate scarce goods to those most in need of them.

The basic goal of emergency relief should be to provide disaster victims with what they need as quickly as possible. Nothing in that mission statement implies that private, self-interested market actions are likely to be any less effective at accomplishing those goals than traditional disaster response mechanisms. Therefore, it is important to recognize that state laws which cripple the ability of the market to provide the goods buyers need by creating or exacerbating shortages are every bit as harmful as would be a law which hampered the ability of nonprofits and governments to respond to disasters. The needs of disaster victims can be met through both private, self-interested actors as well as through government and nonprofit responders. It is therefore essential to rally against

---

[201] *See* Posner, *supra* note 64, at 144 ("I have thus far assumed, with the Court, that the prospect of entry will actually affect the pricing decisions of the firms already in a market.").

[202] This is partially dependent on the ability of aid responders to accurately gauge prices. In most cases, this should present no significant difficulty, but the possibility that information will be difficult to gather illustrates why price-responsive relief should only be a part of a wider disaster response plan.

laws which artificially interfere with the operations of a well-functioning market.

V. CONCLUSION

Legislators enact price gouging statutes as a response to their constituents' anger and frustration at the high prices that follow a disaster. High prices, however, may be less a reflection of the venality of suppliers than a natural market response to an imbalance between supply and demand. Instituting price ceilings serves only to exacerbate the shortages that lead to the high prices in the first place, and certainly can have no effect in reducing such shortages.

Many buyers are understandably unhappy with the high prices they face in the wake of a natural disaster, but instituting price ceilings is not a reasonable remedy to the problem. It is no doubt counterintuitive to many that fixing prices is likely to result in decreased availability of desired goods. Economic theory and real world experience, however, demonstrate that this is precisely the case. It will nonetheless remain difficult to convince the electorate of the wisdom of the economic approach, which is why it is so important to develop policy at the federal level to encourage the more rational approach. As part of a comprehensive disaster response policy, the federal government should direct some portion of aid based on the price mechanism. In doing so, legislators should recognize that they are not engaging in a mere social experiment, but are instead instituting an important policy that will result in a significant increase in material well-being for the victims of future catastrophes.

Michael Brewer[†]

[†] B.A./B.S. University of Utah; J.D. Candidate, Brooklyn Law School, 2007. Thanks to the *Brooklyn Law Review* board and staff, especially Daniel Doeschner and Michael Weitman. Special thanks to Elizabeth Bracco for constantly challenging me on the topic of this Note and on everything else.