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SCHOLARSHIP OF THE ABSURD: BOB BORK MEETS THE BALD SOPRANO

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ANTITRUST ECONOMICS ON TRIAL: A DIALOGUE ON THE NEW LAISSEZ-FAIRE. By *Walter Adams* and *James W. Brock.* Princeton: Princeton University Press. 1991. Pp. xiv, 132. Cloth, $29.95; paper, $10.95.

"It's a simple yes-or-no question, sir: Have you or have you not stopped beating your dog?" This (probably) apocryphal cross-examination question, familiar to every lawyer, has much in common with Walter Adams and James W. Brock's *Antitrust Economics on Trial: A Dialogue on the New Laissez-Faire.*[1] The format of the book is cute — too cute by half. You are a spectator at the voir dire of an expert witness proffered by the defense in an antitrust merger case. The other participants are the prosecuting attorney and a district judge; there's no defense lawyer. It's a clever little device, with an aura of plausibility and respectability that belies the fundamental unfairness of the approach taken.

Adams and Brock put on the stand for our amusement a fictitious Chicago-school economist of the libertarian bent — a caricature of the genre. He is "currently professor of economics at the University of Chicago, a fellow at the Cato Institute, and a consultant to the Heritage Foundation" (p. 3) who has published "in the *Journal of Economic Theory,* the *Journal of Political Economy,* the *Journal of Law and Economics,* the *Journal of Business,* and the *University of Chicago Law Review*" (p. 4) — all but one of which, as the prosecutor points out, are published by the University of Chicago. The authors assure us, however, that "[t]he expert is not set up as a straw man uttering lines concocted by partisan playwrights" (p. xiii).

Oh sure. You can tell this is a setup when our expert's first three examples of price theory in action are crime,[2] family relations[3] and

* Judge, United States Court of Appeals for the Ninth Circuit. Thanks to my law clerk Mark Perry, who, in the interest of full disclosure, did attend the University of Chicago Law School. I, myself, hold an undergraduate degree in economics from UCLA, widely known as the University of Chicago at Los Angeles.

1. Walter Adams is Distinguished University Professor of Economics, Michigan State University. James W. Brock is Moeckel Professor of Business, Miami University.

2. "[C]riminals are about like anyone else. . . . [T]he decision to become a criminal is in principle no different from the decision to become a bricklayer or a carpenter, or, indeed, an economist." Pp. 6-7.

3. "[T]he physical and emotional involvement called love has an important economic compo-

extramarital affairs.[4] While some economists have indeed sought to apply principles of economic theory to situations outside the business world, it is extremely misleading to offer these as mainstream examples which "reflect the worldview of the so-called New Learning (Chicago school), which is currently popular in the federal judiciary" (p. xiii).

When the subject finally turns to antitrust, many of the exchanges between the prosecutor and the economist are educational. The section on price theory and its relation to antitrust, the theory of competition and the harmful effects of monopoly (pp. 15-26) is a particularly lucid and brief exposition of basic antitrust analysis. More often, however (and this becomes truer the deeper one gets into the book), the prosecutor's questions seem designed not to elicit information but to discredit the expert's approach by holding it up to ridicule and scorn. Here, apparently, is the major theme: Microeconomic theory is of dubious applicability to antitrust policy and practice. Of course, Adams and Brock claim no agenda — "[o]ur purpose is not to preach a sermon or to impart a message or to declare a winner" (pp. xiii-xiv) — but by the end of the book economic analysis bears a strong resemblance to a whipped cur with his tail between his legs.

And the hand that done the beating is the economist's own. Adams and Brock are able to define precisely the role of each character, and they help the prosecutor lead the befuddled expert down blind alleys. Worse, they do not allow the participants the benefit of a level playing field: The economist offers theory, which the prosecutor rebuts with anecdote and empirical observation. But instead of giving the expert some empirical ammunition with which to fire back, the authors leave him sputtering.

At one point, for example, the expert is discussing the efficiency effects of conglomerate mergers when the prosecutor points out that some real-world conglomerates have had business problems (pp. 82-85). The authors relegate the expert to techno-babble: "In an economy where allocation of investment funds by the capital market incurs nontrivial transaction costs, the internal allocation of resources to higher yield uses is what most commends the conglomerate firm. In these circumstances, the conglomerate assumes miniature capital market responsibilities of an energizing kind" (p. 85). Why not let the expert respond by pointing to successful real-world conglomerates (and there are many), or by pointing out either empirical or theoretical explanations for the prosecutor's examples? Instead, the expert is made to look pompous and silly. The prosecutor retorts: "Your

nent." P. 8. "Children are much like cars, houses, and machinery. They can be considered consumer durables, which provide utility to their parents." P. 9.

4. "Price theorists have developed a model that explains how a married person allocates his or her time among work, spouse, and paramour." P. 10.

points are well taken in theory, but they remind me of the anti-Enlightenment philosopher Johann Fichte, who insisted that so long as his conclusions were deduced rigidly and correctly, he saw no reason to inquire whether they were true in reality" (p. 87).

But of course this expert is no expert at all: He is a creation of Adams and Brock, and his bumbling, often funny, recourse to theoretical abstractions in the face of the prosecutor's arguments is only a literary device. "To return to the hypothetical," he blurts out at one point when the prosecutor is getting the better of him (p. 60).

Chicago-school antitrust analysis can be, and has been, criticized on a number of grounds; Adams and Brock have been among the zestiest critics.[5] Yet this book represents criticism of a more insidious sort: Our expert, champion of the Chicago school, damns it with his own words. As we all know, this can be far more effective than ordinary criticism.[6] But what if the expert could speak words not put in his mouth by those who think him a charlatan or a fool?

Let's look at just one of the many areas of antitrust policy considered by Adams and Brock: contestability theory. As the expert explains it in the book,

> [the theory of contestable markets] is a generalization of the theory of perfect competition. A perfectly contestable market is characterized by optimal behavior and can exist within a full range of industry structures, including even monopoly and oligopoly. The analysis vastly extends the domain of the invisible hand. It shows that even in highly concentrated markets, the price, in equilibrium, must be exactly equal to marginal cost (as it would be under perfect competition), and that resource allocation will be optimal . . . .
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> . . . [P]otential entry into or competition *for* the market disciplines behavior almost as effectively as would actual competition *within* the market. Thus, even if a market is dominated by a single firm, it is contestable and will perform in a competitive fashion. [p. 27; citations omitted]

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5. A good example with a fairly self-explanatory title is Walter Adams & James W. Brock, *The "New Learning" and the Euthanasia of Antitrust*, 74 CAL. L. REV. 1515 (1986) [hereinafter Adams & Brock, *Euthanasia of Antitrust*]. In fact, Adams and Brock seem to have developed a two-man cottage industry devoted to rooting out the evils of what they call the "new learning." *See, e.g.*, WALTER ADAMS & JAMES W. BROCK, DANGEROUS PURSUITS: MERGERS & ACQUISITIONS IN THE AGE OF WALL STREET (1989); WALTER ADAMS & JAMES W. BROCK, THE BIGNESS COMPLEX (1986); Walter Adams & James W. Brock, *Joint Ventures, Antitrust, and Transnational Cartelization*, 11 NW. J. INTL. L. & BUS. 433 (1991); Walter Adams & James W. Brock, *The Political Economy of Antitrust Exemptions*, 29 WASHBURN L.J. 215 (1990); Walter Adams & James W. Brock, *Vertical Integration, Monopoly Power, and Antitrust Policy: A Case Study of Video Entertainment*, 36 WAYNE L. REV. 51 (1989); James W. Brock, *Structural Monopoly, Technological Performance, and Predatory Innovation: Relevant Standards Under Section 2 of the Sherman Act*, 21 AM. BUS. L.J. 291 (1983); Walter Adams & James W. Brock, *Deregulation or Divestiture: The Case of Petroleum Pipelines*, 19 WAKE FOREST L. REV. 705 (1983).

6. *See* Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2425 (1991) (recognizing persuasive effect of self-damnation).

The prosecutor counters with the example of the airline industry, including the major airlines' computerized reservation systems (CRSs), which he characterizes as "barriers to entry" into the industry.

It's too bad the expert didn't have the benefit of the Ninth Circuit's recent decision in *Alaska Airlines, Inc. v. United Airlines, Inc.*,[7] which applied Chicago-school economic analysis to real-world facts, to help deflect the prosecutor's attack. In that case, several small airlines sued the two giants (United and American), charging that their operation of CRSs (Apollo and SABRE, respectively) violated the Sherman Act. The plaintiffs' theory seems to have been quite similar to Adams and Brock's: The CRSs were alleged to be essential to competition in the airline industry, and the large firms, by denying access to the CRSs, therefore wielded an anticompetitive advantage.[8] The court rejected this argument.

Because United and American each controls only about twelve to fourteen percent of the air transportation market, they rely on other airlines subscribing to their CRSs in order to make the services attractive to travel agents. But "[b]asic economic theory tells us that plaintiffs will withdraw from SABRE or Apollo if the cost of using either CRS causes the cost to the airline of providing a flight booked on a CRS to exceed the revenue that the airline gains by providing the flight."[9] Thus, neither United nor American will use its dominant position in the CRS market to gain any anticompetitive advantage, because the smaller airlines would simply cease to use the services. The court's theoretical approach to the problem squared with the facts of the case:

> United and American have never refused any of the plaintiffs access to their respective CRSs. Rather, United and American have always given all of their competitors in the air transportation market such access for a fee. Neither United nor American have ever set this fee at a level that would drive their competitors away. . . . [I]t is unlikely that defendants would set their fee at such a level, for if they did, they would destroy their CRSs rather than their competition.[10]

The expert might also have offered as a counterexample another recent Ninth Circuit case, *United States v. Syufy Enterprises*.[11] Raymond Syufy bought almost all the first-run movie theaters in Las Vegas, Nevada; the government sued. The district court, following a trial, held that Syufy had not violated the antitrust laws. The court of appeals held that the facts of the case compelled a finding of no liability: "In 1985, Syufy managed to lock up exclusive exhibition rights to

7. 948 F.2d 536 (9th Cir. 1991), *cert. denied*, No. 91-1242, 1992 WL 24283 (Apr. 6, 1992).

8. 948 F.2d at 542.

9. 948 F.2d at 545.

10. 948 F.2d at 545 (footnote and citations omitted).

11. 903 F.2d 659 (9th Cir. 1990).

91% of all the first-run films in Las Vegas. By the first quarter of 1988, that percentage had fallen to 39% . . . ."[12] This finding was exactly what economic theory teaches us to expect: In the absence of barriers to entry, any firm that raises its prices to a supracompetitive level will entice other firms to enter the market and undersell the would-be monopolist.[13] The opinion noted that "[i]t is a tribute to the state of competition in America that the Antitrust Division of the Department of Justice has found no worthier target than this paper tiger on which to expend limited taxpayer resources."[14]

But Adams and Brock's expert is given no such ammunition. He sits helpless as the prosecutor pillories him and economic theory. Occasionally the expert all but concedes the futility of his discipline: "We just have to recognize that economists, like other scientists, tend to measure what is measurable and forget about the rest, even though what is not measured may be vastly more important than what is measured" (p. 40).

There is really nothing wrong with the method Adams and Brock have chosen to advance their ideas: Lampooning the other side's views by making them say things that are silly, pompous, unresponsive, or inappropriate is a common device in academic literature. And, Smith knows, the landscape of economic scholarship is littered with enough overstatements and contradictions that one can come up with a humdinger of a satire by picking and choosing one's examples carefully — as Adams and Brock obviously have.

But the authors here are more ambitious. Starting with the subtitle of the book — "A Dialogue on the New Laissez-Faire" — and ending with the back cover, which carries laudatory quotations attesting to the "evenhanded[ness]" of the discourse, the authors present this as a balanced debate — an unbiased exposition of conflicting viewpoints. This claim is belied not only by the book's contents — which even the nonexpert reader will recognize are anything but evenhanded — but by the fact that both of the authors are aligned with one side of the debate.[15] Although the authors have chosen a courtroom setting, they

12. 903 F.2d at 666.

13. 903 F.2d at 664; *see also* 903 F.2d at 663 ("[L]ike all antitrust cases, this one must make economic sense."). *Syufy* involved a claim of monopsony, rather than monopoly, but the contestability analysis is the same: Any firm that attempts to wield its buying power anticompetitively gives incentives to other firms to overbid it and to the sellers to deal with the new entrants rather than the dominant firm.

14. 903 F.2d at 672. I was the author of *Syufy*. There are those who have suggested that there's more to the opinion than meets the eye. *See, e.g.*, *The* Syufy *Rosetta Stone*, 1992 B.Y.U. L. REV. 457; L. Gordon Crovitz, *Verdict: Frantic Antitrust Ideas are Gone With the Wind*, WALL ST. J., May 23, 1990, at A23. No comment.

15. *See supra* note 6. In one of their earlier works, Adams and Brock make many of the same arguments, using many of the same examples, and conclude that "[t]his 'new learning' is stale wine in musty bottles." Adams & Brock, *Euthanasia of Antitrust*, *supra* note 6, at 1547. By this measure, Adams and Brock's book might be described as flat ale in a fresh mug.

have rejected the philosophy of the adversary system: that truth is advanced by having advocates vigorously argue both sides of the issue.

Adams and Brock do a fine job of pointing out some of the limitations and shortcomings of modern economic theory. But it would have been helpful to their cause — and the cause of truth — had they selected as coauthor one or more of the distinguished economists their expert parodies: Judges Bork, Posner, or Easterbrook; Professors Baxter, Demsetz, or Landes. While the authors carefully cite one of these economists for each of the expert's responses, what guarantee do we have that these are their best responses — or even appropriate ones? At the very least, the authors might have circulated a draft of their manuscript to some of their colleagues whose works they skewer; one searches the preface and acknowledgment page in vain for the customary list of scholars who provided input during the drafting process. Were the authors afraid that flesh-and-blood Chicago-school economists would manage to come up with more convincing answers than their dummy expert? Without such a minimal reality check, Adams and Brock's claim of evenhandedness rings hollow.

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Aficionados of the theater of the absurd, the authors end the introduction to this "Dialogue" with an excerpt from Eugene Ionesco's *The Bald Soprano:* "Mrs. Martin asks 'What is the message?' The Fireman replies, 'That is for you to find out' " (p. xiv). But the message here is no mystery. Far more fitting an allegory is presented in the movie *Svengali:*[16] A bearded, wild-eyed John Barrymore in the title role has just hypnotized the young and beautiful Trilby (Marian Marsh) into professing her love for him. Yet he turns away in disgust, muttering: "It is only Svengali talking to himself again." Yes indeed.

16. SVENGALI (Warner Brothers 1931).