Posner on Antitrust Remedies:  
The Good, the Bad, and the Very Ugly

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In the course of his career as a law professor and judge, Richard Posner thought a great deal about antitrust remedies. Ultimately he collected and synthesized these proposals in his treatise, Antitrust Law. The first edition, characterized as a polemic by Herbert Hovenkamp, was well-received in 1976, and several of its remedial prescriptions were later implemented. For example, Posner successfully argued merger policy should dispense with strict structuralist presumptions in favor of a more flexible economic assessment of the merger’s likely effects. In 2001, Posner issued a substantially revised and updated edition.

This article focuses upon five policy prescriptions that appear in both editions. These prescriptions are interesting both because Posner retained them in the second edition, effectively re-adopting them and in some cases expanding upon them, and because none of them has been implemented. Yet, like a fine wine they have grown more interesting and complex with age. They propose to:

1. Decriminalize antitrust;
2. Replace treble damages with a damage multiplier calculated in each case to reflect the probability of detection;
3. Allow the Department of Justice a right of first refusal to bring consumer antitrust claims for damages;
4. Extend the antitrust laws to reach, and to remedy, oligopolistic conduct without the need to find an agreement—a position Posner recently abandoned; and
5. Limit the use of divestiture as an antitrust remedy.

The propriety of a remedy depends, of course, upon the violation it is meant to fix. Because the underlying facts vary from case to case, so too do our judgments. In that sense a remedy that is inadvisable today may become desirable tomorrow, and vice-versa. Therefore, with the caveat that the underlying facts—and the resulting policy proposals—may shift again, I hazard a few broad conclusions.

3 Richard A. Posner, Antitrust Law 132–33 (2d ed. 2001) [hereinafter Posner, 2nd Ed.] (arguing “[f]or the time being, the history of merger doctrine is at an end,” which is “a modest vindication of the approach taken in the first edition of this book” that “there was little basis in economic theory for automatic intervention in markets in which the four largest firms have a combined market share of less than 60 percent”); see also Hovenkamp, supra note 1, at 927–28 (recognizing “[t]he case law and actual [merger] enforcement practice probably come closer to Posner’s proposals” than the more structuralist view adopted by Areeda and Turner).
Some of Posner’s proposals, such as allowing for more nuanced damage remedies, were—and remain—attractive. I am in complete agreement with his proposal to eliminate treble damages in cases, such as those brought under Section 2 of the Sherman Act, where the conduct is not furtive and more than actual damages are unnecessary either to deter violations or to encourage investigation by private attorneys general.

Other proposals may well have made sense when Posner made them but have not aged well. For example, his proposal to abolish criminal penalties made more sense when enforcers lacked powerful tools to combat cartels, such as leniency programs and heavy sanctions. Some of Posner’s other proposals are provocative but likely as unworkable today as when they were first advanced; this is particularly true of his since forsaken proposal to attack conscious parallelism.

Stepping back, however, it is impossible to disagree with Posner’s motivating principle: We should examine and re-examine antitrust principles we take as received wisdom in order to ensure they remain appropriate as the world changes. To be clear, neither Posner nor I suggest we go so far as to reassess our adherence to the fundamental model of antitrust analysis that focuses upon economic efficiency as the goal and economic analysis as the means. Rather, he has suggested, and I agree, we should periodically consider whether the inputs to this model, the output of the model, or the conclusions to be drawn from the model have changed.

**Criminal Penalties**

Posner argued the United States should eliminate criminal penalties for antitrust violations altogether. He noted that the U.S. criminal antitrust law was imported wholesale—and without adaptation—from general criminal conspiracy law: “The weapons that the criminal law had developed to deal with conspiracies in other areas were simply trained on price fixing.”

Posner argued the imposition of criminal antitrust penalties is inappropriate for two reasons. First, “[I]t is difficult to translate a monetary sum (the costs of a particular price-fixing conspiracy, say) into a nonpecuniary cost”—a specific prison sentence. “The effort to do so,” he says, “is almost certain to lead to excessive leniency,” but, curiously, he does not explain why the result is more likely too little instead of too much punishment. Second, Posner argued imprisonment imposes social costs that exceed the likely benefits. “[I]mprisonment is a much costlier sanction for society to administer than the collection of a fine” because society loses the output of an otherwise productive individual during his imprisonment. The implication of this observation is that prison sentences are, if anything, too long when their full social cost is considered.

In the second edition, Posner, reviewing the number of cases between 1970 and 2000 in which a jail sentence was imposed, noted a significant decline from the 1980s to the 1990s. From those data he concluded that “imprisonment is imposed so rarely in antitrust cases that its deterrent effect...”

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5 Posner, 1st Ed., supra note 2, at 226 (arguing “[m]erely to abolish imprisonment in antitrust cases would not constitute a sufficient reform of the antitrust penalty structure” and proposing an increase in fines and damage awards); Posner, 2nd Ed., supra note 3, at 271 (same).


8 Posner, 1st Ed., supra note 2, at 225; see Posner, 2nd Ed., supra note 3, at 270 (repeating the same phrase but using “likely” instead of “almost certain”).

9 Posner, 1st Ed., supra note 2, at 225; see Posner, 2nd Ed., supra note 3, at 270 (repeating the same phrase but omitting the word “much”).

10 Posner, 2nd Ed., supra note 3, at 45 tbl. 3.
may be slight.”11 This statement seems odd to the contemporary ear: Whereas, on average, courts imposed imprisonment 37 percent of the time in the 1990s, that proportion rose to 62 percent in the 2000s and 70 percent between 2010 and 2016.12 The average antitrust sentence also rose, from 8 months in the 1990s to 20 months in the 2000s and 22 months between 2010 and 2016.13 Outside the United States, at least 30 jurisdictions have now criminalized collusion, but most have done so quite recently, and aggressive criminal enforcement is still rare outside the U.S.14

The tools enforcers use have also changed. Given Posner’s focus upon detection, which is discussed in greater detail below, perhaps the most relevant change is the development of corporate leniency programs. The United States introduced its program in 1978, but it did not take off until after its reform in 1993.15 Since then it has become a key tool in the U.S. enforcers’ toolkit. In 2010 the Department of Justice estimated half of its ongoing cartel investigations were assisted by leniency applicants, and cases in which leniency was granted accounted for 90 percent of the dollars collected in criminal fines over the preceding 15 years.16 By that time, too, more than 50 jurisdictions had adopted leniency programs.17

Given the more robust criminal enforcement we see now, and particularly the significant increase in both individual jail sentences and antitrust fines, Posner might well take a more favorable view of criminal enforcement today.

**Treble Damages**

Posner argued the routine trebling of antitrust damages should be abandoned in favor of a case-specific approach. Consistent with his focus upon economic efficiency,18 he proposed that damage multipliers be used to set the penalty for an antitrust violation equal to its social cost. As he pointed out, the function of a damage multiplier is to account for the uncertainty of detection:19

Because the probability of a violation being detected varies both by the type of conduct and from case to case, the damage multiplier should as well.

Posner proposed two reforms. First, he would allow only single damages in Section 2 cases (and in mergers, to the extent mergers give rise to any damage claims20). Because the probabil-

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11 Id. at 270.
16 Id. at 3.
17 Id. at 1.
18 POSNER, 2ND ED., supra note 3, at 267 (“[A]s I have argued throughout this book, the purpose of the antitrust laws is to promote efficiency . . .”).
19 See id. at 272–73.
20 Plaintiffs have long sought treble damages in merger matters, largely without success. See, e.g., Earl W. Kintner & Merle F. Wilberding, Enforcement of the Merger Laws by Private Party Litigation, 47 IND. L.J. 293, 299–304 (1972) (stating “it seems unmistakably clear that a violation of § 7 of the Clayton Act would support a treble damage recovery”; acknowledging that “the litigation involving this question has
ity of detection is greater than one-third, trebling damages in Section 2 cases (as we routinely do today) over-compensates plaintiffs and leads to more litigation than is efficient.\textsuperscript{21} Posner recommended that “[o]nly single damages should be available in such cases, but they should of course be realistically computed, with interest at market rates from the date of the violation.”\textsuperscript{22} I agree on both counts but also note the lack of pre-judgment interest in antitrust cases makes no sense, economic or equitable.\textsuperscript{23}

Second, Posner believed much greater nuance is appropriate when calculating damages in cartel cases. In contrast to mergers and exclusionary conduct, Posner believed the risk of detection for cartels may well be less than one-third. Accordingly, he recommended abolishing the rule of treble damages and in its place “authoriz[ing] the award of punitive damages in an amount to be determined by the jury,” which would be instructed that “the only thing to consider in setting the amount of punitive damages is whether the defendant’s misconduct was concealed and, if so, what amount of damages would be necessary to raise the punishment cost to what it would have been had the misconduct not been concealable.”\textsuperscript{24} He explained his concept of concealment accounts for “the probability \textit{ex ante} that the defendant would be caught.”\textsuperscript{25} In other words, Posner would allow a variable damage multiplier, whether more or less than three, so that the ex post cost to the defendant in the form of monetary penalties equals the benefit anticipated by the defendant \textit{ex ante} when deciding to join a cartel.

This approach would expand greatly the role of the jury. Whereas today the jury is charged with finding liability and damages, which are then automatically trebled by the court, Posner would in effect add a third component, the \textit{ex ante} probability of successful concealment.\textsuperscript{26} For example, a cartel with a 10 percent \textit{ex ante} chance of detection (as set by the jury \textit{ex post}, that is, after it was detected) would face a damage multiplier of 10.

Like any shift from a rule to a standard, Posner’s proposal raises several practical complications. The first is one of measurement: Estimating the \textit{ex ante} risk of detection is a highly speculative venture, particularly because that risk is itself a quotient, the result of dividing a known value (the number of cartels detected) by an unknown one (the total number of cartels). That the latter

\textsuperscript{21} See \textit{Posner, 2nd Ed.}, supra note 3, at 272.
\textsuperscript{22} Id.


\textsuperscript{24} \textit{Posner, 2nd Ed.}, supra note 3, at 272.
\textsuperscript{25} Id.

\textsuperscript{26} Id.
number is a known unknown does not make it any easier to estimate.\textsuperscript{27} Moreover, the economic literature suggests—and Posner expressly allowed for the possibility—that the risk of detection varies from one cartel to the next depending upon a variety of factors, such as the number of members, the nature of the product, and the nature of the market.\textsuperscript{28} Therefore, the jury would be charged with the more difficult task of determining which cartels are sufficiently similar to the charged agreement to be included in the calculation of the risk of detection; the jury would then adjust the numerator and denominator accordingly.

Presumably the creativity of counsel and the accumulation of precedents would in time make the jury’s task somewhat more tractable, but Posner’s proposal would still make it more difficult \textit{ex ante} to estimate the likely damage figure, with practical implications both for corporate disclosures and for settlement discussions. By expanding the range of possible damages, Posner’s proposal would make it more difficult for a defendant with a corporate reporting obligation to advise its shareholders on the potential cost of a given case.\textsuperscript{29} Surprises, such as when damages turn out to be greater than estimated, might then become the subject of separate securities litigation. The enhanced difficulty in valuing a case would also vex settlement negotiations, as the plaintiff and defendant may have wildly divergent views about the probability of detection and, hence, the resulting damages.\textsuperscript{30} The greater the gulf in valuations, the fewer settlements and the more trials. Further, because the risk of detection may change over time as investigative techniques evolve,\textsuperscript{31} these effects are likely to be dynamic.

All in all, Posner’s proposal seems worse than the problem it is meant to solve. It is no wonder that it has been ignored; even Homer nods.

\textbf{DOJ Right of First Refusal to Take Consumer Damage Cases}

Posner also recommended changing the way in which private cases are litigated. In essence, he argued the market is producing more than the optimal number of private antitrust suits because

\textsuperscript{27} Indeed, the few estimates there are vary widely, from a low of one-in-ten to a high of one-in-three. See John M. Connor & Robert H. Lande, \textit{The Size of Cartel Overcharges: Implications for U.S. and EC Fining Policies}, 51 \textit{ANTITRUST BULL.} 983, 987 n.16 (2006) (collecting estimates from the economic literature).

\textsuperscript{28} See, e.g., Paul A. Grout & Silvia Sonderegger, U.K. Office of Fair Trading, Predicting Cartels 18–36, Economic Discussion Paper, Mar. 2005, http://webarchive.nationalarchives.gov.uk/20140402182912/http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft773.pdf (noting that current cartel detection techniques may provide “disparate marginal returns to detection resources across industries,” i.e., result in each industry and firm facing a different detection rate, and then listing “factors that facilitate or hinder collusion,” such as firm size and the homogeneity of the product).

\textsuperscript{29} See, e.g., Microsoft Corp., 2016 \textit{ANNUAL REPORT} 81 n.17 (Contingencies) (listing various intellectual property, antitrust, and products liability cases, noting the accrual of $521 million in “aggregate legal liabilities,” and estimating that it is “reasonably possible” that “adverse outcomes . . . could reach approximately $1.6 billion in aggregate beyond recorded amounts”). But see, e.g., The Dow Chem. Co., 2014 SEC Form 10-K 20 (filed Feb. 13, 2015) (noting “the existence of the [[$1.08 billion]] jury verdict, the Court of Appeals’ opinion [affirming the award], and [the] subsequent denial of Dow’s Rehearing Petition indicate that it is reasonably possible that a loss could occur” but nonetheless declining to estimate the potential liability because “it is not probable that a loss will occur”).

\textsuperscript{30} See generally A. Mitchell Polinsky & Steven Shavell, \textit{The Theory of Public Enforcement of Law}, in \textit{1 HANDBOOK OF LAW & ECONOMICS} (A. Mitchell Polinsky & Steven Shavell, eds. 2007) (analyzing settlements of criminal cases, where maximum penalties are fixed and known, and concluding that disagreement “about the probability of conviction” could still scuttle an otherwise mutually beneficial settlement); William M. Landes, \textit{An Economic Analysis of the Courts}, in \textit{ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT} 165 (Gary Becker & William Landes, eds. 1974).

\textsuperscript{31} See, e.g., Rosa M. Abrantes-Metz, \textit{Design and Implementation of Screens and Their Use by Defendants}, CPI \textit{ANTITRUST CHRON.} 2 (Sept. 2011) (discussing the increasing adoption of statistical screens—by prosecutors, plaintiffs, and defendants—to assess “possible market conspiracies and manipulations”).
“the plaintiffs’ bar cannot be relied upon to exercise reasonable self-restraint,”32 a possibility to which we shall return later.33 His prescription evolved over time. In the first edition he argued “it is possible to imagine alternatives [to private class action suits] ranging from middlemen’s suits to state parens patriae actions . . . [but] it is not at all clear that any of them is superior to—or even markedly different from—the class action.”34 Evidently his estimation of the merits of private suits subsequently fell; in the second edition he suggested “giving the enforcement agencies (or one of them, probably the Justice Department, which has the deeper bench) a right of first refusal to bring damages suits” on behalf of consumers, although he was “not prepared to go so far as to suggest . . . a monopoly.”35

In both editions he argued the government was bringing too few cases because a “tight budget constraint has forced the agencies to be selective in their choice of cases.”36 Here he posited that the Horizontal Merger Guidelines “are a good example” of how budget constraints “force[] the [DOJ] to bring far fewer cases than it could win under current interpretations of the antitrust statutes.”37 Of course, the judicial interpretation of the antitrust laws “current” in 1976 was a great deal more expansive than is the prevailing view today, particularly in the merger arena. I think it much more likely that the HMGs reflect not a budget constraint but a contemporary understanding of what types of cases are welfare enhancing. After all, who yearns for another Von’s Grocery case?38

A striking aspect of Posner’s proposal is its lack of confidence in the efficiency of the market for private antitrust litigation.39 Indeed, his faith fell further over time, as shown by his 2001 proposal to grant the DOJ a right of first refusal. Perhaps his doubt about the functioning of the market simply reflects his concern that damage multipliers are set too high for some violations (e.g., Section 2 violations) and too low for others (Section 1 violations). If so, then the market may indeed produce too many non-cartel cases and too few cartel cases—particularly those that are not follow-ons to a government prosecution. If Posner’s separate proposal to adjust those multipliers to reflect social costs were adopted and proved workable, however, then the resulting equilibrium would produce the optimal number of each kind of case. That is, this reform would be superfluous if the problem it addresses had already been solved by the more direct method of adjusting damage multipliers.

It also would require the Antitrust Division to choose among competing considerations when deciding when to exercise the Division’s newfound right of first refusal. The Division might reason-

32 POSNER, 2ND ED., supra note 3, at 275; POSNER, 1ST ED., supra note 2, at 228.
33 See infra at 7 & n.41.
34 POSNER, 1ST ED., supra note 2, at 227–28.
35 POSNER, 2ND ED., supra note 3, at 276; see also id. at 273–74.
36 Id. at 275; POSNER, 1ST ED., supra note 2, at 228.
37 POSNER, 2ND ED., supra note 3, at 276; POSNER, 1ST ED., supra note 2, at 228.
39 Cf. Merritt v. Faulkner, 823 F.3d 1150, 1158 (7th Cir. 1987) (Posner, J., concurring) (arguing against appointment by the court of counsel for a prisoner because “we should let the market direct the allocation of those services in cases where there is an effective market in them” and asking rhetorically whether “anyone doubt[s] that there is vigorous competition among lawyers to represent on a contingent-fee basis tort plaintiffs with meritorious claims for substantial damages?”).
ably consult the factors it uses when deciding whether to seek dismissal of a *qui tam* action, all but one of which would be relevant: (1) “curbing meritless [cases]”; (2) “preventing parasitic or opportunistic” cases; (3) “preventing interference with agency policies and programs”; (4) “controlling litigation brought on behalf of the United States,” i.e., avoiding adverse precedent; (5) “safeguarding classified information and national security interests” (likely irrelevant here); (6) “preserving government resources . . . when the government’s expected costs are likely to exceed any expected gain”; and (7) “addressing egregious procedural errors” by which the would-be plaintiff interferes with the Division’s investigation.40

The Division could weigh these criteria in myriad ways, each resulting in a different equilibrium. For example, it might prioritize “curbing meritless [cases]” or “preserving government resources.” The associated equilibria are themselves dynamic because private plaintiffs and defendants will react to any chosen policy by adjusting their own strategies. As the *qui tam* cases show, however, the Department can effectively balance these competing considerations.41 At the same time, applying the *qui tam* factors to Posner’s proposed right of first refusal would vest the Assistant Attorney General for Antitrust with broad discretion, making Division policy vulnerable to abrupt changes when Division leadership turns over.42

**Conscious Parallelism**

Posner long argued Section 1 of the Sherman Act is broad enough to prohibit any conscious parallelism—which he called “tacit collusion”—that results in supracompetitive prices.43 He believed there was adequate support for this proposal in the precedents of the Supreme Court, particularly *American Tobacco Co. v. United States*,44 in which the court said, in an extended dictum, that “[n]o formal agreement is necessary to constitute an unlawful conspiracy.”45 Posner first made this pro-

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40 Michael D. Granston, Director, U.S. Dep’t of Justice, Civil Division, Commercial Litigation Branch, Fraud Section, Memorandum to U.S. Dep’t of Justice Attorneys Regarding Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A) (Jan. 10, 2018). Although this document was intended to remain privileged and confidential, it soon leaked and has been extensively distributed and summarized. See, e.g., Antonio M. Pozos & Jesse A. Witten, Drinker Biddle & Reath LLP, Justice Department Issues Policy Suggesting New Emphasis on Dismissal of Unwarranted False Claims Act Qui Tam Cases (Jan. 29, 2018), https://www.drinkerbiddle.com/insights/publications/2018/01/new-policy-on-dismissal-of-unwarranted-fca.


43 Posner, 2nd Ed., supra note 3, at 95 (“[T]he law should not always equate tacit and explicit pricing agreements. Some degree of tacit coordination of pricing in reaction to external shocks . . . is inevitable and unobjectionable. What is not inevitable and is objectionable is a tacit agreement to limit output and charge a higher than competitive price.”); see also Posner, 1st Ed., supra note 2, at 72 (same); Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969).

44 328 U.S. 781 (1946).

45 *Id.* at 809; *see id.* at 809–10 (focusing upon the co-conspirators’ course of dealing and concluding that “[n]o formal agreement is necessary . . . . Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified”); Posner, 2nd Ed., supra note 3, at 95.
posal before the Supreme Court rejected it in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* but he reiterated it in his 2001 edition. Although Posner has since abandoned the argument, noting that he heretofore had not “sufficiently appreciate[d] the force of Turner’s doubts about the feasibility of an antitrust remedy for tacit collusion,” his initial proposal still has purchase in some quarters and therefore still merits examination today.

Posner limited his proposal to prohibit conscious parallelism in two ways. First, he would not have prohibited apparently supracOMPetitive prices caused by legitimate common factors, such as an external supply shock. He believed detailed economic analysis should be able to distinguish this type of parallel conduct from collusion. He acknowledged that the analysis may sometimes be difficult and may produce some false positives, but preferred it nonetheless. Second, he retreated somewhat by conceding that “[i]t will . . . be difficult to prove tacit collusion in a case of pure price leadership . . . for example where X raises its price, and Y . . . follows suit.” This concession, however, would refocus the inquiry upon proving an agreement, albeit with circumstantial evidence.

Posner would have made tacit coordination subject to both legal and equitable remedies. Consistent with his 2001 proposal to grant the DOJ a right of first refusal, he wrote “the ideal remedy in cases of purely tacit collusion” would be to authorize the DOJ “to bring damages suits . . . on behalf of the victims of antitrust violations.” Relatedly, he would have allowed courts to enjoin facilitating practices. He gives as examples basing-point pricing schemes, inter-firm price communications falling short of an agreement, and “far-in-advance announcement of price changes.”

There are a couple of weaknesses in Judge Posner’s legal argument. First, he relies heavily upon a passage in *American Tobacco* that may not provide as much support as he suggests. Although the court did state in a dictum that “[n]o formal agreement is necessary to constitute an unlawful conspiracy,” it then proceeded to infer the existence of an agreement “from the evidence of the action taken in concert by the parties to it” and the resulting “proof of an intent to exercise the power of exclusion acquired through that conspiracy.”

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46 509 U.S. 209, 227 (1993) (“Tacit collusion . . . describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracOMPetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.”).


48 *See*, e.g., Louis Kaplow, *Competition Policy and Price Fixing* (2013).

49 *Posner, 2nd Ed.*, supra note 3, at 98 (“Remedy is a problem . . ., but not, as Turner thought, because it would require telling oligopolists to behave irrationally.”); *id.* at 98–99 (discussing the risk of punishing firms that were “not colluding”).

50 *Id.* at 97. Posner revisited this complication in his 2013 retraction. *See* Posner, *Book Review*, supra note 48, at 763–64 (summarizing a similar scenario in which oligopolist Y raises its price and noting that, if the law prohibited conscious parallelism, then any response competitor X might make could trigger antitrust liability).

51 *Posner, 2nd Ed.*, supra note 3, at 99.

52 *Id.* (“Coupled with an injunction against any facilitating practices . . . a damages judgment in a tacit-collusion case would promote competition at a tolerable cost in legal uncertainty and judicial supervision.”). *But see* Posner, *Book Review*, supra note 48, at 764–65 (considering alternative remedies, such as forbidding most-favored-nations clauses, advance announcement of price changes, and public inter-firm communications, and rejecting all but the first as “either very difficult for a court to administer . . . or infeasible”).

53 *American Tobacco Co.*, 328 U.S. at 809.
to require at least an “informal” agreement in the sense that it can be inferred from circumstantial evidence. That is quite different from Posner’s proposal to dispense entirely with the requirement that there be an agreement, which would have made the presence of plus factors in American Tobacco irrelevant.

Second, whatever the conceptual merits of the proposal, the Supreme Court has since rejected it, albeit again in a dictum, in Brooke Group. Although the Supreme Court has been known to reverse course, as it did with respect to the per se condemnation of vertical restraints, further reduced the odds that the Court will accept Posner’s proposal. The proposal may also be impractical; although economic modeling has improved a good deal since 1976, it remains difficult even today to distinguish accurately among the various reasons for nearly simultaneous price changes by rivals.

### Structural Remedies and the AT&T Modified Final Judgment

Posner consistently suggested that “divestiture [has] . . . a poor overall record as a Sherman Act section 2 remedy,” a proposition more widely accepted in recent years. In the 2001 edition, however, he also noted an exception for the AT&T Modified Final Judgment (MFJ), which he called “the most successful antitrust structural remedy in history.” He cited a 1999 study concluding the divestiture had a positive effect on competition even after accounting for subsequent deregulation and innovation. Other studies reach the same conclusion.

Still, Posner may be right that divestitures have a poor record, at least if he means in comparison with transactions that are blocked outright. But he is likely wrong if the relevant alternative is a behavioral remedy. As explained in the FTC Statement on Negotiating Merger Remedies, in the

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55 Posner, 2nd Ed., supra note 3, at 111; see also Posner, 1st Ed., supra note 2, at 87–88 (“Why has divestiture such a poor record as either a Clayton Act section 7 or a Sherman Act section 2 remedy?”).


57 Posner, 2nd Ed., supra note 3, at 111. Note that the first edition was published several years before the MFJ.

58 Id. at 110 (citing Clement G. Krouse et al., The Bell System Divestiture/Deregulation and the Efficiency of the Operating Companies, 42 J.L. & Econ. 61 (1999) (“[T]o 1993 the divestiture yielded savings of $115.4 billion and state-level regulatory reform yielded a slightly smaller $96.7 billion in savings (both measured in 1993 dollars”).


60 See Fed. Trade Comm’n, Bureau of Competition, Negotiating Merger Remedies 5 (Jan. 2012) (“Most merger cases involve horizontal mergers, and the Commission prefers structural relief in the form of a divestiture to remedy the anticompetitive effects of an unlawful horizontal merger.”).
DOJ Guide to Merger Remedies, and by enforcement officials in recent statements, the agencies have good reasons to favor structural remedies over behavioral ones, which are less likely to succeed, and which too often have the untoward consequence of turning the antitrust agency into a regulator.

**Conclusion**

Posner advocated several radical changes in the way antitrust violations are remedied. Sometimes his proposed cure is worse than the disease, such as abolishing criminal antitrust enforcement and bringing conscious parallelism within the ambit of Section 1 of the Sherman Act. Others merit serious consideration, including in particular his proposal to eliminate treble damages in cases where the conduct is not furtive. When the Congress next considers amending the antitrust statutes, it should consider both this proposal and the possibility of giving the Antitrust Division a right of first refusal either to pursue or to squelch private consumer cases.

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62 Makan Delrahim, Ass’t Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Keynote Address at the Am. Bar Ass’n’s Antitrust Fall Forum (Nov. 16, 2017) (“I expect to cut back on the number of long-term consent decrees we have in place and to return to the preferred focus on structural relief to remedy mergers that violate the law and harm the American consumer.”); see also Written Responses of Joseph J. Simons to the Senate Committee on Commerce, Science, and Transportation, Jan. 31, 2018, at 16 (noting the failure of some structural divestitures and arguing the failure rate “is too high and needs to be lowered substantially or, ideally, zeroed out altogether”).