Everything You Always Wanted to Know About Price Gouging (But Were Afraid to Ask): A Response to Ramsi Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*

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Good scholarship makes you change your mind, but great scholarship makes you think differently. As usual, Ramsi Woodcock's article "The Efficient Queue and the Case Against Dynamic Pricing" [1] is great, because it made me think differently about price regulation. Woodcock observes that prices not only communicate information,[2] but also redistribute resources.[3] Sometimes, producers change prices in response to competition or changes in the cost of production.[4] But other times, they change prices just because they can.[5]

When prices reflect the marginal cost of production, consumers benefit from market efficiencies.[6] But when prices reflect a surge in demand, they simply transfer resources from consumers to producers.[7] Of course, when prices increase dramatically in response to a sudden surge in demand, consumers object and the government steps in to prevent price gouging.

Obvious price gouging is now the exception that proves the rule of ecommerce. Suddenly, producers can change prices instantaneously in response to tiny changes in demand, extracting the largest possible surplus

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1. Ramsi A. Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, 105 IOWA L. REV. 1759 (2020); *see also Ramsi Woodcock on the Efficient Queue and the Case Against Dynamic Pricing*, IPSE DIXIT (Oct. 1, 2018), https://shows.acast.com/ipse-dixit/episodes/ramsi-woodcock-university-of-kentucky-college-of-law [https://perma.cc/C6EJ-L24W].

2. *See* Woodcock, *supra* note 1, at 1761.

3. *See id.* at 1773–74 ("Every penny [firms] earn in excess of cost represents a pure redistribution of wealth from firms to consumers . . . .").

4. *See id.* at 1770.

5. *See id.* at 1770–71.

6. *See generally* Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945) (observing that prices increase efficiency by communicating information).

7. *See* Woodcock, *supra* note 1, at 1770–74. "Every penny [firms] earn in excess of cost represents a pure redistribution of wealth from firms to consumers, a payment not necessary to keep the firm in the market." *Id.* at 1773–74.

from consumers, without them even realizing it.[8] Business has always been the art of screwing your customers without them realizing it.[9] Ecommerce just made it a science.

However, antitrust law is loath to regulate prices, for fear of inefficiency.[10] Usually, it's right. After all, it's hard enough for producers to know how to set prices, let alone for regulators to evaluate their fairness. Better to prohibit anti-competitive conduct and allow producers to set their own prices, within reason.

But maybe not always? Woodcock argues that "surge pricing," or increasing prices in response to sudden increases in demand, is always undesirable.[11] Therefore, it can and should be prohibited.[12] Woodcock begins by observing that the fundamental purpose of antitrust policy is to increase consumer welfare.[13] Antitrust typically avoids price regulation, because it's so hard to know whether regulating prices will help or harm consumers.[14] While low prices are great, they can also suppress production and deter innovation.[15]

Prohibiting surge pricing is an exception. Unlike other forms of price regulation, surge pricing only ever transfers resources from consumers to producers, without providing any compensatory benefits.[16] In theory, surge pricing could encourage more producers to enter the market. But in practice, producers just use surge pricing to claim more of the surplus for themselves.[17] In other words, surge pricing enables producers to ensure that the vig is (almost) always in their favor. Antitrust can safely prohibit surge pricing because it never benefits consumers, and therefore is never consistent with antitrust policy.[18]

And yet, even great scholarship is rarely perfect, and Woodcock's article is no exception. Specifically, I found three problems with his framing and thesis.

The first problem is Woodcock's use of the term "dynamic pricing."[19] He defines dynamic pricing as "the use of information age tools, such as big data and algorithms, to adjust prices based on new information over periods during which output is fixed."[20] So, dynamic pricing means both increasing

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8. *See id.* at 1766–67.

9. *See id.* at 1772 ("It follows that all firms charge monopoly prices in the sense of prices they choose to maximize their profits in light of existing demand.").

10. *See id.* at 1764, 1774.

11. *See id.* at 1771 ("[D]ynamic pricing, when used to respond to unexpected surges in demand, is always harmful to customers.").

12. *See id.* at 1774.

13. *See id.* at 1763–64, 1775.

14. *See* id. at 1764, 1772–74, 1776.

15. *See id.* at 1773.

16. *See id.* at 1770–71.

17. *See id.*

18. *See id.* at 1777.

19. *See id.* at 1766.

20. *See id.*

and decreasing prices. But as Woodcock himself acknowledges, not all dynamic pricing harms consumers.[21] While increasing prices harms consumers, decreasing prices helps them.[22]

To his credit, Woodcock recognizes that only dynamic price increases harm consumers and should be prohibited.[23] But he is still using the wrong term. The problem he identifies isn't dynamic pricing. After all, dynamic pricing can be good, if it means prices go down! The problem is surge pricing, and only surge pricing. So he isn't really making a case against dynamic pricing, he's making a case against surge pricing.

The second problem is Woodcock's discussion of product differentiation and monopolistic competition. I don't see how they are relevant to the problem he is addressing. For example, he argues that producers can raise prices in response to surges in demand because different producers sell different products, and consumers are willing to pay more for the products they prefer.[24] That's not only wrong, but also undercuts his thesis. Price differentiation based on consumer preferences is fine. Surge pricing is a problem because it enables producers to increase prices in response to an increase in demand for undifferentiated products. Competing to produce a more desirable product is good for consumers. Only price gouging is bad for consumers, because it doesn't rely on product differentiation, only commodity demand.

The third problem is Woodcock's attempt to analogize antitrust law's per se rule against naked price-fixing to his own proposed per se rule against dynamic pricing. Specifically, he observes that naked price-fixing relies on product differentiation, because consumers won't pay high fixed prices unless they are unwilling to purchase lower-priced substitutes.[25] And he argues that because dynamic pricing also requires product differentiation and also increases prices, it should also be prohibited.[26]

But the analogy doesn't work. For one thing, surge pricing doesn't require product differentiation, only an increase in demand. And for another, the problem with price-fixing isn't the exploitation of product differentiation, but the elimination of competition. In other words, it's fine for producers to charge more if consumers like their products better. But it's an antitrust violation for producers to collude to fix the price of an undifferentiated product.[27] And as Woodcock observes, maybe it also should be an antitrust violation for producers to increase the price of an undifferentiated product, in response to a surge in demand.[28]

21. *See id.* at 1770.
22. *See id.*
23. *See id.* at 1770–71, 1774.
24. *See id.* at 1771–73.
25. *See id.* at 1777–78.
26. *See id.* at 1778.
27. *See id.*
28. *See id.*

To the extent these three inconsistences detract from Professor Woodcock's otherwise excellent article, it would be helpful if he provided further insight into his reasoning.