THE RECRUITMENT OF LAW FACULTY

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There are at least three questions to consider when discussing the recruitment of law faculty. The first, and perhaps most obvious, is the economic attractiveness of law teaching as a profession. The second is the nature of the law teaching profession itself. What is the person who enters law teaching expected to do over the course of a professional lifetime? The third question concerns the long-term feeling of accomplishment—career satisfaction, if you will—that comes from a lifetime devoted to teaching law. Once we have examined these questions perhaps we can then address a fourth question: What can be done to make law teaching a more attractive profession?

I.

Dramatic news from New York about the rise in beginning salaries at Wall Street law firms has only served to highlight trends that have been in existence for at least the last ten years. In 1962 when I, five years out of law school, entered the law teaching profession, the salaries paid by law schools for a person with such professional experience were roughly comparable to those paid at major law firms in New York and the few firms in a small number of other cities that purported to compete on a national basis for the best students from the top law schools.[1] Compared to the average lawyer of like age and experience, a beginning law teacher was well paid indeed. Although the teacher could never hope to reach the earning levels of partners at major New York firms, the senior professors at major law schools received salaries that were not com-

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1. I rely on my own personal experience and that of other people my age. One of the startling differences between the present and the period 30 years ago when I graduated from law school is the tremendous amount of information that is now publicly available about the compensation of lawyers. In 1957 all that was generally known was the beginning salary at the major law firms. The going rate in New York was $5400, having been recently raised from $4800. Covington & Burling in Washington, where I started, paid $6500.

William O. Douglas stated that in 1928, three years after he graduated from Columbia Law School, he was offered a salary of $5000 per year to be an assistant professor at Columbia Law School. Douglas, who was then practicing in Yakima, Washington, accepted the offer and began teaching at Columbia in the fall of 1928. W. DOUGLAS, GO EAST, YOUNG MAN 158 (1974). Douglas also reported that when he left the Cravath firm in 1926 to go back out West, he was offered a substantial raise to $5000 per year to remain at Cravath. He started at Cravath at $1800 per year. The highest salary that he reports was offered him in Seattle was $50 per month. *Id.* at 156-57.

pletely out of line with the earnings of successful urban lawyers in many parts of the country. It was thus not atypical for a person entering the teaching profession to do so after four or five years (or even more) of practice. That is no longer the case today. Beginning salaries for law teachers at the better law schools approach an average of $50,000 per year.[2] These are salaries paid to people who typically have at most three years of experience after law school. In many cases this experience will include a judicial clerkship or clerkships. In contrast, starting salaries for associates at the top New York law firms are at least $65,000 and, at some firms, close to $70,000 per year, with substantial automatic annual increases for the first few years of practice.[3] For example, an associate two years out of law school can expect to be making at least $79,000 per year at Cravath, Swaine & Moore.[4] Hiring bonuses and bonuses for clerkships can result in a final package considerably above these sums.[5] In the seventh year with the firm, an associate at Cravath will be making at least $127,000 per year.[6] Of course, not every firm pays as much as Cravath, Swaine & Moore, but the trend among the major firms nationwide is to prevent the gap between the top New York law firms and themselves from widening too greatly. For our purposes the actual details are not too important. What is important is that a person with four or five years of practice will now have to take a major pay cut upon entering the teaching profession. This would be true even if he comes from a city other than New York. Once he enters the law teaching profession, he will enter a profession in which, even at the top law schools, the median faculty salary is not much more than $75,000 per year.

After twenty-five or thirty years in the profession, suppose our hypothetical law teacher becomes a senior member of one of these so-called top law schools or becomes the senior professor at one of the growing number of institutions that pay at least one or two of their senior faculty members salaries comparable to those paid at the top schools. He can reasonably expect to make, at most, an annual salary of approximately $100,000. During this time, some of his classmates from law school will have made partner in New York law firms where the average profits per partner can exceed $700,000 per year.[7] Even in cities like Atlanta there are law firms at which the average profits per partner approach $300,000

2. For this and other assertions about law school salaries, I rely upon confidential information.

3. *See, e.g.*, Adler & Baer, *Why Is This Man Smiling?*, THE AM. LAW., June 1986, at 1; Hengstler, *If I Can Make It There . . .*, A.B.A. J., Aug. 1986, at 28, 30, 42; Marcus, *Bidding War for Lawyers*, Wash. Post, May 26, 1986, at A1, col. 5.

4. Adler & Baer, *supra* note 3, at 24.

5. *See id.* at 24-25.

6. *Id.* at 24.

7. Brill, *The AM LAW 75*, THE AM. LAW., July-Aug. 1986, at 39, 54-55.

per year.[8] And there are many cities where the average profits per partner are at least $200,000 per year.[9] A senior partner of course would be expected to earn more than the average.

Admittedly, not all of our hypothetical law professor's classmates will have made partner in one of these major firms. I had a study done for me of associates in twelve major New York firms and two major Washington firms who were admitted to the bar in 1974 and 1975.[10] There was no firm in which as many as one in three of these people made partner. In some of the New York firms the number who made partner was less than one in ten. Of course, the people who did not make partner did not become unemployed. Some became partners in other, usually smaller, law firms and others entered the offices of corporate general counsels. From what we read in the newspapers, it is obvious that some may even have found higher paying work in the investment banking community.[11] If we are talking about the recruitment of faculty at the major law schools, we must assume that these law schools are looking for people who would have had a very good chance of making partner with one of the major firms. I know it is fashionable to think that teaching attracts people whose personalities would not permit them to be successful practitioners, but almost every outstanding law teacher I have met would have been a very successful legal practitioner. I make no apologies for focusing on the top end of the profession. I do not deny that there may be some people who may be attracted to law teaching because of the pay. There are also people who want to become judges because of the pay, but I have never heard anyone argue that such people make the best judges. For what it's worth, I note that the median salary for all full professors for the academic year 1986-1987 is $60,000 a year. The top salary for a full professor is over $110,000 per year; the lowest is $25,000.

In addition to these sheer dollars and cents items, there are other ways in which the economic disadvantages of teaching law, as opposed to practicing law, can be demonstrated. Over the course of time, as a lawyer makes partner and eventually becomes a senior partner in a major law firm, he will generally solve the problem of adequate secretarial help.

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8. *Id.* at 42, 54-55.

9. *Id.* at 54-55, 66-70.

10. Results on file at *Duke Law Journal* Office. The survey followed the careers of the associates until they either left the firm or made partner.

11. *See* Lewin, *The Fast Track: Leaving the Law for Wall Street,* N.Y. Times, Aug. 10, 1986, § 6 (Magazine), at 14. It should be obvious that it would be inaccurate to say that the ab initio chance of any of these people to make partner at the law firm at which they started was one in ten. Their chances were better than one in ten, since many associates left the firm voluntarily, so to speak—i.e., to do things they would rather do than stay at the firm, such as teach, work in government, or enter business.

Furthermore, he will get a secretary who is able to do filing and a variety of personal chores, including balancing his checkbook and keeping family accounts should he wish to delegate those matters to a secretary. By contrast, secretarial services available to a faculty member may be marginal and in many cases will not improve very much over his professional lifetime. The law professor will also often experience difficulty in securing what he considers adequate travel funds. Moreover, when the professor does travel, he will be obliged to travel coach class. By contrast, his classmate who has become a senior partner of a major law firm will have more opportunities to travel and will do so in business class, at the very least, and often in first class. For those of us who have endured twelve-hour transpacific flights in crowded economy class sections of aircraft, the difference in comfort level is dramatic and becomes increasingly so over time. It may be sad, but nevertheless it is a fact that the older one gets, the less tolerant one is of physical discomfort. Finally, for those faculty members who need research assistance, it will often be difficult to hire good student research assistants. The school may only make work-study funds available for such assistance. The law teacher will thus be restricted to hiring one of the limited number of students qualified for work-study assistance.

II.

I now turn my attention to the question: What does a person who enters the law teaching profession do over the course of a professional lifetime? Initially, he certainly ought to feel some excitement about teaching. If he does not, he has clearly made the wrong choice. For the practicing lawyer, the years between the third and seventh years out of law school are the worst. The excitement of joining the firm has now passed. People no longer make a fuss over him. He is confronted with the drive to keep up in the race for partnership. In contrast, his compatriot the law professor now has a substantial measure of control over how he spends his time. The law professor is also confronted with the excitement of teaching people who are not much younger than he is. Finally, the law professor should value the fact that from the beginning he will have a voice in the governance of the law school.[12]

The first years of teaching should also be a learning experience for our hypothetical law professor, who is now finding out that teaching a

12. It may be worth noting that, although the size of law faculties has not increased as dramatically as has the size of law firms, law faculties have increased in size. In my judgment, once a law faculty increases beyond 25 or 30 members, the quality of the collegiality of the faculty as a whole goes down and the individual law teacher is more likely to find his collegiality in various subgroups of the faculty brought together either by age or intellectual interests.

subject is much harder work than one might anticipate. There will be only two clouds over our hypothetical law professor at this early stage of his career. The first is a dull feeling that grading examinations is a terrible occupation. As he gets older, he will find that his efficiency in grading examinations goes down and that his distaste for the task increases almost exponentially. The second and darker cloud over his existence will be the need to produce scholarly work that will ensure tenure. For some people this can be a very exciting time. For others, however, it can be a very frightening time indeed, particularly for those who have difficulty writing. At any rate, our hypothetical law professor will be torn between the need to come up with something scholarly enough to warrant tenure and the desire to strike out in certain original directions that might lead to dead ends. If the attempted scholarship does lead to a dead end, the professor may lack the tenure piece or pieces that the law school requires. But most people who are recruited by the top law schools are given tenure. Whether this is due to the high standards applied to the initial recruitment of faculty or due to the fact that tenure standards are not after all really that high, I refuse to express a definitive opinion. I suspect that it is probably some combination of both these factors.

After a person has been given tenure, however, the question arises as to what he will do for the rest of his life. And the answer for most law professors is the same: they will continue to teach, grade examinations, and try to produce scholarly work. Some people, of course, will drop out of the scholarly race. They cannot, however, escape the inexorable pressures of teaching—usually, the same courses over and over again—and grading the same increasingly boring examinations. In many schools, moreover, even some fairly good ones, our hypothetical law professor will be teaching twelve and sometimes as many as fourteen semester hours a year. Few people can continue to produce much substantial scholarship with that kind of teaching load, particularly as they get older. If our hypothetical law professor is at one of the very best schools, he may be lucky enough to teach only eight semester hours a year and get as much as six months off every three years or so.

By contrast, the hypothetical classmate of our law professor, if he succeeds in making partner in a major firm, will have a strong opportunity to change the nature of his work. No longer will he have to proofread briefs or prospectuses or sit in the library cranking out routine memoranda. Partners are not required to rely on inexperienced, underpaid, and often poorly motivated research assistants. There are associates who are paid good money to do that sort of work for them. If the partner is a person of vision, he will be able to take a more managerial

view of the practice of law, advising clients with respect to some of the most important aspects of their business or personal lives.

In order to provide more spice and variety to life, a law professor is likely to proceed on one or both of two courses of action. First, he may seek out opportunities for foreign travel and the chance to teach abroad. Up to a point, this is desirable. Beyond a certain point, however, it can trivialize his professional interests and accomplishments. On the other hand, he may seek out opportunities for consulting, particularly if his law school is near a major metropolitan area, and even more particularly if he teaches a subject that has immediate practical applications, such as corporate law, taxation, or the financing of real property transactions. Again, up to a point, this can be stimulating; when taken beyond a certain point, however, the question arises whether the person should remain in law teaching. In the long run, the time devoted to securing the financial rewards of a big-time consulting practice will impair his teaching, scholarship, and ability to respond to the collegial demands of fellow faculty members. He will also be less available to students. Faculty who live in large metropolitan areas may feel driven to engage in a substantial consulting practice because of the economic pressures that they confront, but this regrettable factor does not alter the adverse effect upon the fulfillment of their obligations as law professors.

III.

After this litany of horrors, why would anyone want to become a law professor? The point that I would want to make is that law teaching can be the ideal profession for some people. Such a person would be one who likes to work by himself and is able to handle the apparent freedom to organize his life that law teaching offers. He will enjoy being able to take an active role in raising his children. He will be a person who has the good fortune to be at a school outside a major metropolitan area, or who has some independent means, or who has a spouse employed in some professional capacity. He may of course have all of these advantages. Such a person will enjoy getting up before a classroom full of students; he will not be someone who is shy about speaking before large groups on a daily basis. Finally, and most importantly, he will be someone who continues to develop intellectually over a lifetime, who will find new things to study and new things to explore over a career that may last upwards of forty years. Failing that intellectual interest, he may seek to achieve some sense of professional fulfillment by entering into administration, either at the law school or the university level. How long a person can serve as a law school dean without becoming completely burned out professionally is another matter. For people who do not really enjoy

performing in public, who do not continue to develop intellectually over a forty-year period, or who do not enjoy writing, I think that in the long run teaching will be a very frustrating career.

IV.

It strikes me that if we are going to continue to attract first-rate men and women to the teaching profession, we have to do something about the law teaching environment. Beginning at the more mundane level of the economic environment in which law teachers labor, there is something dangerous about a profession in which a person cannot look forward to even doubling his entry salary over the course of a professional lifetime of thirty or more years. With starting salaries of $50,000, there are few people now entering the law teaching profession who can expect, assuming law school salary increases really keep pace with inflation, to earn twice as much in real terms as they did when they first entered the profession.[13] Many people in law teaching make no more in real terms than one and one-half times their initial salaries. In contrast, a successful

13. It is of course always hazardous to make long-term economic predictions. People who entered law teaching in the 1950's and who have reached the upper levels of the law teaching profession have done much better than this. If a person entered law teaching in 1957 at a salary of $5000 per year, that would translate into a salary of approximately $20,000 in December 1986. (The Consumer Price Index was 84.3 in 1957. In December 1986, it stood at 331.1.) If he started at $6000, that would amount to close to $24,000 in December 1986. If such a person were now at the top of the profession and making approximately $100,000, his salary would thus have increased from between four and five times in real dollars. This is, of course, probably somewhat of an overstatement of the extent to which his economic position has improved because, as his salary has increased, he has been put into a higher tax bracket. In other words, his real after tax income has probably not increased as rapidly as his real gross income.

In 1962, when I entered teaching, five years out of law school, I was paid a salary of $12,000. The Consumer Price Index in 1962 was 90.6. That means that $12,000 in 1962 converts into approximately $43,500 in December 1986. If a law teacher 10 years out of law school were making $19,000 per year in 1967, which was a realistic salary for a person at one of the better law schools, and at a time when the Consumer Price Index stood at 100.00, he would have to be earning a salary of $62,700 in December 1986 merely to have kept up with inflation. To have doubled his real earnings in about 20 years of effort during the prime of his life, he would have to be making at least $125,000 in 1986. There is no law professor who earns that much from teaching.

In summary, people who entered law teaching before inflation began to accelerate in the late 1960's have done better than double their real earnings. The earlier one entered the law teaching profession, the better one has done. Those who entered the profession after the inflation of the late 1960's have not done as well. The Consumer Price Index has more than tripled since 1969.

It is instructive to look briefly at the remuneration of lawyers at major New York firms during this period. A lawyer starting at $5400 in 1957, *see supra* note 1, would need to make approximately $21,500 in December 1986 to have the same real earnings. If he had succeeded in making partner at a major New York Law firm his earnings in 1986 would be anywhere from a perhaps unrealistically low estimate of $250,000 per year to as much as $800,000 per year. That is, his real earnings would have expanded from 12 to almost 40 times. The December 1986 Consumer Price Index is taken from the Wall St. J., Jan. 22, 1987, at 2, col. 3. The figures for prior years are taken from THE STATISTICAL ABSTRACT OF THE UNITED STATES 1986, Table 795, at 477.

practicing lawyer can look forward to at least four- or fivefold increases in real earnings and perhaps as much as a tenfold increase.

In this regard, it might be useful to compare other bureaucratically organized professions outside and within the university. In the military, a newly commissioned officer currently begins with a base pay of $1,260.90 per month.[14] A major general with thirty years service is authorized pay at the rate of $6,012.90 per month. A full general with that much service is authorized $7,558.50 per month, and, if he is one of the chiefs-of-staff, $8,340.00 per month. These latter figures are somewhat meaningless because, owing to Congress's inability substantially to raise its own pay and its unwillingness to allow senior members of the Executive Branch to earn more than members of Congress, the top rate for the military is now, for all intents and purposes, fixed at $6,041.66 per month, which is the pay rate for level five of the executive schedule. Nonetheless, a person who enters the military can, if he is successful, anticipate an increase in real earnings of something on the order of four and one-half to five times his initial salary.[15] Law professors also fare badly in comparison with teachers in other fields. Within the liberal arts component of a major university—where starting salaries for assistant professors are quite low by law school standards—successful persons can look forward to increasing their real earnings by at least three times;[16] if they become superstars, they may ultimately earn four or five times their initial salaries.

It might finally be noted that, in 1931-32, Underhill Moore received a salary of $15,000 per year. William O. Douglas (born 1908) received $13,000 in 1931-32 and $14,000 in 1932-33 as a law professor. L. KALMAN, LEGAL REALISM AT YALE 1927-1960, at 126, 270 n.130 (1986). Douglas declined an offer of $20,000 per year from the University of Chicago. *Id.* at 129. No present day professor of law is as comparatively well paid. Consumer prices increased almost ninefold between 1933 and 1984. STATISTICAL ABSTRACT OF THE UNITED STATES 1986, Table 78, at 470. Douglas claims that the offer from Chicago was for $25,000 per year and that he had accepted it but that he never actually taught at Chicago. *See* W. DOUGLAS, *supra* note 1, at 163-64.

14. For these and the other figures referred to in the text, see Exec. Order No. 12,578, 52 Fed. Reg. 505, 511 (1987) (sched. 8), *as modified by* 52 Fed. Reg. 4125, 4126 (1987).

15. Housing allowances for all general officers are approximately twice those for second lieutenants. *Id.* at 513.

16. For example, in a group of universities that includes, inter alia, all the Big Ten state universities (except the University of Iowa), Cornell, and MIT, the average salary of a new assistant professor of English for the academic year 1985-86 was $22,101. The average salary of full professors was $44,086 and the top salary was $80,250. The average salary for full professors is not very helpful because it includes a low salary for a full professor of $27,805. *See* OFFICE OF INSTITUTIONAL RESEARCH, OKLAHOMA STATE UNIVERSITY 1985-86 FACULTY SALARY SURVEY B148 (1986). The average new assistant professor in comparative literature earned $27,000. The high salary for a full professor was $76,913. *Id.* at B149. In classics, the comparable figures were $22,515 and $64,080. *Id.* at B150. In philosophy, the comparable figures were $22,492 and $63,936. *Id.* at B154. In history, the comparable figures were $23,092 and $70,000. *Id.* at B186. And, in political science, the figures were $24,688 and $86,200. *Id.* at B188.

Given the need for relatively high, by university standards, starting salaries for law teachers, an increase in real earning power of even three times over the course of a professional lifetime for a successful law professor is probably out of the question. At the very minimum, however, one would expect at least a two-to-one ratio between beginning salaries and the most senior salaries at the top law schools. Few law schools in this country are currently achieving that goal with consistency. Much less costly, but in some ways much harder to implement, would be increases in travel funds made available to faculty. One of the points of difficulty in this regard is that, except for base pay, law schools are organized on an egalitarian basis. It is very difficult to give senior members more in the way of travel funds than junior members, particularly when the junior members are earning less money in the first place. Nevertheless, I would submit that discretionary travel funds of $1,000 to $2,000 a year would do wonders for faculty morale. Such resources would permit faculty members to attend professional conferences, participate in symposia, and visit colleagues at other universities—opportunities that incidentally would do much to facilitate the scholarly enterprise.

Next, something must be done to improve the general level of faculty secretarial services. In some schools there is somewhat less hesitation in providing better secretarial services to senior faculty. But even here many law schools find it difficult to prefer senior faculty. No faculty member, and particularly no senior faculty member, should have to share a secretary with more than one other colleague. Computers and word processors are helpful, but they are not the answer. A good secretary does more than type. A secretary should be able to answer telephones and do a lot of routine things which at present often occupy a great deal of the faculty member's time. Although not as important as good secretarial service, the availability of enough hard money to permit faculty members to hire good research assistants would also be a big help.

I have already referred to the need to keep teaching loads down, preferably to no more than eight semester hours a year. The cost to scholarship is too great to allow the profession to ignore the effect of heavy teaching loads. Although law school teaching loads may seem light in comparison to what is expected of professors teaching in the liberal arts components of the university, closer examination reveals that this conclusion is not altogether valid. First, there are some superstars in the liberal arts component of the university who are allowed to carry very low teaching loads, lower than those of any law faculty member I know. Second, because it is not customary to give law school instruction on a pure lecture basis, a law professor must put in substantial time preparing for each hour of class even if he has taught the course many times

before. In contrast, once a professor in the liberal arts component of the university has put in the initial time required to prepare lectures, the time required for classroom preparation in future years will be reduced. Also, let us not forget that senior members of the liberal arts faculty of a major university spend much of their time teaching seminars and small graduate courses. The relationship between teaching and scholarship is thus often much closer than it is even for the average senior law professor.

Finally, in considering teaching loads, one can never forget that law teachers grade their own examinations and that, at the better schools, objective tests are largely frowned upon. Many successful law teachers teach classes of a 100-150 students who will be expected to write four-hour essay examinations. The burden upon the law professor is accordingly much greater than it would superficially appear to be if one considered only the number of classroom hours involved in a course. There is much to be said for limiting the size of law school courses to no more than 100 students and preferably to no more than seventy-five. This may not be economically feasible, however. Even if it were, some people might maintain that, at least from the perspective of the professor who is relieved of the obligation to grade some examination papers, it is just not worth it. There may be better things to do with the large amount of money that would be required to implement such a strategy. The problem of grading examinations is an intractable one. Perhaps there is no good solution. One solution, of course, would be to give one-hour essay examinations. It might be possible with enough imagination to structure a question that was fair, comprehensive enough, and at the same time detailed enough to give the faculty member a fair idea of the student's overall ability. Certainly if one were to move to a simplified grading system, let us say one constructed on an honors, pass, and failure basis or perhaps even an honors, high pass, pass, and failure basis, such a shorter examination makes some sense. I cannot think of any other method to alleviate the terrible pain imposed upon faculty members by the need to grade examinations.

These, then, are the steps that I think should and could be taken to make law teaching a more attractive profession. Of course, insofar as people do not consider the long-term implications of their decisions, I suppose many of my suggestions would be considered irrelevant. If people only consider short-term reasons for doing anything, and more people than one would think fall into this category, then I suppose the only two strategies necessary to recruit and keep good people in the law teaching profession are (1) high initial salaries and low initial teaching loads, and (2) a salary structure that permits schools to give large increase in pay and other perquisites to any faculty member who is thinking of leav-

ing in order to reenter practice or teach at another law school. Such procedures would encourage senior faculty restlessly to seek out new opportunities and would skew scholarship to those fields with an immediate payout. I do not think these strategies are in the long-term interest of either the educational institution or the profession.

Before concluding, I should add that I have been proceeding upon the assumption that there will be a steady need to recruit new law teachers. Despite the very high ratio of tenured faculty to untentured faculty at most law schools, and despite the leveling off of applications for admission at even the best law schools (at lesser schools, applications have declined),[17] most law schools have thus far continued to recruit new faculty. Any long-term projection of the need to hire new faculty, however, must take into account not only the effect of an applicant pool that is at best no longer expanding significantly, but also the effect of the new federal legislation that outlaws mandatory retirement.[18] Educational institutions are given a grace period until December 31, 1993 before the act applies to them.[19] If substantially fewer faculty retire in the 1990's as a result of that legislation, and if the heavily tenured university community is unable to develop strategies to deal with the situation, the effect on universities will be disastrous. The absence of new blood will lead to ossification. What gives one some hope is that the situation may become so disastrous that some solution will have to be found.

17. *See* Vernon & Zimmer, *The Size and Quality of the Law School Applicant Pool: 1982-1986 and Beyond*, 1987 DUKE L.J. 204, 209.

18. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342.

19. *Id.* at § 6(a)-(b).