

HAVING A FACULTY THAT EVERYONE WANTS

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WHEN I joined legal academe at Minnesota in 1980, I did so as a naive new member of the professorate who assumed that my job was to attain tenure, be promoted to associate then full professor, and ultimately obtain a chair. I assumed that if I produced articles and developed into a solid teacher and colleague, I would one day retire from the Minnesota faculty when the time was right.¹ That was my goal in 1980. I moved from Los Angeles to the cold climes of Minnesota with little thought of moving to other law schools either before or after I received tenure. I assumed that my legal career would begin and end at Minnesota.

When I decided that academia was not right for me at that time in my life, I chose to return to my former law practice at Latham and Watkins in Los Angeles. The thought never occurred to me to explore opportunities at other schools before returning to practice. Indeed, during my two years at Minnesota, although we did a lot of hiring, we lost only one faculty member to another school, and I was advised that the reason the faculty member was leaving was personal.

Thus, my initial view of the legal academy was that it was a stable profession in which there wasn't a whole lot of movement or personnel changes. Indeed, many of my closest friends and mentors on the Minnesota faculty were legendary faculty like J.J. Cound, Leo Raskind, and Don Marshall, to name a few—people who had been at Minnesota for decades. My old dean, Robert “Bob” Stein, had created a very comfortable and supportive environment for faculty including a (then) new building, great students, and a pretty generous salary in one of America's most livable cities. Why would anyone want to leave?

I did leave, but also for personal reasons. When I came to my senses and decided that the best job in the world was as a law faculty member, I convinced my then fiancée (now spouse of several years) to return with me to Minneapolis (a place where she had never been) to see if she—as an almost born and definitely bred Californian—could survive in Minneapolis. During our weekend visit, we both realized it wasn't going to work out. Minneapolis was too cold for her—she didn't understand how people could wear short sleeve shirts and shorts on 50 degree days in March when we visited in 1983.

So, off we went to Virginia, where I was fortunate enough to receive an offer as a tenure-track associate professor in January 1984. Most of the Virginia faculty at that time had started and spent their entire careers at Virginia. A couple of faculty members had joined the faculty after starting their teaching careers at “lesser” law schools. And, for my first three or four years at Virginia, there was only one faculty departure—a professor who left following marital discord and relocated, very successfully, to a top tier law school in a major urban area. And during those three or four years, the size of the faculty was—and this is an educated guess—between

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1. This was before mandatory retirement was eliminated for professors and other educators. Hence, I assumed then that I would retire at the mandatory age of 70.

40 and 45. Faculty visited at other schools (I myself visited at Texas during the 1988-89 academic year), but they always returned professing happiness at their return to the Old Dominion and its premier law school. We hired a new dean, Thomas Jackson, in 1989, who was and is fabulous and who made growth of the faculty one of his priorities.

Eventually Tom left the law school to become provost of the university in 1992 and Bob Scott, who is one of my mentors and closest friends in the business, became dean. He, too, established growth as one of his priorities. Hence, during the nineties we hired a lot of people. If I had to guess, about half of the new hires were at the entry-level and about half of the hires were hired laterally. What's interesting is that no one anticipated the unforeseen impact the lateral hires would have on our "home-grown" faculty and the culture of the law school as it related to faculty mobility. You see, up until the mid-90s, there still was not a lot of faculty movement. Oh sure, people left, but most of the people who left did so because they were asked to do so—they were denied tenure—something that Virginia became associated with (rightly or wrongly) in the mid-nineties. Those of us who attained tenure visited elsewhere, but we didn't leave.

And then something odd started to happen. Tenured and even chaired professors began leaving Virginia to go to other law schools. The faculty was shocked! How could they do this? They were traitors. How could they leave idyllic Virginia for NYU, Stanford, Yale, or Harvard? Those who began what some of us considered an exodus were those whom we had recruited from other less prestigious law schools and who had little, if any, loyalty to Virginia. When they received what I am sure they perceived to be "better" offers, they took them (after all, these are by and large rational people working at a law school almost synonymous with "Law and Economics," and I am certain they viewed their new academic homes as "pareto superior" to Virginia or the moves would not have been made).

And then the world imploded! One of the home grown stars, perhaps the biggest of the biggest, the superstar among superstars, left to take a faculty position at a competitor. Pretty soon other faculty, both home grown and those hired laterally, began to leave. Not in any great numbers, but generally one or two a year. Not all that unusual when you realize the faculty had grown to total over 70 and was among the best in the country. It stands to reason that many of the faculty would receive attractive offers and that some would be too attractive to pass up. In fact, the rational response to the departures should have been more power to them! They were leaving for reasons that made perfectly good sense.

That, however, was not the faculty's reaction. The faculty's reaction was the equivalent of the sky is falling because people were leaving. Many of them harkened back to the idyllic days when no faculty left. I didn't think of it then, but have since, that it is in large part that Virginia hired others laterally who then moved on that created a climate in which leaving became a viable option. Prior to the arrival of these academic "vagabonds," leaving was viewed as an unacceptable option.

I, too, felt every departure personally. Typically, one was losing a friend as well as a colleague. However, the feeling was not of loss, but anger that someone could or would actually depart. There was also another, even stronger, feeling: failure. That somehow we, the school, the faculty and the administration, had failed because

“so and so” had departed, irrespective of the rationality of the departure and the reasons therefore.

This was often a topic of faculty discussion, both formally and informally. Even though we all heard the old adage that the easiest thing in the world for a dean to do is to hire a faculty that no one wants, most, if not all of us, felt like our faculty was too damn attractive to others, and the dean should do something about it. Now, I don't know what Bob Scott, and before him Tom Jackson, could have done in any of the cases with which I am familiar because in each of those cases, I knew why the person was leaving and it made sense to me. Yet, there was still palpable unease that people were leaving and it was someone's fault. (I don't know that it was or believe that it ever became the dean's fault. However, it is my guess, and only a guess, that one of the things that weighed on Bob Scott and Tom Jackson was the number of departures even though they could do little, if anything, to prevent it.²)

It was about then (1995) that I moved on to a position in Virginia's central administration as Vice Provost for Faculty Recruitment and Retention for the university, splitting my time 50/50 between the law school and my new administrative duties. Now as the title indicates, my principal job was to recruit faculty, some entry-level, but mostly lateral hires. Concurrently, I was charged with retaining those faculty that we had assembled in Virginia. Now anyone with an ounce of knowledge of how universities work will recognize that you win some and you lose some—for good and bad reasons—when it comes to faculty retention matters.

In other words, no matter how hard you try, certain faculty are going to leave if this or that school offers them a position. Or, you will lose a faculty member if his or her spouse or partner is either unemployed, underemployed, or unhappy with the area. The reasons why faculty leave are too numerous to detail herein; all of which are plausible, reasonable, and don't reflect negatively on the university. Reasons which, at the end of the day, are quite rational and make a lot of sense.

On the other hand, there are schools out there where you can identify a scholar you are interested in, and you can almost guarantee a successful recruiting effort. What does all this mean? It means that there is an academic employment market for the professorate at the university (as well as law school) level, which establishes priorities or, to be more crass, a pecking order, and that the market for the professorate works pretty much like any other market. People, including faculty, make employment choices based on what are, by and large, rational factors like joint maximization of employment opportunities, prestige of institution (which provides a form of compensation that is often stronger than dollars), lifestyle choices, and sometimes even dollars.

What I quickly discerned as vice provost is that there is no problem created by faculty leaving for other institutions on a regular and predictable basis. That is to be expected. If not, then the deans of the respective schools reporting to me had achieved the mythical faculty that no one wanted and were happy about it. If we had any deans fitting this profile at the University of Virginia, I was not aware of

2. Money was never stated to be a reason for a departure. Nor would throwing additional money at some of our soon to be departures delay or preclude their departure. I know for a fact this was tried with little success.

them. It became clear that what was important is why people are leaving at any given time. To that end, I conducted exit interviews when warranted. That is, when someone was leaving and the reason therefore was not obvious, I would set up an appointment and meet to discuss their departure.

As you might imagine, there are good and bad reasons for leaving an institution like Virginia. (Actually I can't provide you with many examples of departures that were "bad" because we had so few. There was one case where a faculty member said the environment in her department was hostile. I had another faculty member allege that the compensation she received was inadequate, and the inadequacy was in part based on gender—I investigated the claim and deemed it baseless.) At the end of my seven year tenure as vice provost, I was pretty satisfied that most if not all of the faculty departing were leaving for the right reasons. And so, when my boss, the provost, or his boss, the president, would get upset about this or a high-profile departure, I would remind them that things change—that they had both arrived at Virginia from different institutions, and they had made their choice to join the faculty for reasons that at the time made perfectly good sense.

Now I am a dean of a very good law school (I am, of course, being modest: it is an excellent law school). Some, including me, would contend it is a premier law school in the United States. Guess what? Over the last several years some of our faculty have left to join other law schools. This has created consternation amongst the faculty and the perception that these departures have weakened the institution somehow. Thus, if I had to point to the number one issue that affects morale for faculty, both at Virginia and at Minnesota, the two schools at which I have been privileged to be a faculty member, I would have to say faculty departures (not due to resignation or tenure denials, but departures to accept similar positions at other law schools) top the list of things that can cast a pall on faculty morale.

Faculty not only see those departures as defections, but since they remain, they internalize those departures in a way that is hard to analogize to another context. This, I think, is due in part to the unique structure of legal education and the relatively transparent, flat national market of law schools. By that I mean, at last count, there were only 191 ABA-approved law schools. Moreover, all of these law schools aspire to be or claim to be national law schools and hence all are ranked by the all powerful *U.S. News and World Report*.³ Thus, we in academe are in a profession (some would say guild) of which there are a limited number of members (9,673 according to the AALS in 2002-03) at a limited number of places, and we all know each other. We read and cite each others' articles, and we visit and have others visit our institutions. Moreover, we do all this in an environment in which we are relentlessly compared to our peer schools almost daily. Finally, we all want to be the best—we all aspire to be the best even though, as we often tell our students, only half of them can be in the top half of the class. Similarly, only 20 law schools can be in the top 20 when ranked by this or that entity.⁴

3. See Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effect of Rankings*, IND. L. REV. (forthcoming 2005) (discussing the harms foisted upon the schools by the rankings).

4. Although that is statistically true, I am willing to concede that given the rankings and the variables, albeit soft nonquantifiable variables on which they are based, there are probably legitimately

What does all of this mean? What does this add up to? In a world of relative preferences,⁵ where dollars are not the only benefit by which one judges one's job satisfaction, often being a faculty member at a school that has a better reputation or is perceived as better, for which more emotional benefit or relative preference is derived, will be a sufficient reason to make a change.

- ◆ Given the limited power faculty have at the entry point in the market, it is rational to assume that faculty often accept positions at schools when they would prefer to be elsewhere, that is, at another school. Faculty tend to be, one would hope, highly competitive and very bright people who have aspirations to be employed at the best place possible. Yet the process by which we hire individuals at the AALS Recruitment Conference and the interview process which takes place following the Conference does not provide a lot of flexibility to entry-level candidates who simply want to be hired at the best school possible. Moreover, the process is itself imperfect in that it fails to predict accurately who will or will not be successful in academe. People are often hired based on the evaluation of a student note, maybe one or two articles, the recommendations of a judge or judges and law professors who have observed the candidate in law school (!) and a judicial clerkship (!), which have nothing to do with the candidate's performance as a teacher and a scholar. In other words, given the way our hiring system functions, it is perfectly rational to assume that there will be a lot of movement by faculty after they have "proven themselves" through the publication of articles, etc. We have no way to accurately evaluate the quality of inputs, i.e., entry-level hires, into our system.
- ◆ Moreover, our market allows some schools the luxury of not competing in the entry-level market. Given the imperfections that are present at the entry-level (how many "sure things" have you failed to tenure or instead tenured and later wished you hadn't), those at the top of the market can avoid the error costs associated with entry-level hiring and hire only proven commodities. These market powerful law schools can act in a perfectly rational risk-avoiding manner by allowing others, with less attractiveness and market power, to employ, train, and provide a proving ground for unproven scholars and then "cherry-pick" those now proven scholars when needed.
- ◆ Assuming that there is an entry-level market that produces "hires" which are not optimal from the point of view of the entry-level hire either because the market cannot accurately, at the point of entry, match the hire with the school or because some schools choose not to make entry-level hires, that suboptimal placement is not permanent because of the existence and operation of the market for lateral hires. Thus, there is faculty mobility post entry-level because there is a market that exists in which the schools can evaluate faculty and seek to hire those who are "underemployed" (that is, faculty who are employed at schools where the quality and quantity of their scholarly and other outputs exceeds that of the other faculty at that law school). For example,

30 schools in the top 20, as statistically improbable as that may be.

5. See, e.g., Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992).

Professor Brian Leiter's voluminous (and often misleading) output (on the internet and elsewhere)⁶ ranking faculty on numerous metrics including, but not limited to, their publication in top law reviews, citation rates, etc., is one index of faculty quality that one can turn to in order to locate and evaluate underemployed faculty. Consequently, there is a strong possibility that underemployed faculty will enjoy opportunities to improve their lot by leaving for what is perceived to be a better job.

- ◆ There is faculty movement even when faculty placement is optimal. This I think is due to the rise of what I characterize as "superstar" faculty and their increased mobility. When I entered the profession some 25 years ago, my impression was that the faculty who were employed at any one of the top ten law schools that aspired or asserted it was a top five law school (the usual suspects) very rarely moved. Where would you go? How much could you improve your prestige, standing, etc., by moving from a school that was, say, ranked fourth to one ranked second when there was a fairly large and mostly unanswerable debate over which school was "better." This rise in superstar faculty is, I believe, detrimental to the academy. Faculty are interviewed on television and quoted in the popular press. Talking heads become stars. Further, superstar faculty develop "fan clubs" with their articles cited ad nauseam so that the author doing the citing may be recognized by the superstar. When obscure law faculty achieve superstar status in our profession, it becomes a coup to attract them and hire them from other schools. As a result, faculty leave Harvard to go to NYU, faculty leave NYU to go to Stanford, Stanford faculty leave to go to Columbia, Columbia faculty leave to go to Yale, and Yale faculty leave to go to Harvard (completing the circle). The only thing that really changes are the salaries and the perks (reduced teaching loads, increased slush funds for travel allowances, etc.) lavished on these highly sought after and incredibly pampered and somewhat spoiled faculty members.⁷

The bottom line is that if you do your job extraordinarily well, or perhaps just well, and you are a faculty member at a law school, there is a strong likelihood that at some point in your future you will have the opportunity to leave for what is perceived to be a better job. Moreover, even if you become a very successful academic and attain what I have characterized as superstar status, there is a strong possibility that you will be wooed by yet another very good law school and change jobs as a result. What was perhaps the norm twenty years ago—that is, starting at one law school and remaining there your entire academic career—is now clearly the exception. With faculty hired this year at any of the top fifty law schools, I feel confident predicting that over 75% will not end their career where they started (or

6. See, e.g., Brian Leiter, *New Educational Quality Rankings of U.S. Law Schools, 2000-2002*, at <http://www.utexas.edu/law/faculty/bleiter/rankings02/> (last visited Oct. 15, 2004).

7. We have created an "arms race" for faculty, and we have only ourselves to blame. But that is the subject of another essay.

if they do they will have made stops as permanent hires at other law schools along the way before their return to their original law school).⁸

But here is what's odd about this phenomenon. When people do leave, for right or wrong reasons, the people who have not yet left or who choose not to leave attribute the faculty member's departure to institutional failure. And let me be clear on what I mean by that. The faculty at the losing law school treat the departure as a negative reflection on the losing law school and internalize a feeling of failure—not of loss, but failure, the failure to keep the departing faculty member. The reasons for the faculty member's departure are not relevant; what is relevant is that the faculty member left and to those remaining that means there must be something wrong (terribly wrong) with the law school. This is even more perverse when, during the same time period, the losing law school plays the same market game and hires new faculty from lesser law schools, which now causes the lesser schools to fill gaps created in their faculties.

THESE FEELINGS OF INSTITUTIONAL FAILURE ON THE PART OF FACULTY WHO
REMAIN DON'T MAKE ANY SENSE. IT DOESN'T ADD UP!

I contend that if you are a remaining faculty member it is appropriate to have a range of feelings associated with the departure of a colleague, and they are listed immediately below. It is not, however, appropriate to view the institution as failing when a faculty member leaves for another law school. It is appropriate to feel the following:

- ◆ Envy—that I personally was in the position to produce and accept the offer that was extended to my colleague.
- ◆ Anger—they should have picked me! This is different from envy, which can be felt by those who honestly recognize that they are not yet in a position to be sought after by a “better” school.⁹
- ◆ Happiness—they picked the wrong person—boy, are they making a mistake. Let's be honest, we have all been on faculty where, to use a cliché, the faculty has been improved through “addition by subtraction.” Further, faculty may be happy at a departure because the departing member was perhaps an opponent or had coveted teaching assignments that are now open.

8. Indeed, I will make a prediction that for faculty hired after 2000, the ones who remain for their entire career at the original school that hired them will be those viewed as less attractive to the market, that is, failures, when compared to those who do move on to other law schools. In other words, in the future, mobility will be equated with success in the profession and lack of mobility will be equated with failure.

9. In fact, envy differs from anger (see *infra*) in that one who is covetous of another who has accepted an offer to move may not be in a situation in his or her life station or career (children are in school, and I don't want to move them at this time, or spouse/partner has an ideal job where currently located that cannot be duplicated in another employment market) to pursue or accept such an offer. Hence, the person may be envious of the individual who receives and accepts an attractive offer but not angry about the fact that he or she remains on the faculty.

It is not appropriate to feel that the institution has failed. Quite the contrary. The institution has succeeded in nurturing and producing a productive faculty member whose productivity has been validated by the market.¹⁰ The fact that a faculty member has departed to join what is perceived by the market as a “better” law school has, however, several advantages that are not to be ignored.

- ◆ First and foremost, the very success that was epitomized by the hiring, training, and loss of a productive faculty member who has moved on to greener pastures causes the law school losing the faculty member to be attractive to other, highly motivated faculty at both the entry and lateral levels who seek to improve their lot by becoming a member of a faculty that has a proven track record of successfully placing its former faculty at “better” law schools. Hence, the odds of that law school developing a permanent cadre of faculty whom no other school wants, I would guess, are extremely slim.
- ◆ Second, and building upon the first point, the departure of a highly valued (and usually highly compensated) faculty member creates at least one and perhaps two vacancies that can be filled either at the entry-level or in the lateral market. Those hires provide new blood and energy to a faculty that is prone to going stale if all of its members remain the same over an extended period of time.
- ◆ Those faculty who have departed serve as ambassadors for the school that they left. It is hard to denigrate the quality of a school if you have just recruited one of their more successful faculty members. Hence, departing faculty members may serve to elevate the prestige of the school left behind.

What does all of this mean? At the end of the day, I am certain that I would rather lose faculty for any of the “good” reasons one can identify than to have a faculty that no one wants. And faculty will leave my law school for what are perceived to be greener pastures. That is inevitable and often desirable. Being a dean at a top-notch law school, I have resigned myself to losing some of my better faculty members. Indeed, this has already occurred during my brief tenure at Minnesota.¹¹ I will not be bitter, nor will I be sad. I will try to learn from this article and recognize that this sort of movement is not only inevitable but ultimately good for the school. Further, I will definitely not associate such movement with institutional failure. Quite the contrary.

Of course, having a faculty that everyone wants

10. The downside, of course, is that the law school losing the faculty member had made a good choice in the selection of the faculty member, has made an investment in the faculty member, and is now losing that “good choice” to another institution. Presumably if all of the productive members of the faculty departed and only the faculty who were not remained, the dean would have finally succeeded in assembling the dreaded “faculty that no one wants.”

11. As most are aware, one of our top professors, our one and only McKnight Presidential Professor of Law, Dan Farber, left Minnesota on January 1, 2004, to join the University of California at Berkeley (Boalt Hall) faculty. Another of our chaired professors, Don Dripps, has recently moved to the University of San Diego Law School.