

## The Scholar as Coauthor

Jonathan S. Masur<sup>†</sup>

The task of describing (or even hinting at) Eric Posner's immense scholarly contributions in just a few thousand words is a daunting one. Twenty-five thousand words, perhaps. Two hundred and fifty thousand words, even better. Posner's work has spanned so many fields, and encompassed so many important and influential insights, that any summary would necessarily give short shrift to half a dozen ideas that, for many other faculty, would be the crowning achievements of their careers. It would be difficult even to name the field with which Posner is most closely associated. Perhaps the leading candidate is international law, a subject on which he has written multiple books and dozens of articles.<sup>1</sup> But Posner has also done enormously influential work on executive power,<sup>2</sup> law and political theory,<sup>3</sup> administrative law,<sup>4</sup> foreign relations law,<sup>5</sup> contract law,<sup>6</sup> banking and financial regulation,<sup>7</sup> judicial behavior,<sup>8</sup> and a wide variety of other subjects.

In many respects, Posner's work exemplifies the best of law and economics scholarship. Posner has addressed himself to fields

---

<sup>†</sup> John P. Wilson Professor of Law and David & Celia Hilliard Research Scholar, University of Chicago Law School. I thank Daniel Abebe, Anu Bradford, Adam Cox, and Jake Gersen for their helpful contributions to this essay.

<sup>1</sup> See generally, e.g., ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1 (2005).

<sup>2</sup> See generally, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2011); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

<sup>3</sup> See generally, e.g., Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002).

<sup>4</sup> See generally, e.g., MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006).

<sup>5</sup> See generally, e.g., Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007).

<sup>6</sup> See generally, e.g., Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829 (2003).

<sup>7</sup> See generally, e.g., ERIC A. POSNER, *LAST RESORT: THE FINANCIAL CRISIS AND THE FUTURE OF BAILOUTS* (2018).

<sup>8</sup> See generally, e.g., Lee Epstein & Eric A. Posner, *Supreme Court Justices' Loyalty to the President*, 45 J. LEGAL STUD. 401 (2016).

of law, particularly public law, that had never been subjected to sustained analysis and critique from a law and economics perspective. Posner has thus been able to reshape the way that these fields are understood and, in so doing, expose the shortcomings of earlier approaches by viewing them through a law and economics lens. The fact that Posner accomplished this feat across so many divergent fields of law reflects his insatiable intellectual curiosity. Most scholars, even great scholars, might have been content to make contributions of this type to one or perhaps two cognate fields; Posner, by contrast, has remade whole swaths of the law that before his intervention would have seemed to bear no meaningful relation to one another. Posner's work continues: in recent years, he has turned his attention to antitrust law, including monopoly power exercised by institutional investors and monopsony power in labor markets, to significant effect.<sup>9</sup> Indeed, as this short essay is being written, he is probably busy developing new interventions in previously dormant fields.

Posner's scholarly plasticity has had other salutary effects as well. Many of the most influential legal scholars have done most of their work alone and are most known for their contributions as solo authors. Others are known principally for their work with one or two coauthors of approximately equal renown.<sup>10</sup> To some degree, Eric Posner fits each of these molds. He has done enormously influential solo work.<sup>11</sup> He is also known for repeat collaborations with a number of other highly influential scholars of his generation. The list of such Posner coauthors most notably includes Cass Sunstein, with whom he has written nine papers,<sup>12</sup>

---

<sup>9</sup> See generally, e.g., Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018); Eric A. Posner, Fiona M. Scott Morton & E. Glen Weyl, *A Proposal to Limit the Anticompetitive Power of Institutional Investors*, 81 ANTITRUST L.J. 669 (2017).

<sup>10</sup> Russ Feingold, the former senator from Wisconsin and coauthor (with Senator John McCain) of the famous McCain-Feingold campaign reform bill, noted that McCain often quipped that the people of Wisconsin thought Feingold's first name was "McCain." See Russell Feingold, *Russ Feingold: John McCain Was a Committed Leader. He Was Also Really Fun.*, N.Y. TIMES (Aug. 26, 2018), <https://perma.cc/BS3T-D9T8>. Similarly, one could easily imagine that there are law students throughout the world who think that Steve Shavell's first name is "Kaplow," or perhaps "Polinsky." See generally, e.g., Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998).

<sup>11</sup> See generally, e.g., Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996).

<sup>12</sup> See generally, e.g., Posner & Sunstein, *supra* note 5.

Jack Goldsmith, with whom he has written eight papers,<sup>13</sup> and Adrian Vermeule, with whom he has written a remarkable sixteen articles and two books.<sup>14</sup>

But what sets Posner apart from the vast majority of other highly influential scholars is that he has also coauthored with an enormously wide variety of different people, particularly junior faculty—both junior in the sense of less senior than Posner himself and junior in the sense of not yet having been granted tenure. The apotheosis occurred from 2007 through 2011, when, during a four-year span, Posner coauthored with no fewer than *eight* untenured members of his own faculty at the University of Chicago: Daniel Abebe,<sup>15</sup> Anu Bradford,<sup>16</sup> Adam Cox,<sup>17</sup> Rosalind Dixon,<sup>18</sup> Jacob Gersen,<sup>19</sup> Anup Malani,<sup>20</sup> me,<sup>21</sup> and Thomas Miles.<sup>22</sup> These eight faculty members represent *two-thirds* of the junior faculty hired at the University of Chicago during that time period. (Another cluster of coauthorship occurred from 2015 through 2018, when Posner wrote with four additional junior coauthors from his own

---

<sup>13</sup> See generally, e.g., Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

<sup>14</sup> See generally, e.g., Posner & Vermeule, *supra* note 2.

<sup>15</sup> See generally Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507 (2011).

<sup>16</sup> See generally Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT'L L.J. 1 (2011).

<sup>17</sup> See generally Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809 (2007); Adam B. Cox & Eric A. Posner, *The Rights of Migrants: An Optimal Contract Framework*, 84 N.Y.U. L. REV. 1403 (2009). Cox and Posner later wrote a third paper together. See generally Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285 (2012).

<sup>18</sup> See generally Rosalind Dixon & Eric A. Posner, *The Limits of Constitutional Convergence*, 11 CHI. J. INT'L L. 399 (2011).

<sup>19</sup> See generally Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573 (2008); Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543 (2007).

<sup>20</sup> See generally Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017 (2007).

<sup>21</sup> See generally Jonathan S. Masur & Eric A. Posner, *Against Feasibility Analysis*, 77 U. CHI. L. REV. 657 (2010); Jonathan S. Masur & Eric A. Posner, *Climate Regulation and the Limits of Cost-Benefit Analysis*, 99 CALIF. L. REV. 1557 (2011).

<sup>22</sup> While this paper was never published, it was indeed written. See generally Thomas J. Miles & Eric A. Posner, *Which States Enter into Treaties, and Why?* (John M. Olin Program in L. & Econ., Working Paper No. 420, 2008).

faculty—Tony Casey,<sup>23</sup> Adam Chilton,<sup>24</sup> Daniel Hemel,<sup>25</sup> and Nick Stephanopoulos.<sup>26</sup>) The trend was so pronounced that a 2010 article in the University of Chicago Law School alumni magazine discussing the Law School’s early-career faculty referenced the fact that Posner had already coauthored with three of them and was in the process of writing with three more.<sup>27</sup> One junior faculty member was known to joke that “it appears that you have to write a paper with Eric to get tenure around here.”<sup>28</sup>

It would be difficult to overstate the impact of such a towering scholarly figure writing with so many people just beginning their academic careers. At an individual level, there is a great deal that the typical early-career scholar can learn from a senior faculty member, particularly one as accomplished as Posner. And there is probably no better way to learn from a successful scholar than to write with one. Working with Posner is like taking a master class in how to develop incisive paper ideas. Adam Cox, who wrote two articles on immigration law with Posner, tells the following story: “He had just taught contracts, and I had just taught immigration law. We had just walked out of our respective classes and into the elevator together. He asked me a question about why the immigration system doesn’t embrace the labor economics literature.”<sup>29</sup> Cox and Posner rode the elevator for three floors, chatting about this topic, then parted ways. Explains Cox, “I thought that was just a fun conversation. The next day he sent me a table of contents.” Jake Gersen compared the experience of writing with Posner to “drinking from a firehose,” a metaphor I endorse.<sup>30</sup> The

---

<sup>23</sup> See generally Anthony J. Casey & Eric A. Posner, *A Framework for Bailout Regulation*, 91 NOTRE DAME L. REV. 479 (2015).

<sup>24</sup> See generally, Adam S. Chilton & Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 J. LEGAL STUD. 277 (2015); Adam S. Chilton & Eric A. Posner, *The Influence of History on States’ Compliance with Human Rights Obligations*, 56 VA. J. INT’L L. 211 (2016).

<sup>25</sup> See generally Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277 (2018).

<sup>26</sup> See generally Eric A. Posner & Nicholas O. Stephanopoulos, *Quadratic Election Law*, 172 PUB. CHOICE 265 (2017).

<sup>27</sup> Lynn Safranek & Marsha Ferziger Nagorsky, *The Law School’s Young Faculty: Letting Their Ideas Do the Talking*, UNIV. OF CHI. L. SCH. (Mar. 18, 2010), <https://perma.cc/L3JV-4S4F>.

<sup>28</sup> It was just a joke; all four faculty members who did not happen to coauthor with Posner also received tenure, including the person who made this joke.

<sup>29</sup> Telephone Interview with Adam B. Cox, Robert A. Kindler Professor of L., N.Y. Univ. Sch. of L. (Apr. 8, 2021).

<sup>30</sup> Email from Jacob E. Gersen, Sidley Austin Professor of L., Harvard L. Sch., to author (Mar. 11, 2021) (on file with author).

papers that I wrote with Posner were not the first that I had written, but I nonetheless believe that I learned how best to formulate and construct articles by working with him.<sup>31</sup>

There is also a signature style to Posner's writing: in Anu Bradford's words, it is "crisp, clear, and extremely effective" and emphasizes clarity of thought and exposition above all else.<sup>32</sup> One of the critical advantages of Posner's mode of scholarship is that all of the analytical moves are out in the open. This writing style forces the author to consider and defend the logic and rationale behind those moves, to address counterarguments, and to see the proposed line of analysis from multiple angles. The words operate only in service of the idea itself, or as Gersen put it, "There is never attachment to text—only ideas."<sup>33</sup> Bradford notes that the article she wrote with Posner became her "benchmark of how to convert a new idea into a successful piece of writing."<sup>34</sup>

One also learns how to be productive. Very productive. Everyone who has worked with Posner has a story about his rate of productivity and how it brings out the best (and the most!) in others. Here is Bradford's recounting of the early phases of her paper with Posner:

We agreed on the basic idea and outline and then divided the sections each of us would write. Next day, he sent me his first full section, all written up. It was tightly argued, well written, and read like my final polished draft reads after [a] few months of thinking, writing, and re-writing. 24 hours and 25% of the paper was done. And I am quite certain that Eric had not stayed up all night writing it. I had not, of course, written a word by then.<sup>35</sup>

Daniel Abebe relates a similar experience:

We ended the conversation [about our paper] by saying something about thinking more over the next few days and maybe building an outline. . . . Maybe two hours later, he sends

---

<sup>31</sup> I do not mean to assign responsibility or blame to Eric Posner for all of my other scholarly work, and I am quite confident that he would not want to be associated with much of that work! Rather, if there were valuable aspects to that scholarship, then they are due in part to his good influence. But all the mistakes, as the saying goes, have been my own.

<sup>32</sup> Email from Anu Bradford, Henry L. Moses Professor of L. & Int'l Org., Columbia L. Sch., to author (Mar. 3, 2021) (on file with author).

<sup>33</sup> Email from Jacob E. Gersen to author, *supra* note 30.

<sup>34</sup> Email from Anu Bradford to author, *supra* note 32.

<sup>35</sup> *Id.*

something that looks like a 5–10 page introduction[,] which completely summarizes the argument, situates it in the literature, and basically functions as a framework for the paper. I was amazed. Worried that I wasn't doing my part, I started making comments, editing, suggesting changes, etc., when suddenly he sends a revised draft reflecting his "updated" thinking. It was even better and anticipated some of my comments.<sup>36</sup>

Or, as Jake Gersen put it, "With Eric the back and forth starts with an idea, a search for something to say, and an agreement on who will write what, followed by an email twelve hours later with his half of the draft done."<sup>37</sup>

My own experience was of a piece. In the summer of 2009, Posner and I had discussed a potential paper idea but had not yet begun working on it. He mentioned that he had signed up to give a workshop in a few weeks and was interested in presenting our paper; could we have it done in time? Regretfully, I explained that in seven days I would be leaving on vacation, assuming that would be the end of the matter. "What are you doing until then?" Posner responded. So we wrote the first draft of the paper that week.<sup>38</sup> In the alumni magazine article that mentions Posner's multiple coauthorships with early-career faculty, he was asked if there was a difference between working with junior faculty and with his more established colleagues. "Junior faculty work harder!" he replied.<sup>39</sup>

Yet even aside from the impact on individual collaborators, there are tremendous systemic effects on an institution when one of its most influential members collaborates with a dozen relative newcomers. This type of activity, particularly at Posner's high standards for quality and quantity, has the effect of instantiating a slew of constructive institutional norms. One of them is the norm of collaboration itself. The fact that such an esteemed member of the faculty is willing to coauthor so broadly operates as a

---

<sup>36</sup> Email from Daniel Abebe, Vice Provost, Univ. of Chi.; Harold J. & Marion F. Green Professor of L. & Walter Mander Teaching Scholar, Univ. of Chi. L. Sch., to author (Mar. 12, 2021) (on file with author).

<sup>37</sup> Email from Jacob E. Gersen to author, *supra* note 30.

<sup>38</sup> Do not fear, dear reader, that this is merely the stereotypical story of a UChicago Law paper that is written in the blink of an eye and then set aside as the authors moved on to new things. We did a lot of revising in the year between that July workshop and when the paper was finally published. See generally Masur & Posner, *Against Feasibility Analysis*, *supra* note 21.

<sup>39</sup> Safranek & Nagorsky, *supra* note 27.

signal to other faculty, particularly untenured faculty, that co-authorship is valued or even prized.<sup>40</sup> This is particularly significant for untenured faculty members who often cannot know how their voting colleagues will view coauthored work, particularly co-authored work with someone more senior.

Posner also helped make it cool to work in multiple fields. In many places, for many years, the model for a law professor has been to acquire deep expertise in a single field, write only in that field (or a closely related area), and be known only for their contributions in that field. Posner turned this model on its head both by making significant contributions in so many disciplines and by doing so with so many different people. In that respect, Posner's many collaborations are both a result and a manifestation of his breadth and reach as a scholar. He is, of course, not the only highly influential scholar to have worked so broadly. But the impact of doing so while collaborating with junior colleagues was to generate a norm that venerated such an approach.

In combination, these two norms are liberating. They freed Posner's colleagues from worrying about writing the "right sort of paper" with the "right sort of person" before tenure. They mitigated concerns about what the presence or absence of additional names at the top of the paper might mean for one's tenure case. They placed the focus squarely on the one factor that should have mattered: writing the best possible paper.

Finally, and perhaps most importantly, Posner helped instantiate a norm of nonhierarchy. The fact that one of the most influential scholars in the country was willing—even excited!—to work with junior colleagues signaled powerfully that career stage and seniority were unimportant; all that mattered was the quality of one's ideas. This nonhierarchical norm is present throughout Posner's work. I have not been able to locate a single Posner paper (or book) in which the names are not alphabetized. He appears never to have felt the need or inclination to claim more than an equal share of credit, despite undoubtedly often deserving it. This type of norm, which can be set only by the people who would stand at the top of the putative hierarchy, echoes virtuously throughout the faculty and, indeed, throughout the entire institution. It encourages other senior faculty to invest in junior faculty and to pay close attention to their ideas; in turn, it helps junior

---

<sup>40</sup> See Tom Ginsburg & Thomas J. Miles, *Empiricism and the Rising Incidence of Coauthorship in Law*, 2011 U. ILL. L. REV. 1785, 1786 (2011) (noting the rise of coauthorship in legal scholarship).

faculty feel greater ownership in the institution. It encourages faculty to invest in fellows and read their work. It encourages everyone to invest in teaching (and learning from) students. In many respects, the ideal university is nonhierarchical, with all members of its scholarly community learning from and disseminating knowledge to one another. Despite having reached the apex of his profession, Eric Posner nevertheless manages to embody this egalitarian ethos. Everyone who has come in contact with him—and even many who have not—are better off for it.

There are very few scholars who have impacted so many areas of law. There are fewer still who have impacted so many people.