

THE ETHICS OF PRICE GOUGING

Matt Zwolinski

Abstract: Price gouging occurs when, in the wake of an emergency, sellers of a certain necessary goods sharply raise their prices beyond the level needed to cover increased costs. Most people think that price gouging is immoral, and most states have laws rendering the practice a civil or criminal offense. The purpose of this paper is to explore some of the philosophic issues surrounding price gouging, and to argue that the common moral condemnation of it is largely mistaken. I will make this argument in three steps, by rebutting three widely held beliefs about the ethics of price gouging: 1) that laws prohibiting price gouging are morally justified, 2) that price gouging is morally impermissible behavior, even if it ought not be illegal, and 3) that price gouging reflects poorly on the moral character of those who engage in it, even if the act itself is not morally impermissible.

1. Introduction

In 1996, Hurricane Fran struck North Carolina, leaving over a million people in the Raleigh-Durham area without power. Without any way of refrigerating food, infant formula, or insulin, and without any idea of when power would be restored, people were desperate for ice, but existing supplies quickly sold out. Four young men from Goldsboro, which was not significantly affected by the storm, rented refrigerated trucks, bought 500 bags of ice for \$1.70 per bag, and drove to Raleigh. The price they charged for the ice was \$12 per bag—more than seven times what they paid for it.¹

This kind of behavior is often referred to as “price gouging.” Many states, North Carolina included, prohibit it by law. And even when it is not legally prohibited, it is generally thought to be exploitative and immoral.² The purpose of this paper is to explore the philosophic issues surrounding price gouging, and to argue that the common moral condemnation of it is largely mistaken. I will make this argument in three steps, by rebutting three widely held beliefs about the ethics of price gouging: 1) that laws prohibiting price gouging are morally justified, 2) that price gouging is morally impermissible behavior, even if it ought not be illegal, and 3) that price gouging reflects poorly on the moral character of those who engage in it, even if the act itself is not morally impermissible. The core of my argument will be that

standard cases of price gouging provide great benefit to those in desperate need, that they tend to lack the morally objectionable features often ascribed to them such as coercion and exploitation, and that attempts to prohibit the practice will harm individuals who are already vulnerable and can least afford to bear further harm.

The argument of this paper is an exercise in non-ideal theory.³ Much of what bothers us about price gouging, I suspect, is the fact that it takes place in a social context where the background political and economic institutions are less than fully just. Many people object to the inequality which pervades the distribution of wealth and social services in the United States, and worry that price gouging either exploits or exacerbates that inequality. The real problem, such people might say, is not price gouging itself but the more fundamental issue of an unjust basic structure. I do not wish to deny that questions about the basic structure are important. But they cannot be the *only* questions that are important. If our basic structure is unjust, then we still need to decide how individuals should act, and how particular policies should be formulated, in the context of our unjust society. Part of what we should be doing, to be sure, is trying to make the basic structure more just. But assuming that this goal will not be achieved immediately, we still need to decide what to do about price gouging here and now.

Before we can proceed to the normative arguments about price gouging, however, we will need to arrive at a more precise understanding of the concept than that which we are given by common usage. Specifically, we will want an analysis which makes clear how cases of price gouging differ from the kind of ordinary market price hikes which are not even *prima facie* morally objectionable. Section two will undertake this analysis. Section three will begin the normative argument by attempting to show that laws prohibiting price gouging are morally unjustified and ought to be repealed. Section four will go further and argue that most, though not all, cases of price gouging are at least morally permissible, if not morally praiseworthy. An implication of this position is that individuals have reason to reject calls to voluntarily refrain from price gouging where it is not prohibited by law. Finally, section five will argue that price gouging does not *necessarily* reflect poorly on the character of those who engage in it. Some people who engage in price gouging no doubt will do it from bad motives or disreputable characters, but the mere fact that they engage in price gouging is not *evidence* for this conclusion.

2. The Concept of Price Gouging

A fruitful place to begin a conceptual analysis of price gouging is with the language of the statutes which prohibit it. At present, there is no Federal anti-gouging legislation, though one bill specifically focused on gasoline has passed the House and is currently pending in the Senate.⁴ Approximately thirty-four states, however, have laws against price gouging, a survey of which reveals that gouging is generally defined in terms of three elements. See Appendix A for a detailed overview of these laws.

- 1) Period of Emergency: Almost all anti-gouging laws specify that they apply only to actions taken during times of disaster or emergency.⁵
- 2) Necessary Items: Most laws further specify that their restrictions apply only to certain classes of items, generally those which are necessary for survival or for coping with serious problems caused by the disaster. California, for instance, is typical in limiting its scope to items which are "consumer food items or goods, goods or services used for emergency cleanup, emergency supplies, medical supplies, home heating oil, building materials, housing, transportation, freight, and storage services, or gasoline or other motor fuels."⁶
- 3) Price Ceilings: The definitive feature of anti-gouging laws is the limit they set on the maximum price that can be charged for specified goods. Such limits are set either by prohibitions on "unreasonable," "excessive" or "unconscionable" price increases, or by specific limits on the percentage increase in price allowed after the onset of the emergency.⁷ In the most extreme laws, the maximum allowable percentage increase is set at zero.⁸

This preliminary analysis leaves a number of important questions unresolved, such as what ought to count as an emergency, which kinds of items are "necessary," and which of the varying methods of determining unacceptable price hikes should be employed. These complexities will be explored to some extent in the remainder of this paper. For the most part, however, the argument that follows will be broad enough that the differences between various conceptions of price gouging will not matter. Any conception of price gouging which fits the general outline above is vulnerable to the kinds of criticism that I will make below.

It is worth noting the heavy strain of moralistic language running through the various anti-gouging statutes. The vast majority of state statutes define the act of price gouging in terms of normative concepts such as "unreasonable" or "unconscionable." And both Arkansas and California claim in the preamble to their laws that their restrictions are necessary in order to prevent merchants from taking "unfair advantage" of consumers.⁹ These facts, along with the very name for the activity (one usually finds the verb "gouging" in conjunction with the direct object "eyes") suggest that the concept of price gouging is moralized—part of what we *mean* in saying that someone is engaged in price gouging is that they are doing something wrong. To avoid settling the substantive question of the morality of price gouging by definition, however, I propose that we understand the wrongness of price gouging in a *prima facie* sense. Thus, I suggest that we understand price gouging as a practice in which prices on certain kinds of necessary items are raised in the wake of an emergency to what appear to be unfair or exploitatively high levels.

Whatever its defects in terms of lack of precision, this definition should serve to narrow the focus of our normative investigation. For, note what this definition does *not* include. It does not say that price gouging involves deception, misinformation, or the use of force against consumers, nor do these claims play any role in the standard

arguments against price gouging. In the discussion that follows, then, we shall focus on cases where these factors are not present. We shall do this in order to discover whether there is anything objectionable in price gouging *per se*, and not just with extraneous factors or behaviors which might or might not accompany it.

3. *The Moral Status of Laws Against Price Gouging*

The argument in this section is designed to show that laws against price gouging are morally unjustified. That is, it attempts to show that we *do not* have all-things-considered good moral reasons to pass, maintain, or support such laws, and that we *do* have all-things-considered good moral reason to repeal them. Moreover, it is designed to show that such laws are unjustified *whatever* one might think about the moral status of price gouging itself. Even if price gouging is morally reprehensible, there is good reason not to prohibit it by law.

One difficulty with anti-gouging laws is that there is no unproblematic way of defining the practice of price gouging for legal purposes. Laws which prohibit "unconscionable" or "unreasonable" exchanges, for instance, present serious problems of interpretation and predictability given the difficulty of assigning clear and shared meanings to these terms. Even those whose full-time occupation is interpreting, applying, and working with the law have grave difficulty understanding precisely what these terms mean.¹⁰ There is little hope, then, that ordinary merchants or individuals who begin selling goods for the first time in the wake of a disaster will be able to form a clear understanding of what the law requires of them. Without such an understanding, these individuals will be unable to predict how the law will respond to their behavior, and unable to plan their economic activity accordingly. This is objectionable both on grounds of efficiency and fairness.¹¹

Laws which prohibit price increases above a specified level (including zero) fare better on the dimension of clarity, but run into other difficulties as a result of the inflexible nature of the limits they set. Many such laws, for instance, take no account of increased costs which the sellers might face as a result of the same disaster which put their customers in difficulty. This raises problems from both fairness and consequentialist perspectives. In terms of fairness, it is not clear why the merchant should be forced to absorb the increased costs in order to benefit her customers, especially if we think that those merchants exercised good foresight and responsibility in obtaining a ready stock of goods which might be necessary in the case of a disaster. It is true that we might plausibly think that society as a whole bears some responsibility for protecting its members in time of crisis, but placing the whole of this responsibility on one class of persons seems an affront to fairness. In addition, the *consequences* of not allowing merchants to make up for increased costs are likely to be bad—for merchants, of course, but for customers as well. For, while the statutes under consideration punish selling items at above a certain specified level of price, they do not punish those who choose not to sell at all. Rather than continuing to sell needed goods such as generators, then, merchants

might respond to anti-gouging statutes by closing up shop altogether. Because of the law, merchants will lose out on potential profits and customers will lose out on the opportunity to decide for themselves whether the goods they could have bought would have been worth the higher price.

Some statutes try to avoid these difficulties by allowing price increases above the specified cap if the increased price is directly attributable to increases in cost borne by the seller. But even here, problems persist. For, most states which do allow such an exception limit the kinds of costs which can be taken into account to either increased costs imposed by the merchant's supplier or increased costs of labor and material in the merchant's provision of the goods. And this limitation of relevant costs seems arbitrary. Why, for instance, should there be no account made for increased *risk* faced by the merchant in remaining open for business during time of disaster?¹² Surely an increased risk of damage or theft is a factor that merchants ought to be able to consider in deciding whether the benefits of doing business in a post-disaster context outweigh the costs, and is a reasonable consideration in favor of raising one's prices. But risk is not the only sort of cost neglected by anti-gouging laws. Such laws also fail to take account of the various opportunity costs that the merchant might face in continuing to do business in the area, rather than shifting her capital to other less dangerous and more profitable markets. From an economic perspective, opportunity costs and costs imposed by risk can be just as burdensome on the seller as standard monetary costs, so there is no obvious reason why one special category of costs should be privileged above others (Buchanan, 1999). But the law is often a clumsy instrument for achieving morally precise outcomes, and here as elsewhere, I suspect, it prefers to look only at those elements of the situation which are easily measurable—costs of products, labor and material. Lawmakers are thus faced with a dilemma. A narrow focus on easily measurable costs might be necessary in order to craft a law that can be enforced and understood, but this clarity can only be accomplished at the cost of failing to take account of all the relevant costs faced by the merchants to whom the restrictions apply.

Even if these practical difficulties could be overcome, however, there would still remain a decisive moral consideration against anti-gouging laws. The main reason why such laws are morally unjustified is that they prohibit mutually beneficial exchange in a way that makes those who are already vulnerable even worse off.

Whatever else one might think about price gouging, the standard cases—those not involving deception, misinformation, or other extraneous factors—are clearly beneficial to both parties participating in the exchange. Even if the price they are being charged is exceptionally high and more than consumers would ideally like to pay, the fact that they are willing to pay it shows that they nevertheless value the good they are purchasing more than the money they are giving up for it. And assuming they are not misinformed, deceived, or irrational, there is no reason to think that they are *wrong* in assigning these relative values. Not only will the exchange satisfy their subjective preferences, but there is every reason to think that it will make them better off from an objective point of view as well. The goods that they

are purchasing are, after all, genuinely *important*. And while the price of generators might rise dramatically in the wake of a disaster which knocks out power to a certain population, so too does the *need* people have for generators. Their willingness to pay the higher price is a reflection of this increased need, and not the product of mistake or irrationality.

Of course, one might insist that consumers are not benefitting *enough* from the exchange. Perhaps merchants have a moral duty of beneficence to sell needed goods to consumers at something less than the market-clearing price. Or perhaps there is some moral notion of a "fair" price which price-gouging merchants are violating. One could grant all that has been said above, in other words, and still hold that merchants who charge the market-clearing price for necessary goods in the wake of a disaster are *exploiting* their customers.¹³

I am not convinced by the accounts of exploitation on which such an argument would rely, and will have more to say about this in the next section. For our present purposes, however, we can grant the wrongfulness of this kind of exploitation and simply point out that this wrongfulness is insufficient warrant for prohibiting price gouging by law.¹⁴ For many of the very same concerns which underlie our objection to exploitation also count against any attempt to prohibit mutually beneficial but exploitative exchanges.

If, for instance, we object to exploitation because it sets back the interests of the exploited person, we can note that the prohibition of price gouging sets back their interests even more. To see this, we need simply to think about how anti-gouging laws work. When such laws have any effect at all, it is because they require merchants to sell goods at below the market-clearing price. The market-clearing price is the price at which the quantity supplied is equal to the quantity demanded. If prices are set above the market-clearing price, there will be insufficient demand for merchants to sell all their goods, and a surplus will result. If, on the other hand, prices are set below the market-clearing price as anti-gouging statutes require, there will be *too much* demand for available supply. There will, in other words, be a shortage of the relevant goods.¹⁵ This point is established both by widely accepted economic theory, and by experiences with price caps such as those established during the oil crisis of the late 1970s.¹⁶ The existence of shortages, in turn, means that many consumers who would like to buy goods—even at the illegal market-clearing price—will be unable to do so.¹⁷ Because they are prevented from engaging in the economic exchanges they desire, they are made worse off. And because the goods affected by price gouging laws are *necessary* goods that are especially important for their health and well-being, they are probably made *significantly* worse off.¹⁸

If, on the other hand, one's reasons for objecting to exploitation are of a deontological rather than a consequentialist nature, then a parallel argument can be made regarding the relevant deontological considerations. Exploitation might plausibly be argued to manifest a lack of respect for the personhood of those who are exploited. But laws against price gouging both manifest and encourage similar or greater lack of respect. They manifest a lack of respect for both merchants and

customers by preventing them from making the autonomous choice to enter into economic exchanges at the market-clearing price. They send the signal, in effect, that *your* decision that this exchange is in your best interest is unimportant, and that the law will decide for you what sorts of transactions you are allowed to enter into. And they encourage a lack of respect for buyers by making it more likely that their needs will be *neglected* by those who are in a position to help them.¹⁹ This is because anti-gouging laws lead to shortages not just in the literal sense in which the supply is completely consumed with leftover demand unsatisfied, but also in a broader sense in which others who could supply the needed goods choose not to. The world never literally runs out of ice, generators, or sandbags in the wake of disaster. Such goods exist, and could be brought to the people who need them if those who possessed them were sufficiently motivated to do so. And whatever our moral attitude toward the fact might be, it is nevertheless a fact that the potential for high profits is one of the most effective ways available of so motivating individuals. Laws which prohibit the reaping of such high profits lead many individuals who would have done something to help to do nothing instead. As a result, disaster victims' needs are not exploited, but they are not satisfied either. They are simply ignored. This is a less obvious way of failing to value the humanity of such persons, but it is a failure nonetheless, and one which I am sure most persons would be willing to trade for the disrespect involved in mutually beneficial exploitation, if given the choice.

Before moving on to a moral evaluation of price gouging itself, there is one complication regarding the consequentialist case against anti-gouging laws. That case assumes that anti-gouging laws will prohibit mutually beneficial exchanges, and this seems to be an *a priori* truth. But the argument also assumes that prohibiting mutually beneficial exchanges will make consumers worse off, and this is more properly seen as an empirical hypothesis than an issue of pure economic logic. Suppose that price gouger *S* holds a monopoly on good *G* in a given area. And suppose further that the lowest price that *S* would be willing to accept for *G* is *X*, whereas the highest price that buyer *B* would be willing to pay for *G* would be *Z* (where $Z > X$). In the absence of anti-gouging restrictions, the market-clearing price will be very close to *Z*. With carefully crafted anti-gouging laws, however, it is possible to set the maximum legally permissible price at something closer to *X*. The law would simply need to know the value of *X* and set the maximum legal price of *G* at *X*. Since *S* is still willing to sell *G* at *X*, and *B* of course is willing to buy *G* at *X*, such laws could conceivably reduce the price which *B* must pay for *G*, without destroying *S*'s incentive to supply *B* with *G*. Anti-gouging laws could thus, at least in principle, function as strategic mechanisms for reducing disparities in the distribution of cooperative surplus.²⁰ But while this result is possible in theory, in practice the epistemic hurdles involved arriving at knowledge of *X* for all goods *G* and all sellers *S* seem utterly insurmountable.²¹

In summary, this section has argued that laws against price gouging are subject to several important objections. First, anti-gouging laws face a dilemma in the way

they define the offense. Laws which define gouging in terms of "unconscionable" or "exploitative" prices do a good job capturing the nature of the moral opposition to price gouging, but are so vague that there is little chance that market actors will be able to predict which prices would be illegal and which would not. This is both unfair and inefficient. On the other hand, laws which seek to resolve this vagueness by setting clear limits on permissible price increases wind up being excessively rigid and prohibiting not only morally objectionable increases (say, those due to pure greed) but morally unobjectionable ones as well (those due to the supplier's attempt to recoup increased costs due to risk or opportunity costs). Finally, even if anti-gouging laws could be crafted in such a way as to avoid this dilemma, they would still face a decisive objection insofar as they prohibit mutually beneficial exchanges between sellers and buyers, and moreover prohibit them for buyers who stand in desperate need of precisely this kind of beneficial exchange. Anti-gouging laws thereby cause great harm to precisely the people who can afford it least. For all these reasons, I conclude that even if price gouging is in some way immoral, laws against the practice ought to be repealed.

4. The Moral Status of Price Gouging Itself

The last section accepted, *arguendo*, that the activity of price gouging is immoral. This section seeks to challenge that assumption by showing that price gouging is, at least in many cases, morally permissible. To make this argument I will set forth and rebut two arguments against the moral permissibility of price gouging, and then set forth two positive arguments in support of its moral permissibility. Throughout, my strategy will be to show both that there is more that is morally praiseworthy in price gouging than we might expect, and that much of what has been labeled morally questionable about the practice is either less objectionable or less unique to the practice of price gouging than has been supposed. Thus, the claim I wish to defend in this section is not that *all* cases of price gouging are morally permissible. Rather, it is that many cases of price gouging lack morally objectionable features and have much that is morally praiseworthy, and that when these conditions are met, we should view price gouging as morally permissible.

a. Against the Permissibility of Gouging—Coercion

The first concern one might have about price gouging is that it is objectionably coercive.²² Philosophical accounts of coercion vary, so it is difficult to provide a one-size-fits-all refutation of this claim.²³ Nevertheless, before turning to a more thorough examination of the charge, we can note that most cases of price gouging have three features that, together, appear to undermine concerns about coercion on almost any understanding of that concept. First, most buyers in price gouging cases consent to the exchange. Second, most cases of price gouging do not involve deceit, lack of information, or irrationality on the buyers' part. Taken together, these two facts support, though they do not yet conclusively establish, the claim that buyers

enter into the exchange *voluntarily*.²⁴ Finally, unlike standard cases of coercion, the harm which threatens to befall the victim is not caused by the alleged perpetrator (the price gouger) but rather by the disaster or emergency from which the buyer is trying to recover.²⁵ Relative to the baseline of no exchange at all, the gouger's proposal stands to *improve* the lot of the buyer, not to worsen it.²⁶

Still, even granting all this, there are two remaining ways in which one could make the case that price gouging is coercive, both of which involve different ways of understanding the "baseline" to which the buyer's situation is to be compared in order to determine whether she is being subjected to non-coercive *offer* or a coercive *threat*.²⁷ The first way is to assume that the seller has a moral obligation to supply the good to the buyer at less than the market-clearing price, and to understand coercion as defined relative to a moralized baseline (Wertheimer, 2006: 206–11). If we make these assumptions, then the seller's proposal to "take it or leave it" at the market-clearing price is more like a threat than an offer, since what the seller is doing is threatening to violate a moral obligation by which she is bound—the obligation to provide the good to the person in need at a *reasonable* (less than market-clearing) price. This line of thought seems to be what underlies the claim that proposals are coercive when the alternatives to accepting it are flatly unacceptable or incompatible with "the minimum conditions of a worthwhile life" (Raz, 1982: 112; Raz, 1986: 148–57). For, if such arguments are meant to show that the *person making the proposal* is acting coercively, and not merely that the person to whom the proposal is made is being coerced (perhaps by the storm, or by her need), then this will presumably have to be grounded in a claim that the person making the proposal has an obligation not to take advantage of the victim's vulnerability by making her proposal on such unfavorable terms, i.e., that her proposal is more like a threat than an offer.

The problem with this line of argument is that it seems to mask what is really a concern about exploitation as a concern about coercion. Intuitively, the difference between threats and offers is that threats reduce options while offers enhance them. And equally intuitively, the actions of price gougers—especially the sort of price gougers described in the story at the opening of this paper—appear to enhance rather than to reduce the options of disaster victims. Thus, I think we should conclude that the proposals which gougers make to buyers are genuinely offers and not coercive threats, but this will leave open the possibility that they are *wrongfully exploitative* offers. I will address this concern in the next section.

The second remaining way of making the case for the coercive nature of gougers' proposals is to define coercion relative to a non-moralized baseline of statistical normalcy.²⁸ On such an understanding, *A*'s proposal would count as coercive if and only if it makes the consequences of *B*'s not doing *X* worse than they would be in the normal course of events. To slightly alter an example from Alan Wertheimer, suppose that *B* asks *A*, a physician, to treat his illness. *A* is charitable physician who normally treats all patients at no cost. In this case, however, *A*, seeing that *B* is desperate, says that he will treat *B*'s illness if and only if *B* gives him \$100.²⁹

On the statistical test, *A*'s actions constitute coercion because his actions make the consequences of *B*'s not paying \$100 much worse than they would normally be. Similarly, then, we might hold that If *B* could normally buy ice for \$1.70 per bag, and *A* proposes to sell the only remaining ice for \$12 per bag, then *A*'s proposal is coercive insofar as it makes the consequences of *B*'s not paying \$12 much worse than they would normally be. As I see it, there are several responses to this line of argument. Much will depend, of course, on how we understand the "normalcy" condition in this analysis. We might conclude, for instance, that the charge of gouging could be applied to long-standing merchants who increase their prices in the wake of a disaster, but not to "entrepreneurs" like the ones described at the beginning of this paper, since it is only from the former that buyers could have ever obtained ice for \$1.70 in the first place. Or we might instead deny that the price which individuals would normally be charged in a non-disaster situation is the appropriate test for what they should be charged in an emergency where shortages exist—that what is normal in context *X* is an appropriate standard for what is coercive in context *Y*.

There is probably some truth in both of these responses to this argument, but the most fundamental response is simply that the statistical test is an inappropriate test for the presence of coercion. Nozick's counterexample to this theory seems devastating: if *A* beats *B*, his slave, each morning on a regular basis, and one day offers to stop beating him if and only if *B* does *X*, it seems clear that *A* is wrongfully coercing *B* (Nozick, 1969: 450). But on the statistical test, *A* is *not* coercing *B*, since he is not proposing to make the consequences of *B*'s not doing *X* worse than they would normally be. This seems clearly wrong. Hence, examples like this demonstrate that our intuitions are strongly driven by moralized understandings of the baseline by which coercion is to be defined. And this, as I have said, leads us back to what is really a concern about exploitation, not coercion.

b. Against the Permissibility of Gouging—Exploitation

The second and much more prevalent concern about price gouging is that it is wrongfully exploitative.³⁰ We have already examined the concept and possible moral wrongness of mutually beneficial exploitation in section two of this paper. The core of this concern is that it is unfair for sellers to take advantage of buyers' vulnerability in order to derive disproportionate benefit to themselves, even if buyers are benefitting from the exchange as well.

There are, however, some puzzles about the wrongness of mutually beneficial exploitation, at least when it is supposed to lead us to think that there is something *especially* wrong with acts of price gouging, as compared with the actions of most non-gougers.

The puzzles have to do with an incoherence in our thinking about what morality requires of us in terms of aiding those in distress. On the one hand, to the extent that we hold that price gougers are guilty of mutually beneficial exploitation, we hold that they are acting wrongly even though their actions bring *some* benefit to disaster victims. On the other hand, many of *us* do *nothing* to relieve the suffering

of most disaster victims, and we generally do not view ourselves as acting wrongly in failing to provide this benefit—or, at least, we do not view ourselves as acting *as* wrongly as price gougers. How can it make sense to hold these two attitudes simultaneously?

The puzzle is one way of bringing out what Wertheimer calls the “nonworseness claim.” That claim holds that in cases where *A* has a right not to transact with *B*, and where transacting with *B* is not worse for *B* than not transacting with *B* at all, then it cannot be seriously wrong for *A* to engage in this transaction, even if its terms are judged to be unfair by some external standard (Wertheimer, 1996: 189).

From a consequentialist moral framework, the nonworseness claim seems obviously true. But the point is meant to have traction for deontological theories as well. If *B*’s need places a claim on *A* for help, then it is puzzling how it could be worse by any moral standard—respect for persons, responsiveness to moral reasons, and so on—for *A* to provide some help than it is for him to provide none.³¹ On the face of it, those who ignore the needs of the vulnerable altogether treat them with *less* respect than those who do *something* to help.

But not all are convinced by this claim. Those who reject it typically do so on the grounds that there are special moral constraints that apply to our interactions with others *if we choose to interact with them*, but which do not have anything to say about those who choose not to interact at all. We can spell out this idea more precisely with the following three claims: (1) in some situations *A* has special moral reasons to provide certain benefits to *B* if *A* and *B* interact in mutually beneficial and consensual ways, (2) *A* would not have had those moral reasons had *A* not chosen to interact with *B*, and (3) this is true even if *B* is better off as a result of interacting with *A* regardless of whether these additional benefits are provided. Alan Wertheimer has called this idea the “interaction principle,” and some form of it seems necessary for rejecting the nonworseness claim. But what reasons can be given in support of the interaction principle?

While she does not address the principle by this name, Ruth Sample provides one argument in support of the interaction principle. According to Sample, the core wrongness of exploitation lies in the fact that it is a form of treatment which “degrades or fails to respect the inherent value” of the person with whom one is interacting (Sample, 2003: 57). The inherent value of others, according to Sample, “makes a claim on us,” and when we exploit them, we fail to honor that claim (Sample, 2003: 57). We fail to do this by “neglecting what is necessary for that person’s well-being or flourishing,” by “taking advantage of an injustice done to him,” or by “commodifying, or treating as a fungible object of market exchange, an aspect of that person’s being that ought not be commodified” (Sample, 2003: 57). Because hers is non-consequentialist account, Sample holds, it cannot be defeated by appeal to the nonworseness principle. For there is a difference, she claims, between exploitative interaction and mere neglect. Neglect is “simply not interacting with another person when we could do so” (Sample, 2003: 60). Neglect might be morally wrong, as when we ignore a person suffering from malnutrition,

but there is nevertheless a basic distinction between treatment and nontreatment which "motivate[s] our idea that exploitation is *particularly* bad" compared to neglect (Sample, 2003: 61, emphasis added).

I have criticized Sample's argument in more detail elsewhere (Zwolinski, 2007: 709–10). The basic problems with applying it to the standard cases of price gouging are two. First, it is not clear that charging market-clearing prices in a time of shortage is really disrespectful in the necessary sense. One can admit that the inherent value of other human beings makes a moral claim on us while disputing that that claim requires us to sell scarce goods at below the market-clearing price.³² This is especially true if we broaden our focus from a single instance of a purportedly exploitative transaction to the broader market of which that exchange is but one small part. Selling one unit of a good to an individual at below the market-clearing price might be a way of honoring the value of *that* individual, but what about the value of all the other individuals in the market? *Ex hypothesi* there are not enough units of the good to satisfy everyone's demands, so some people's needs will go unmet. Rejecting consequentialism does not allow one to avoid the problems of scarcity and the trade-offs it requires. I will have more to say later about how charging the market-clearing price can be compatible with respect for persons. Here it is sufficient to note that the charge of its disrespectfulness has not been sufficiently established.

The second problem with Sample's account lies in its contrast between exploitation and neglect. Sample holds that the former is disrespectful in a way which makes it particularly bad compared to the latter. But it is not clear why this should be so. As Sample points out, what respect for others requires from us is not universal beneficence of a Singerian sort. Rather, it requires "limited but positive engagement" with others" (Sample, 2003: 67). Sample infers from this that those who neglect others have often simply "[lost] sight of the value of other valuable beings," whereas those who engage exploitatively with others are coming face to face with others' value but "flouting" the requirement of respect (Sample, 2003: 68). But it is a mistake to read this much about agents' motivations from their behaviors. Neglect might be the product of simply not having others' value at the forefront of one's mind, and in such cases neglect might be less disrespectful than certain forms of exploitation. We usually blame someone less severely who does the wrong thing because they are distracted, compared to someone who does wrong with full clarity and focus of intention. But neglect can also be a conscious choice. When we know of others' suffering and have the ability to relieve it but do not, we are making a choice. When we know of others' suffering and choose not to think about it—to change the channel either literally or figuratively—we are similarly making a choice. This choice might sometimes be justified—indeed, given the never-ending cycle of suffering in the world, it *has* to be sometimes justified if we are to live normal lives.³³ But a justified choice is still a choice, and it is a mistake to simply lump those who make it in with those who are non-culpably uninformed or unable to help.

Likewise, it is a mistake to assume that all those who are engaged in price goug-

ing are "flouting" the value of other persons in a way which makes their action worse than conscious neglect. Price gouging might not express beneficence towards others, as would an act of charitable donation, but it is at least a *partial* engagement with the value of others, unlike neglect, which ignores that value altogether. Price gougers treat their fellow human beings as traders, rather than as brothers and sisters in the Kingdom of Ends. But to treat someone as a trader is still a far cry more respectful than treating him as an object.³⁴ And it is more respectful, too, than treating him as an insignificance.

Even if one accepts some version of the interaction principle, however, its application to the case of price gouging is not without substantial difficulties. For it is not at all clear how we should understand the nature of the "interaction" which is alleged to give rise to new obligations on the part of the seller. Does the fact that *A* owns a store which sells generators in the town where *B* lives entail that *A* has "interacted" with *B* and as such has special moral obligations to relieve *B*'s suffering in the wake of a disaster by supplying her with a generator at a less than market-clearing price? Does it matter whether *B* was previously a customer of *A*'s? What about someone who, like the men in the story with which this paper began, makes their first foray into arbitrage by bringing needed goods from out of town and selling them to disaster victims with whom they have never done business before? Is the fact that they interact with the sellers at the time of the sale sufficient to generate special moral obligations, or does there need to be some pre-existing interaction?

Regardless of the way in which these questions of detail are settled, appeals to an interaction principle in cases such as these raise a difficult question of fairness given the burdens they impose on sellers. This point can be made clear by reflecting on an analogy with cases of easy rescue.³⁵ It is natural to think that where *A* can rescue *B* at little or no cost, *A* has a moral obligation to do so. But the validity of this intuition is cast into some doubt when we consider the broader context of *A*'s interaction with *B*. Suppose it is the case that (1) *A* is under no obligation to interact with *B* in the first place, (2) *A*'s interaction with *B* makes *B* better off, even when *A* does not satisfy the moral obligation of rescue, (3) *A* and *B* interact consensually, (4) *A*'s interaction with *B* violates no independent moral constraints, and (5) *A* would not consent to interacting with *B* if *A* knows that he would be bound by a moral obligation to rescue if he chooses to do so. If these conditions are met, then theories which subject *A* to a moral obligation to rescue *B* on condition of their interaction seem to suffer from both a defect of unfairness and a serious internal tension. *A*'s interaction with *B* is supererogatory, done with *B*'s consent, violates no independent moral constraints, and benefits *B*. Why, then, should the interaction itself place *A* under new moral obligations toward *B*, beyond those to which *A* and *B* mutually agree? On the face of it, it seems unfair to burden *A* with this extra requirement given that he is *already* doing more than is morally required of him. If, however, one wishes to claim that the additional moral burden on *A* is *not* unfair, perhaps because *B*'s great need is of such tremendous moral weight, then it is not clear why one should agree with (1) above. If *B*'s being rescued is that important,

why hold that *A* can blamelessly avoid rescuing *B* simply by refusing to interact with *B* in the first place? The claim that *A* is under no obligation to interact with *B* at all seems, at the very least, in tension with what must be supposed about the moral importance of *B*'s being rescued in order to support the belief that *A* would be under a moral obligation to rescue *B* should *A* and *B* choose to interact.

This argument of this section is meant to cast doubt on the claim that price gouging is wrongfully exploitative, but it has not decisively demonstrated that the argument is without merit. My argument against the wrongfulness of mutually beneficial exploitation is an inconsistency argument—it is meant to show that there is something inconsistent about condemning mutually beneficial exploitation in the form of price gouging *more* than we blame those who do nothing at all to help victims of disaster. One way of avoiding this inconsistency would be to blame price gougers less, but we could resolve it equally well by blaming those who do nothing more. My argument in this section, then, does not show that price gouging is not wrong—it only shows that considerations of exploitation do not establish it as being *especially* wrong in the way that most of us view it as bring prior to philosophical reflection.

c. Prices and Allocative Efficiency

We turn now from rebutting arguments against the moral permissibility of price gouging to setting out arguments in favor of it. The first argument has to do with the allocative function of prices in a market economy. When functioning properly, markets tend to allocate resources toward their most valued uses. Those who value a good more will be willing to pay a higher price for it than those who value it less. If everyone bids for items in proportion to the value it holds for them, each item will go to the person who values it most.³⁶ But this only happens if prices are allowed to adjust freely in response to changes in supply and demand. If prices are not allowed to rise above a exogenously specified level, there will be no way of discriminating between those who value goods more highly than the level reflected by that price, no way of using higher prices to ration scarce supply, and needs that could have been satisfied will go unmet.³⁷ Indeed, the most urgent needs may go unmet precisely because the scarce resources were sold at a price too low to exclude consumers whose need was not urgent.

Of course, in a less than perfectly competitive market allocative efficiency is only a tendency, and not an absolute law. If you don't have enough money, or if you're not thinking rationally, or if you're not in the right place at the right time, or if you simply don't know about the opportunity to purchase some good, the market won't allocate it to you no matter how much you value it.

I will have more to say below about the implications of the ways in which real world markets fall short of the ideal of perfect competition.³⁸ For now, it is enough to note that the mere tendency toward allocative efficiency is morally significant. Scarcity is a ubiquitous fact in markets and decision making, but in the wake of a disaster it is a fact which looms especially large. Without electricity to power their

refrigerators, for example, lots of people will have lots of different uses for ice. Some of those uses will be trivial—someone will want ice merely to keep her beer cold. Other uses will be more serious—a diabetic wants ice to keep her insulin safely stored. But there will not be enough ice to satisfy all potential uses. Some method must be used to ration the available supply. The real question is not whether the price system is a perfect mechanism for allocating goods to their most valued use, but whether it is better than the available alternatives.

It might seem that there is one obviously superior alternative—making individualized judgments about the need and/or desert of prospective buyers, and selling to those who measure highest on those morally relevant characteristics. Since the argument for relying on prices is simply that ability to pay *correlates* with what we take to be a morally significant characteristic—the extent to which an individual values the good—we could do better by assessing the morally relevant characteristic directly, and distributing on that basis.

There is more than a grain of truth to this argument, and I suspect it underlies much of our discomfort with price gouging and, more generally, the use of prices to allocate scarce resources. No parent would distribute food to his children—even in an emergency—on the basis of ability to pay. I doubt that most people would treat even their neighbors this way. Why, then, should it be acceptable as a system of distribution more generally?

The answer has to do with several important differences between these kinds of relationship and the kinds of relationships usually involved in price gouging. First, most plausible moral views hold that we have special duties toward our families, friends, and neighbors. We might have imperfect or perfect duties of care, for instance, which conflict with and override our liberty to profit from selling them scarce resources. Furthermore, and more significantly for this argument, we are in a better position to *know* the morally relevant characteristics of those with whom we are in close association. This sort of consideration is easy for us as philosophers to lose sight of. After all, in philosophic arguments and thought experiments we can stipulate the morally relevant characteristics and take them as a given. In practice, however, discerning which characteristics are morally significant and which are not is considerably more difficult. And, importantly, our ignorance of moral significance is itself morally significant, for it suggests that one of the criteria by which our actual practices should be evaluated is how well they work in a world where we do not operate with all the relevant moral knowledge. In some contexts our ignorance will be less of a factor than it is in others. It is relatively easy for me to know my neighbor's needs, character, and so on. But even with my neighbors my epistemic state is significantly inferior to that which characterizes my relation to my family. And the four men from Goldsboro with whom this paper began had essentially *no* way of knowing anything about the people to whom they were distributing their ice. Furthermore, if we are to take recent evidence from moral psychology seriously, it appears that individuals are not as skilled or consistent in assessing the morally relevant characteristics of others as we might like to believe.

We are often swayed by what in a more objective light we would view as morally irrelevant characteristics, such as race, sex, or affective display.³⁹ The choice, then, is not between imperfect allocation by prices versus perfect allocation by moral merit. All our distributive options are imperfect. Sometimes the imperfections of market prices will be more significant than those of individualized judgment, and sometimes the opposite will be true. The point of this section is not to argue that price gouging is permissible in all cases. Rather, it is to argue that in many cases of price gouging, charging the market-clearing price will tend to allocate goods in a way that tracks (albeit imperfectly) what we think are morally significant characteristics like intensity of need. When it does, and when we have no alternatives available which better satisfy our moral obligations,⁴⁰ we have good reason to view price gouging as morally permissible.

Furthermore, in those cases where price gouging produces something short of a morally ideal allocation, the best response might not be to try to prohibit or condemn price gouging, but to alter the institutional rules under which it takes place. If, for instance, one's concern with price gouging is that antecedent inequalities of wealth will lead to the rich getting the goods and the poor being left with nothing, then one could address this by either attacking the inequality of wealth directly through social welfare policies or, perhaps more plausibly, having governmental agencies purchase scarce and necessary goods at market prices and provide those goods at a subsidized rate or free of charge to those in need. This latter approach was taken by the city of Boston, with apparent success, during a shortage of flu vaccines in 2004 (*Boston Globe*, 2004). By setting up clear "rules of the game" and allowing market actors to operate freely within those rules, these approaches take advantage of market efficiencies without raising concerns over distributional inequality.

d. The Signaling Function of Prices

The final argument in support of the permissibility of price gouging draws on Hayek's work on the information-conveying function of the price system.⁴¹ For Hayek, as for others in the Austrian tradition of economics, the *imperfect* nature of market competition is a crucially important fact for understanding the nature of markets.⁴² It is precisely because we do *not* live in a competitive equilibrium where supply is precisely equal to demand that prices and market competition are important. In the real world, as opposed to the world of equilibrium models, facts are constantly changing. People's desires change, the quantity and quality of available resources change, and so on. When this happens, the natural reaction of prices is to change accordingly. In so doing, prices convey information to market actors about the new relative supply and demand of goods, and at the same time provide them with an incentive to alter their behavior in light of that new information.

In the case of price gouging, the higher prices charged for ordinary goods serve as a signal to both consumers and suppliers of that good. We have already seen, in the section above, how prices can serve as a signal to consumers. To illustrate the theoretical point with a real-world example, however, we can look at the case of

hotels in Florida which were charged with price gouging in the wake of Hurricane Charley. According to charges filed by the state Attorney General, one hotel in West Palm Beach charged three individuals a rate of over \$100 per night for a room, more than double their advertised rate of less than \$50 per night. "Families putting their lives back together," the Attorney General wrote, "should not have to worry about price gouging" (Crist, 2004).

But the higher prices did more than simply increase the profits of the hotel owner. They also sent a signal to consumers to economize, and in so doing *helped* many families. The lower the price of hotel rooms, the higher people's demand for them. As prices increased, people looked for other ways to satisfy their needs. As one commentator pointed out, a family that might have chosen to rent separate rooms for parents and children at \$50 per night will be more likely to rent only one room at the higher price, and a family whose home was damaged but in livable condition might choose to tough it out if the cost of hotel room is \$100 rather than \$50 (Sowell, 2004). Thus, while the increase in price does not literally increase the supply of hotel rooms, it increases the *available* supply—as a result of consumers' economizing behavior, more hotel rooms are available to individuals and families who need them most.

Prices also send signals to increase supply in more direct ways.⁴³ If ice can be bought for \$1.70 per bag in Goldsboro and sold for \$12 in Raleigh, this tells people that Raleigh needs Goldsboro's ice, and that there is a substantial profit to be made in getting it there. Prices convey information about where there is high demand for goods, and supply a built-in incentive for individuals to meet that demand. The four men discussed at the beginning of this paper were probably not moved to drive to Raleigh by altruistic motives. But in doing so, they did something to help alleviate the shortage of ice that Raleigh was facing. And if they hadn't been arrested for price gouging, others who heard about the profits they were making presumably would have followed suit. As more people brought needed supplies to Raleigh, competition would cause the price to decrease, and a new and lower equilibrium would be approximated.

The lesson we can draw from Hayek's insight is that markets are dynamic, and that our moral intuitions often fail to consider this dynamism. When we think about price gouging we often imagine a small, fixed supply of resources being distributed among a group of people. If a high price is charged, the rich will get the goods, and the rest won't. From all appearances, those who bought ice from the four men in Raleigh were in a zero-sum game with each other—one could win only if another lost—and the price gougers were taking advantage of this vulnerability. This seems to violate the most basic of moral standards—if *we* were desperately in need of ice, we would not want others to profit from our misery. In a static world, price gouging seems to be a clear-cut violation of the Golden Rule.

But here, as with many other cases involving markets, our intuitive moral response is driven too much by what we can visualize, and not enough by what is harder to see.⁴⁴ It is easy for us to visualize the zero-sum relation between the indi-

viduals fighting over a small immediate supply of ice. It is more difficult for us to see the way in which the market forces at work in that scenario operate to increase supply and to spur the discovery and improvisation of substitutes, such that what is zero-sum in the microcosm is positive-sum in the macrocosm. The quantity of a resource available in a market can shrink or grow, and the most important factor in effecting this change is the resource's price. Indeed, the fact that a resource commands a high price in a market is an *essential step* in bringing additional supply to that market. Holding prices low, voluntarily or by regulation, may seem to achieve justice in the microcosm, but it does so at the cost of keeping the microcosm static, and preventing the influx of supply that would alleviate concerns about unfairly high prices in the market as a whole. Market competition is a process, and the high short-term prices charged by gougers are just one step in that a process—a step that is indispensable to the incentives for discovery and entrepreneurship which move markets closer to a state where people's needs are more widely met.⁴⁵

e. Emergencies and Market Failure

Before moving on to explore the ways in which price gouging reflects on an agent's moral character, it is worth pausing to consider an obvious line of objection to the arguments of the preceding two sections. The defense of price gouging that I have just presented is based on certain empirical and theoretical claims about the effective operation of markets. And while those claims might have merit in the ordinary, day-to-day operation of the market, it is not so obvious that they continue to hold in cases of emergency. And since it is only in such emergency conditions that price gouging becomes an issue, what reason do we have to suppose that market mechanisms will be effective in situations where individuals are operating on a possibly very short time horizon, with imperfect information, high transaction costs, and with a possibly very small number of sellers?⁴⁶

By the neoclassical standard of perfect competition, markets in emergency situations are rife with market failures. But the model of perfect competition is not the only way of thinking about the virtues of markets, and is probably not the most illuminating way of thinking about them in emergency contexts. In such contexts, a model which focuses on competition as a *process* rather than as an equilibrium state is likely to be more helpful. Israel Kirzner's presentation of the Austrian theory of the market process, for instance, defines competition as the "rivalrous activities of market participants trying to win profits by offering the market better opportunities than are currently available" (Kirzner, 1979: 9). Note that this kind of competition, unlike the competition of the neoclassical model, occurs not *in spite* of the fact that equilibrium has not been reached, but precisely *because* equilibrium has not been reached. It is by the process of competition that we move from states of greater disequilibrium to states of lesser disequilibrium. In other words, no progress toward equilibrium could be made unless the current allocation of resources is flawed in some way. Competition, for Kirzner and others in the Austrian school, is a discovery process in which new opportunities are sought out, and in which the potential for

pure entrepreneurial profit spurs individuals and firms to discover errors in the ways that others are currently deciding to use scarce resources (Hayek, 1968).

To illustrate, while it is true that market actors in a state of emergency will not have access to perfect information, this *at most* shows that the outcomes of market processes will fall short of the theoretical ideal of perfect competition.⁴⁷ But this does not mean that competitive forces are doing no significant work. As Vernon Smith and others have demonstrated experimentally, markets can achieve equilibrium or near-equilibrium outcomes even when none of the actors in those markets have perfect information or act perfectly rationally.⁴⁸ Even in the absence of perfect information there are still market pressures, which place a premium on the discovery of new and better ways of using scarce resources to satisfy demand. Buyers will still buy a greater quantity of a good at a lower price, and sellers will still sell a greater quantity at a higher price. Gaps in information will thus result in increased expenses or decreased profits, while advantages in information will lead to entrepreneurial profit. Even in a state of great disequilibrium and market imperfection, market pressures will thus still have an equilibrating effect. This, presumably, is why the four men described at the beginning of this essay charged *only* \$12 per bag. What prevented them from charging, say, \$40 instead was presumably not altruism, but the realization that \$40 was more than the market would bear. The higher the price, the greater the incentive would have been for individuals to make do with existing substitute goods, or to innovate new substitutes, and the greater the incentive would have been for other individuals to supply the same good more cheaply. The equilibrating tendencies of the market are not instantaneous, but neither are they completely negated in the face of emergency.

Much will depend, however, on the nature of the emergency involved. In a natural disaster the effects of which persist for several days or weeks, there is time for information to spread, for individuals from non-affected areas to marshal resources, and for the process of competition to work. In other sorts of emergencies, though, the notion of a "market" seems entirely misplaced. Take the simple thought experiment often used to illustrate the nature of wrongful exploitation. *A* is drowning in a lake, and *B* rows by on the only boat in sight. *B* offers to give *A* a ride to shore *if A* is willing to sign a contract (which *B* has brought along in anticipation of just such an occasion) pledging to sign over the deed to his house in exchange. In this example, it is clear that *B*'s price does little to promote the value of allocative efficiency. There is no one else fighting for a spot in *B*'s boat. If *A* doesn't get in, *B* will simply leave it empty. Moreover, in this case, there is no doubt in *B*'s mind about which allocation of resources would best promote overall welfare or moral goodness however defined. *A* needs the extra seat more than *B* needs to keep it empty, and there is no need to rely on the information-conveying function of prices to tell him this. And, finally, while it is logically possible to make the argument that *B*'s exploitatively expensive rescue will lead others to increase the supply of rescues over the long run (*C*, *D*, and *E*, upon hearing the story behind *B*'s fancy new house, invest in houseboats and start patrolling nearby lakes looking

for drowning victims to exploit), the appeal to the signaling function of prices in this context looks more like a pathetically thin rationalization of individual greed than a genuine justification. In this kind of emergency, then, none of the standard moral justifications of market processes are present, and the worry about morally objectionable exploitation looms large. Price gouging in this sort of situation, then, ought to be regarded as morally impermissible—what is clearly morally required in this situation is rescue at a fair price, even if what exactly constitutes a fair price is not itself entirely clear. But not all emergencies will look like this. And in cases of emergency where the normal market processes can still be expected to produce morally admirable outcomes, and in which alternative institutional or individual arrangements for achieving better outcomes (however defined) are not present, then there is still a strong case for the moral permissibility of price gouging.

5. Price Gouging and Moral Character

Even those who are swayed by the arguments above might feel that there must still be something morally objectionable about those who engage in price gouging. Perhaps the practice should not be prohibited by law. And perhaps the act of gouging itself is not *per se* morally objectionable. But the fact that there are good arguments to be made for the moral permissibility of price gouging in certain cases does not mean that those who actually engage in the practice are motivated by these considerations. In other words, the common moral condemnation of price gougers as greedy, callous, and selfish might be absolutely correct.

It is, however, a bit of a puzzle why one might think that engaging in a morally permissible activity would constitute evidence of an immoral character. If an action is morally permissible, then what can one's performing that action say about one's character other than that one is disposed to perform morally permissible actions? Still, many find arguments of this sort convincing. Immanuel Kant, for instance, thought that non-human animals did not have moral status, and hence that there was nothing wrong *per se* with treating them as mere means to one's own ends. Still, even Kant thought there was something wrong with people who inflict gratuitous suffering on animals. What was wrong with them, however, was not *merely* that they were causing animals to suffer, but that in doing so they betrayed a defect in their character. The kind of people who inflict gratuitous suffering on animals, Kant reasoned, tend to also be the kind of people who inflict gratuitous suffering on human beings. Hence, even though there's nothing morally wrong with causing animals to suffer in itself, people who do so thereby demonstrate that they are likely to do other things which *are* morally wrong—viz., causing human beings to suffer (Kant, 1994, p. 106).

Kant's reasoning points us in the direction of one way in which engaging in morally permissible behavior might betray a morally vicious character. We should notice, though, that Kant's reasoning is only valid on the assumption that moral character operates in a fairly "coarse-grained" way. After all, it certainly seems as

though there is a fairly sharp and obvious distinction to be made between hurting animals and hurting human beings, such that even if one had a disposition to engage in the former sort of activity, one might lack the disposition to engage in activity of the latter sort. If, however, our dispositions are so coarse-grained that they cannot track the relatively fine-grained distinctions between different the different targets on which cruelty might be inflicted, then it is possible that there will be what Nozick calls an "undesirable moral spillover" between actions of one sort and actions of another.⁴⁹ On this scenario, our options are less like a "disposition to hurt animals" versus a "disposition to hurt human beings," and more like a "disposition to hurt living things" or not. One who hurts animals is expressing a disposition of this latter coarse-grained sort, and this, on the Kantian account, makes him liable to do some things which are morally permissible (hurting non-human animals) but also to do some things which are morally impermissible (hurting human beings).

As it so happens, Kant was mostly correct when it comes to people who inflict needless suffering on animals.⁵⁰ But notice that his argument rests inescapably on empirical premises. Whether our dispositions are fine- or coarse-grained is a question for empirical psychologists to resolve, not one which can be settled from the philosopher's armchair. And there's no reason to suppose that the answers psychologists return will be of a tidy or uniform sort. Human beings might be very poor at drawing distinctions between different instances of inflicting pain, but very good at drawing distinctions between, say, different ways of expressing falsehoods (most people, I would suppose, are unlike Kant in recognizing a rather stark moral difference between lying on one's resume about one's educational background and lying to a murderer at one's doorstep about the location of his intended victim).

It is similarly an empirical question, then, whether the motivations which drive people to engage in price gouging are sufficiently coarse-grained that they will, as a tendency or as an inexorable psychological law, drive them to engage in morally *impermissible* acts as well. A disposition to charge market-clearing prices for necessary items to desperate people might also be a disposition to engage in acts of fraud or coercion against the vulnerable when one can make a profit by doing so. But then again, it might not.

None of this is meant to dispute the intuition with which this section began—that some people who engage in price gouging do so from morally despicable motives. This is a real possibility, and indeed could be the reality in a majority of cases. All I want to argue here is that the fact that a person engages in price gouging is not *sufficient evidence* to conclude that she has a bad moral character. Assuming the arguments in section four regarding the moral permissibility of price gouging are correct (or even just assuming that people *believe* them to be correct), the activity of price gouging is compatible with a number of different moral motivations. Some might engage in the activity because they care only about their own profit, and engage in price gouging for this reason alone. Others, however, might care both about their own wealth and the suffering of others, and believe that charging the market-clearing price will contribute to both these ends. We would properly condemn the former

sort of gouger as having insufficient regard for the well-being of others. But what about the latter sort? A gouger of this kind is not a moral saint—he does not do all that is possible in order to help those in need without any regard to his own interest. But neither, it seems, is he necessarily morally vicious. He bases his decision partly on his own interests and those of his family, but also on consideration for the needs of others and what he not unreasonably believes will best serve those needs. His moral character, while perhaps not exemplary, is at least *decent*.

Perhaps, though, we will want to say that moral *virtue* requires more than merely doing what is morally *permissible*. The Aristotelian *phronimos* doesn't simply do the bare minimum that morality permits. Someone who fully instantiates all the virtues such as justice, beneficence, and liberality, we tend to think, would be disposed to charge less than the market-clearing price, even if charging the market-clearing price passes the threshold of moral permissibility.⁵¹ Such an individual would still allow himself *some* profit, since nothing in the traditional Aristotelian account of virtues requires that he give his own interest no weight or even less weight than the interests of others. But he could, we think, reap a *reasonable* rate of profit while still charging far less than what the market would bear.

To a large extent, I think this is an accurate account of how the fully virtuous person would act. After all, the justification I have given in this paper of relying on market prices is, in large part, that they are a useful heuristic for achieving moral good. If the *phronimos* can achieve that good directly, by allocating resources to those who need/deserve/merit them most, and if he can find ways other than high prices to channel increased supply to the area, then he has good moral reason to do so. So should we ordinary mortals try to do as the *phronimos* would do? Two considerations must be kept in mind in answering this question, though they pull us in opposite directions. On the one hand, we should keep in mind that the decision-procedure which would be ideal if we were fully virtuous, fully informed, and fully rational, is not necessarily the decision-procedure that is ideal for us as we are. Call this an attitude of epistemic humility. Relying on the imperfect heuristic of market prices might very well do more good than trying to make decisions based on full considerations of the morally relevant facts, at least when we are largely ignorant of those facts.⁵² On the other hand, just as we should keep in mind that our decisions can be led astray by our ignorance of the relevant facts, so too should we keep in mind that they can be led astray by our biases. In particular, it is important to bear in mind our bias toward rationalizing those actions which serve our own self-interest. Most of us, unfortunately, will probably not look too hard for counterarguments when we're told that seeking maximum profit for ourselves will do more good for others than charging less. While there is a case, then, to be made for charging the market-clearing price, we should never be too sanguine about thinking that this case applies to us in our situation. Most of us are simply too willing to fool ourselves into thinking that it does, regardless of the facts.

6. Conclusion

In this paper, I have presented a qualified defense of price gouging. I have done so by arguing for three claims. First, I argued that even if price gouging is immoral, it ought not to be prohibited by law. Existing laws against price gouging either fail to provide clear guidance to sellers or fail to take account of all the morally significant reasons which could underlie a price increase, and it is difficult to see how laws could be reformed to avoid this dilemma. Furthermore, any legal prohibition of price gouging will create disincentives for individuals to engage in economic activity which helps those made vulnerable by emergencies. Because laws which prohibit price gouging thus harm vulnerable buyers and are unfair or unclear to sellers, they are immoral and should be repealed. Second, I argued that price gouging is, at least oftentimes, morally permissible. Price gouging is not inherently coercive, and if it is exploitative at all it is so in a way which makes it difficult to see why it is wrong (or, at least, *more* wrong than the actions of those who do *nothing* to help victims of emergencies). Moreover, price gouging can serve morally admirable goals by promoting an efficient allocation of scarce and needed resources, and by creating economic signals which will lead to increases in the supply of needed goods available to desperate populations. When it does so, I have claimed that we have good reason to think of price gouging as morally permissible. Finally, I argued that even though those who engage in price gouging *might* do so from morally despicable motives or characters, we cannot assume that *all* of them do so, since there are morally virtuous (or at least morally acceptable) motives which might drive individuals to engage in the practice as well.

APPENDIX A

*U.S. Anti-Gouging Laws by State*⁵³

State	Goods Covered	Allowable Price Increase	Exception for increases due to	Maximum Penalties
Alabama	All	25%	Actual Costs	Civil—\$25,000
Arkansas	Disaster Goods	10%	Costs +Mark-up	Misd.—\$1,000
Arizona	No Law	---	---	---
California	Disaster Goods	10%	Costs +Mark-up	Misd.—\$10,000
Colorado	Medication Only ^a	10%	Actual Costs	Civil
Connecticut	Health and Safety Goods	None	Actual Costs	Misd.—\$10,000
District of Columbia	All	10%	Actual Costs	Civil—\$1,000
Delaware	No Law	---	---	---
Florida	Disaster Goods	Unconscionability	Actual Costs	Civil—\$24,000
Georgia	Health and Safety Goods	None	Actual Costs	Civil—\$10,000
Hawaii	All	None	Actual Costs	Civil—\$1,000
Idaho	Listed Necessities	Unconscionability	Actual Costs	Civil
Illinois	Governor's Option ^b	Option	Option	Civil
Indiana	Fuel Only	Unconscionability	Actual Costs	Civil
Iowa	Disaster Goods	Unconscionability	Actual Costs	Civil
Kansas	Disaster Goods	25%	Actual Costs	Civil
Kentucky	Disaster Goods	Unconscionability	Actual Costs	Civil—\$10,000
Louisiana	All	None	Actual Costs	Civil/Criminal
Maine	Necessities	15%	Costs +Mark-up	Civil
Maryland	No Law	---	---	---
Massachusetts	Fuel only	Unconscionability	Actual Costs	Civil
Michigan	All ^c	Unconscionability	None	Civil
Mississippi	All	None	Actual Costs	Felony—\$5,000
Missouri	Necessities	Unconscionability	Costs +Mark-up	Civil
Montana	No Law	---	---	---
Nebraska	No Law	---	---	---
Nevada	No Law	---	---	---
New Hampshire	No Law	---	---	---
New Jersey	Health and Safety Goods	10%	Actual Costs	Civil
New Mexico	No Law	---	---	---
New York	Health and Safety Goods	Unconscionability	Actual Costs	Civil
North Carolina	Health and Safety Goods	Unconscionability	Actual Costs	Civil

North Dakota	No Law	---	---	---
Ohio	No Law	---	---	---
Oklahoma	Disaster Goods	10%	Actual Costs	Civil
Oregon	No Law	---	---	---
Pennsylvania	All	20%	Actual Costs	Civil—\$10,000
Rhode Island	No Law	---	---	---
South Carolina	All	Unconscionability	Actual Costs	Misd.—\$1,000
South Dakota	No Law	---	---	---
Tennessee	Disaster Goods	Unconscionability	Actual Costs	Civil
Texas	Necessities	Unconscionability	None	Civil
Utah	Disaster Goods	10% ^d	Costs +Mark-up	Civil -\$10,000
Vermont	Fuel Only	Unconscionability	Actual Costs	Civil
Virginia	Disaster Goods	Unconscionability	Actual Costs	Civil
Washington	No Law	---	---	---
West Virginia	Disaster Goods	10%	Actual Costs	Misd.—\$1,000
Wisconsin	No Law	---	---	---
Wyoming	No Law	---	---	---

Appendix Notes

a. The exclusive focus on medication makes Colorado anomalous. At the time of this writing, there have been several unsuccessful attempts to pass more comprehensive anti-gouging laws in the State Legislature.

b. Illinois's law gives the governor the option to enact price controls in time of emergency, but the scope and nature of the controls is not specified.

c. Michigan's law is anomalous insofar as it requires no triggering event such as a natural disaster or emergency. Instead, the law simply prohibits ever selling goods at unconscionably high prices.

d. Individuals who sold a particular good at some point during the thirty days prior to the declaration of emergency are limited to a 10 percent increase in price above their pre-disaster price (with allowances for increased costs and mark-up). Individuals who did *not* sell the good in the thirty days prior to the declaration of emergency, however, are allowed to sell the goods at 30 percent above their cost.

Notes

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1. I owe the example to Mike Munger, an economist and resident of Raleigh at the time, who discusses the issue in Munger, 2007: 60.

2. Belief in the immorality of price gouging goes back at least as far as Thomas Aquinas, who writes that if one man has a great need for an object which another man has, but does not greatly need, then "the latter ought not to raise the price" on that account (Aquinas, 1918: 318–320, part 2, second part, question 77). As Alan Wertheimer points out, however, Aquinas's doctrine is much less hostile to market forces than is generally supposed insofar as the notion of a "fair price" from which Aquinas is cautioning sellers not to depart will vary with changes in the cost of production, costs of transportation, and even risk. See Wertheimer, 1996: 42. Insofar as contemporary anti-gouging laws typically do not make allowances for all of these factors (risk is almost never explicitly taken account of), Aquinas's doctrine is actually substantially less restrictive than current law.

3. On the distinction between ideal and non-ideal theory, see Rawls, 1971: 8–9.

4. H.R. 1252, "The Federal Price Gouging Prevention Act," was introduced on February 28, 2007, and passed the House on May 23, 2007.

5. Anti-gouging statutes are generally triggered by an official proclamation of emergency, and last either the length of the emergency or for some specified time—Kansas, for instance, specifies that its law shall be in effect for either the time during which the declaration of emergency is in effect, or for a period of thirty days after the event that triggered the declaration, whichever is longer. See K.S.A. 50-6, 107. Michigan is an exception to this general rule, as it requires no triggering event and simply has general prohibitions on excessive price increases or profits. See UDAP Statute MCL 445.903(1)(z).

6. Cal. Penal Code §396. The District of Columbia, Hawaii, and Mississippi, however, are among the states which have laws that are not limited to necessary or disaster-related items, but extend to any good and/or service. See D.C. Code §28.4101-4102, Haw. Rev. Stat. §209.9 and Miss. Code Ann. §75-24-25.

7. Massachusetts, Virginia, Florida, Indiana, and New York are among the states which prohibit the sale of goods at "unconscionably high prices" or "grossly excessive prices" in the wake of an emergency. See 940 Mass. Code Reg. 3.18, Va. Code Ann §59.1-526 (Supp. 2005), Fla. Stat. Ann §501.160(2) (West 2002 and Supp. 2005), Ind Code Ann. §4-6-9.1-2 (West 2005), and N.Y. Gen. Bus. Law §396-r(1) (McKinney 1996 & Supp. 2005). Arkansas and California are examples of states which set a percentage cap (both use 10 percent) on price increases in the wake of a disaster. See Ark. Code Ann. §4-88-33 (2001 & Supp. 2005) and Cal. Penal Code §396 (West 1999 & Supp 2006). Most states that use a percentage cap also allow that cap to be exceeded if the cause of the price increase can be directly attributed to increases in cost to the seller.

8. Georgia, Louisiana, Mississippi, and Connecticut all have laws prohibiting any price increase for certain goods in the wake of a disaster. See Ga. Code Ann. §10-1-393.4(a)(1995), La. Rev. Stat. Ann. §29:732(2005), Miss. Code Ann. §75-24-25(2003), and Conn. Gen. Stat. §42-232(1991). Louisiana's code is, for reasons which are at least understandable if not correct, one of the harshest laws on the book, stipulating that criminal gouging offenses which result in property damage in excess of \$5,000 can be punishable by up to five years imprisonment at hard labor.

9. See UDAP Statute A.C.A. 4-88-301 et seq. and Cal. Penal Code §396.
10. The Federal Trade Commission, in its report on possible gasoline price manipulation in the wake of Hurricane Katrina, notes that "Unconscionability cases have been particularly difficult for courts to analyze because there are no clear criteria as to when a price term is unconscionable" (Federal Trade Commission, 2006). The report goes on to quote several legal sources in support of its claim, such as E. Allen Farnsworth, who writes in his respected book on contracts that "unconscionability itself is incapable of precise definition" (Farnsworth, 1982: §4.28, at p. 310). The Uniform Commercial Code's test for unconscionability, on the other hand has been described as "unintelligible or abstract," *Sitogum Holdings, Inc. v. Ropes*, 800 A.2d 915, 919 (N.J. Super. 2002) (quoting Arthur A. Leff [Leff, 1967: 485, 488-89]), and "an amorphous concept," *Kugler v. Romain*, 58 N.J. 522, 543-44 (1971).
11. Indeed, Lon Fuller has argued that the desirableness of clarity is not merely an external standard by which we can judge laws to be either good or bad, but an *internal* standard of legality itself. Laws which are basically unclear fail to achieve an essential purpose of law and hence, in a way, fail to be laws at all (Fuller, 1964: 63-65). Fuller, however, is more optimistic about the ability of the law to rely on imprecise standards such as "fairness" without running afoul of the requirement of clarity than is F. A. Hayek, who writes that "one could write a history of the decline of the Rule of Law . . . in terms of the progressive introduction of these vague formulas into legislation and jurisdiction, and of the increasing arbitrariness and uncertainty of, and the consequent disrespect for, the law and the judicature" (Hayek, 1944: 78).
12. Louisiana is the only state of which I am aware to explicitly include increased risk as one of the costs which sellers can legitimately recoup by increasing their prices. See LA. REV. STAT. ANN. §§29.732.
13. The sort of exploitation at work would be what Alan Wertheimer has called "mutually beneficial exploitation," in Wertheimer, 1996: chap. 1. Most extant accounts of exploitation are compatible with the possibility that mutually beneficial exploitation can exist, and that it can be morally wrong. See, for instance, Meyers, 2004: 319-33, where exploitation is defined as unfairly taking advantage of an individual, benefitting from her misfortune, and benefitting disproportionately relative to one's contribution. Robert Mayer, similarly, argues that the essence of exploitation is a failure to benefit the victim *as much as fairness requires*, and hence that even mutually beneficial transactions can be exploitative and wrong. See Mayer, 2007.
14. Alan Wertheimer and Robert Mayer reach the same conclusion, though via slightly different argumentative routes. See Wertheimer, 1996: chap. 9; and Mayer, 2007: 147.
15. The result of a shortage, in turn, is to effectively set the price at which goods can be obtained at infinity. Consumers' willingness to pay, on the other hand, is very high in the wake of an emergency, though well short of infinity. Since goods could be brought to market for a cost lower than consumers' willingness to pay, a potential consumer surplus is destroyed by anti-gouging laws and the shortages they create. The amount of consumer's surplus, if the demand curve slopes up steeply near the origin, is enormous, and is in fact arbitrarily large in terms of measurement.
16. Both the theoretical relationship between price caps and shortages and a discussion of the gas shortage of the 1970s can be found in many economic textbooks, including the leading textbook (Samuelson & Nordhaus, 1998: 74-77, 184).
17. Or that they will be forced to do so in the black market, where prices will likely be higher due to the increased transaction costs necessary to avoid the law, and where the likelihood of fraud and outright coercion are greater due to the inability of consumers to appeal to the law should a dispute regarding the transaction arise.
18. This point is illustrated by a story about the four men with whom this paper began which, though difficult to verify and possibly apocryphal, is certainly within the realm of possibility. According to this story, relayed by Munger (see note 1), the four men were arrested for

price gouging by Raleigh police, and their refrigerated truck was impounded. Once impounded, the truck was placed in a lot where, under the heat of the Raleigh sun, the ice for which people had been lining up to pay \$12 per bag proceeded to melt into a useless pool of water.

19. Some philosophers who have written on the topic believe that neglect is a less morally serious offense than exploitation. I disagree, at least when the claim is made in this generalized and unqualified way, but will have more to say about such arguments in section 4b.

20. See Simmons, 1993: 237–238; and Barry, 1986: 21.

21. Indeed, the hurdles seem very much akin to those faced by market socialists in setting prices in the absence of market signals. On the connection between the problems of market socialism and certain forms of economic regulation, see Kirzner, 1979: 3–8.

22. The link between coercion and price gouging is often made through the notion of unconscionability. As we have seen, price gouging is often defined, partly, as the charging of unconscionable prices. And prices or other contractual terms are often thought to be unconscionable when the agreement from which they arise is coercive in nature. See, for instance, Norman Bowie's discussion of the famous unconscionability case of *Henningsen v. Bloomfield Motors* in which he labels the agreement as "coercive in nature" given the lack of available alternatives open to Mr. Henningsen (Bowie, 1988: 96). Similarly, Joel Feinberg describes the Henningsen case as involving "duress" for essentially the same reason (Feinberg, 1986: 249).

23. Some accounts of coercion, for instance, are moralized, in that the concept is defined in term of one or more other normative concepts such as "the *wrongful* use of a threat to shape the actions of another." Other accounts attempt to define coercion in ways which make no reference to other moral concepts. The most significant contemporary version of a moralized theory of coercion is to be found in Wertheimer, 2006. Non-moralized accounts have been offered by Michael Gorr (Gorr, 1986), and David Zimmerman (Zimmerman, 1981), among others. Other issues of dispute include whether to define coercion in terms of a baseline (moralized or not) at all, whether coercion is, as a conceptual matter, always at least a *prima facie* wrong, and whether offers and not just threats can be coercive. The discussion below is intended to remain neutral among these various competing accounts by focusing on those elements which appear to be necessary conditions for any plausible account of coercion.

24. See, for instance, Joel Feinberg, who characterizes assumptions of risk as voluntary when "one shoulders it while fully informed of all the relevant facts and contingencies, with one's eyes wide open, so to speak, and in the absence of all coercive pressure. There must be calmness and deliberateness, no distracting or unsettling emotions, no neurotic compulsion, no misunderstanding. To whatever extent there is compulsion, misinformation, excitement or impetuosity, clouded judgment (as from alcohol), or immature or defective faculties of reasoning, to that extent the choice falls short of perfect voluntariness." See Feinberg, 1983. With the possible exception of coercion, which I discuss in this section, none of these other voluntariness-undermining features appear to be present in the standard cases of price gouging (or at least, in the case of unsettling emotions, not present to a sufficient *degree* to undermine voluntariness).

25. The criminal law, for instance, defines coercion (or duress) in a way which requires among other elements that "*another person* threatened to kill or grievously injure the actor or a third party, particularly a near relative." See Dressler, 2006: 323. This definition arises in the context of considering coercion as a justification or excuse for otherwise criminal behavior, but most philosophical accounts of coercion similarly require *wrongdoing* or at the threat of wrongdoing on the coercer's part, and not merely bad outcomes or difficult choices on the victim's part. See, for instance, Wertheimer, 2006, especially chapter 1.

26. I will have more on the issue of baselines immediately below.

27. On the distinction between threats and offers, see Frankfurt, 1973: 167. See also Wertheimer, 2006: 204–14.

28. See Nozick, 1969: 447–50; Feinberg, 1986: 219; and Wertheimer, 2006: 206–07.

29. See Wertheimer, 2006: 208.

30. The charge of exploitation is reflected in the language of state statutes which describe price gouging as taking “unfair advantage” of consumers (see note 9, above). Norman Bowie and Patricia Werhane make a similar claim in their book on *Management Ethics*, where they write that “price gouging is wrong because it takes advantage of those who are made vulnerable” through no fault of their own (Bowie & Werhane, 2005: 66).

31. We can, I think, coherently suppose that the *character* of a person who interacts with another in a mutually beneficial but exploitative way is worse than the character of a person who simply neglects that other. For, while the exploiter provides some benefit, it need not be any part of his *aim* to provide such benefit. We could even imagine that he views his providing benefit to disaster victims as a regrettable but necessary side-effect of his own profit-maximization. But nonworseness is not a claim about moral character. It is a claim about the rightness and wrongness of acts. And just as we can maintain that it is possible to do the right act for the wrong reason, we can say here that mutually beneficial exploiters are performing a better act than neglecters, even if the reasons for which they act reveal a worse moral character.

32. For a parallel argument that focuses on the question of whether respect for persons requires paying above market-clearing wages for sweatshop labor, see Sollars & Englander, 2007: 117–20.

33. See, for instance, Miller, 2004; and Schmidtz, 2000.

34. To deal with another as a trader is, partially, to respect the constraints of reciprocity in one's dealings with that person. And while reciprocity might not be the whole of morality, it is undoubtedly a part of it—a way of showing respect for both others and oneself as partners in a cooperative venture. On this point, see Schmidtz, 2006: chap. 15.

35. The *locus classicus* of easy rescue cases is Singer, 1972. More recent discussion of easy rescue and the moral challenges such cases present can be found in Murphy, 2003; Cullity, 2006; and Kamm, 2006.

36. But see the paragraph immediately following for complications.

37. For a discussion of this point in relation to the case against anti-gouging laws, see Skarbek, forthcoming.

38. See section 4.e.

39. Kahneman and Tversky's famous work in Kahneman & Tversky, 1982, for instance, contains many examples wherein moral reasoning is improperly swayed by the language or order in which information is presented. More recently, Jonathan Haidt has shown that much of our moral reasoning is driven by, and tailored to fit, emotional reactions such as disgust (Haidt, Koller, & Dias, 1993; and Haidt, 2001).

40. Note that this is a significantly weaker condition than saying that there must be no alternatives available which produce morally better results. An act can surely be morally permissible even if it is not morally optimizing.

41. Hayek's classic statement of this position can be found in Hayek, 1980.

42. See, for a general overview, O'Driscoll & Rizzo, 1996.

43. See Samuelson & Nordhaus, 1998: 72.

44. This was one of the key insights of the nineteenth-century French political economist Frédéric Bastiat, most famously expressed in Bastiat, 1995.

45. See, generally, Kirzner, 1996.

46. Geoffrey Rapp presents an especially novel form of market-failure argument in support of anti-gouging legislation in Rapp, 2005–2006. For a response, see Skarbek, forthcoming. My arguments in this section will deal only with more standard cases of market failure.

47. Actually, it does not even clearly show this much. Perfect information is a *sufficient* condition for market equilibrium; it is not a *necessary* one. See Mas-Colell, Whinston & Green, 1995: 545–50; cited in Skarbek, forthcoming.
48. See Smith, 1982; and Gode & Sunder, 1993; cited in Skarbek, forthcoming.
49. Nozick thinks the existence of such a spillover would be puzzling. “If it is, in itself, perfectly all right to do anything at all to animals for any reason whatsoever, then provided a person realizes the clear line between animals and persons and keeps it in mind as he acts, why should killing animals tend to brutalize him and make him more likely to harm or kill persons? Do butchers commit more murders? (Than other persons who have knives around?)” (Nozick, 1974: 36).
50. Cruelty to animals is, for instance, an accepted marker for antisocial personality disorder as part of the “MacDonald Triad,” and is accepted as a diagnostic criterion for Conduct Disorder by the Diagnostic and Statistical Manual of Mental Disorders IV, text revision, code 312.
51. I thank Larry Solum for suggesting this point to me.
52. See section 4.c.
53. I owe a great debt of thanks to David and Brian Skarbek who present a much more thorough summary of US anti-gouging laws in Skarbek & Skarbek, 2008.

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