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An Immoral Law: Congress Should Not Criminalize "Price Gouging" of Gasoline

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Congressional demagoguery over prices at the pump has reached new heights in the "Federal Energy Price Protection Act of 2006" (H.R. 5253). Though the conduct at issue, "price gouging," goes undefined in the legislation, it (whatever it is) could be punished with civil *and* criminal sanctions that include a $150 million fine and imprisonment for up to two years. In addition to being economically harmful, the criminal provisions of H.R. 5253 are potentially unconstitutional and certainly immoral. The price mechanism is the bedrock of the American economy, and so H.R. 5253 would exact criminal punishment on gasoline sellers who are guilty merely of raising prices in a competitive market, which is no moral wrong. Criminal liability in this case is inappropriate, and so Congress should scrap the criminal provisions of H.R. 5253.

At some level, almost every Member of Congress knows that price controls don't work and that they foster shortages and wreak economic havoc. If price controls did work, Cuba would be the paradise its leaders claim it to be. In reality, Cuba's rate of economic growth, compared to other Latin American nations, fell sharply after 1959—and even faster after the withdrawal of Soviet support—and most Cubans now live difficult lives, with electrical blackouts an almost daily occurrence.

Nevertheless, American politicians sometimes pretend that the laws of economics can be suspended for individual commodities, such as gasoline, and that they can safely enact policies that resemble price controls for those commodities. Perhaps politicians really do not understand how a healthy market economy stimulates additional production and conservation, or perhaps they just don't trust Americans' reaction when the demagogues charge that they are not doing enough to stop gasoline "price gouging." The policies they propose are just as harmful either way.

Other articles have explained the structural reasons why gasoline prices have increased in recent years and will likely remain higher than in the past, why price controls or their functional equivalent are the wrong answer for the perceived problem, why healthy profits in a competitive market (i.e., absent monopoly conduct, which is regulated) are vital to stimulate increased production in a capital-intensive industry, and most importantly, why attempts to define and punish so-called "price gouging" are foolish.[1]

However, the criminal provisions of H.R. 5253 merit special attention. It is particularly pernicious to criminalize such ill-defined conduct. To begin with, criminalizing another form of conduct is unnecessary. National and state antitrust laws already prohibit anticompetitive acts that actually harm consumers, such as collusion to set high

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prices, monopolization, and other schemes that reduce price competition. Yet in its lengthy investigations, the Federal Trade Commission found no evidence that domestic producers, refiners, or distributors engaged in collusive or anticompetitive behavior. Rather, it found that these businesses engage in vigorous competition to attract consumers during periods of uncertainty with a high risk of supply disruption.

As the FTC concluded, high prices and periodic above-normal profits are the natural market response (i.e., the premium the market demands) for engaging in a high-risk, capital-intensive business with long-term contracts and potentially huge future losses. When the energy sector has a bad year (which is not infrequent given the risks associated with that industry), losses can be colossal. The only way for the industry to sustain or increase investment in new refineries and new production is for it to make healthy profits some years that exceed the potential long-term losses on those investments. Without these profits, investment will flag and supplies will struggle to keep pace with rising demand—resulting in still higher prices and perhaps still more accusations of price gouging.

What, then, is "price gouging"? Congress does not even attempt to define it in H.R. 5253, and the FTC has explained that the concept is too nebulous and subject to manipulation for government to define, regulate, or proscribe at all. "Price gouging" may fairly be described as a derisive—and economically meaningless—rhetorical label for prices that someone thinks are unjustifiably high. It is an especially absurd label to apply to a fungible product like gasoline with many suppliers that all compete to undercut one another with prominent signs that advertise their prices to passing motorists.

As nebulous as "price gouging" is, the House recently passed H.R. 5253 to outlaw it. Under the bill, the FTC would have to define price gouging[2] and then enforce the law's prohibition with regard to certain fuel sales, doling out civil *and* criminal sanctions that include a $150 million fine and imprisonment up to two years. Although the fine for retailers is limited to $2 million, they still may be prosecuted as felons and subjected to two-year prison terms. The Senate has advanced the bill on its floor calendar, skipping committee action.[3]

In addition to being economically harmful, the criminal provisions of H.R. 5253 are potentially unconstitutional. Due process in criminal matters requires a fair warning of what conduct is and is not criminal. The FTC will struggle to find a definition that makes a meaningful distinction between decisions that provide a fair return to stockholders (or a reasonable retail profit) and those that constitute "price gouging." It is not enough for the FTC to devise a definition that narrows criminal exposure somewhat if the offense is still vague and the prohibited conduct overlaps significantly with legal (and valuable) economic activity. As the FTC itself concluded, uncertainty is inevitable: "Price gouging" is an empty notion, a mere epithet that says more about the speaker than the conduct in question. Almost any likely definition could be found unconstitutionally vague.

The criminal provisions of H.R. 5253 are morally troubling because it is immoral to cause someone to be imprisoned who is guilty of no wrong. It is terrible economic policy to regulate competitive market pricing decisions with civil sanctions because it is counterproductive to stimulating conservation, increasing production of the scarce commodity, triggering substitution to less costly

1. See, e.g., Ben Lieberman, "The FTC's Primer on Price Gouging," Heritage Foundation *WebMemo* No. 1120, June 12, 2006, at *www.heritage.org/Research/EnergyandEnvironment/wm1120.cfm*; Ariel Cohen and William Schirano, "The Real Culprit Behind Price-Gouging: OPEC," Heritage Foundation *WebMemo* No. 1102, May 21, 2006, at *www.heritage.org/Research/EnergyandEnvironment/wm1102.cfm*; and John Lott, "Let the Market Work Even During Disasters, *Investors Business Daily*, Aug. 24, 2004.
2. Section 2(b) mandates that the FTC "shall define 'price gouging'" no later than six months after the bill becomes law.
3. There are numerous other energy bills in the House and Senate that have similarly objectionable provisions—see, e.g., S. 2557, the "Oil and Gas Industry Antitrust Act of 2006" (which at least attempts to define the prohibited conduct in section 2)—but no others have passed either House of Congress.

alternatives, encouraging technological innovation that will improve efficiency, and in promoting the allocation of resources to the economy's highest value users. But it is more than just bad policy when Members of Congress try to criminalize ordinary pricing decisions. It is malicious to punish someone as a criminal for innocent and productive business conduct.

The distinction between civil and criminal law is based on a fundamental moral difference, and this difference is not a trivial one to be toyed with by politicians in a tough election year. The sanctions of the criminal law, particularly prison sentences, are the most awesome power government may exercise against its citizens. Accordingly, the prosecutorial power is constrained by several explicit rights in the Constitution. But traditional criminal law not only affords *procedural* rights to the accused; it also draws an important moral line between what *substantive* conduct is and is not criminal.

As it emerged in the common law, crimes were limited to conduct that is inherently evil, including acts that every civilized society recognizes as wrong: murder, battery, theft, kidnapping, etc. In our common law tradition, the government is also required to prove that the accused acted with a malicious intent to commit the wrongful act (the *mens rea* requirement). Thus we presume citizens know that killing is wrong but acquit those who are insane and do not understand the nature of their actions or know the difference between right and wrong. Similarly, accidental killing is not murder, and accidental accounting errors are not theft. Thus, proving that a bank teller knowingly paid an amount that turned out to be in error does not prove a crime. For criminal liability, the prosecutor must also prove the teller intended to defraud the owner of his money.

The civil law, in contrast, is designed to remedy personal or other injuries, whether the damage was intended or not. If someone drives through my flower beds, he is civilly liable for damages whether he intended to do so or not (unless I gave him permission, in which case he owes me nothing). Thus, the same act may be blameless (if done with permission), give rise to a civil damages for trespass (whether accidental or not), or be prosecuted as a criminal misdemeanor (but only if done with intent to trespass).

Over the past century, regulatory agencies have gained authority to regulate conduct under the civil laws that is not inherently wrong but is only wrong because the legislature defines it as such. The failure to disclose certain facts in reports to regulatory agencies, for example, does not cause real harm in most cases, but it is a civil offense if the law requires such disclosure. In recent decades, Congress and state legislatures have increasingly made such regulatory offenses crimes, and these laws are often vague about the knowledge element necessary for prosecution. For example, an executive might be convicted of a crime for knowingly signing and filing a report, which, unbeknownst to him, failed to disclose a particular fact.

This terrible trend in the criminal law (described in depth at *overcriminalized.com*) must be reversed. It is wrong to impose strict criminal liability on corporate managers for the unauthorized crimes or mistakes of a subordinate, but in theory, the executives can do something to detect the wrongdoing. Even if such vicarious criminal liability is incompatible with the traditional criminal law requirement of personal moral culpability, the deterrence value of that liability is at least debatable. The same theory cannot support criminalizing "price gouging," however. How can the state deter that which is not, and cannot be, defined?

Indeed, the accusation of "price gouging" often arises when company managers try to fulfill their fiduciary duty to maximize profits for their shareholders in a high-risk market—which is inherently desirable, in the long run, for consumers and the market. The common law, for very good reason, limited crimes to conduct (1) which is inherently wrong, and (2) in which the accused acted with a malicious intent. It makes no sense, and it is wicked, to hold someone criminally liable for conduct that is not clearly defined and not inherently wrong. Accordingly, Congress should scrap the criminal provisions of H.R. 5253.

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