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The Alchemy of Promotion and Tenure

Arthur Austin[*]

- *I have seen otherwise honorable faculty members engage in the most unscrupulous, underhanded conduct to avoid hiring or promoting individuals they did not wish to see admitted to their ranks. They have lied, maligned character, altered rules, manufactured precedents and distorted policies.*[1]

He was sweating like a Mississippi pig in July. That was some dream. It was a new installment in the dream he had been having the past several weeks. Each one was a different version of the forthcoming faculty meeting on the tenure and promotion of Cyrus M. Tugwell. Tonight it was Ken Cesey in my office yelling Tugwell was a no good son of a bitch Posnerian reactionary who was subverting corporate law and leading Scoff Law School into the celebration of mediocrity. On and on. Then a couple of nights ago Patricia West was screaming at me something about Tugwell not being Black. Talk about a strange statement. "Christ, he's blacker than you; hell, you look more Italian than my wife." Wrong thing to say. Fortunately, he woke up as West was pounding him with a paper weight. Then there was the encounter with Ms. Bay Buckman who, instead of wearing her Dworkin style dress (as in Andrea, not Richard), was in a tight sweater accenting What the hell is going on Tugwell should be a sure thing. The students like him. He seems to get along with everyone—hangs around with that dangerous bourbon sipping old fool Snopes too much. I'll speak to him about that. Tugwell's publication record is outstanding. Publishing in Stanford and Chicago is not bad for someone so young. And the clincher—he is Black. I should get some points from the President on this promotion. Which I damn well need. I have been getting bad vibes from that guy on our minority program. But if it is a sure thing, why these dreams?

The law school's architect once wrote that the faculty lounge was designed to blend collegiality and scholarly instincts, hence a plush and dignified sitting room on the first floor with a cylinder opening onto the second floor library. Every Friday at 5 p.m. Professor Peabody Snopes took his brandy to a corner on the second floor to reflect on events and ponder on life. Maybe read a little of Dr. Hunter Thompson's best work. It was a quiet Friday, and as usual Scoff Law Library was empty. Snopes began to nod off with a vague echo of a Patsy Cline song fading—when he was jerked back. Adam Smyth-Symes and Risque Moot were talking. Smyth-Symes was talking in his affected English accent saying something about "interesting—mmm—interesting thing, the female" His wife had kicked him out when she found a letter of lust to a law student on his PC. That explained why he was here on a late Friday afternoon, but what about Professor Moot? What was that asshole doing here? A minute later Lester B. Bile walked in with Patricia West and Bay Buckman. What a crew! Snopes was dumbfounded. They had nothing in common. Tugwell once said Moot was someone with temporarily unmet challenges who succeeded because his articles were so bad they were critic-proof. Then there was Smyth-Symes, who had been able to beat ten sex harassment charges, two by marrying the complainants. According to rumor, he liked to entertain guests with an extensive choice of porno flicks. Bile, who had been yelling from the moment he walked in, was obviously furious.

"He is not going to get through!" He was almost drooling. He is, Snopes reflected, a very bitter man. Always looks like he is eating a lemon. Tugwell had him tagged: "Bile has low self-esteem, which he earned." Started with a sure winner reputation, law review at Yale, white shoes Wall Street firm, had his first article published in Yale, then zero. Hasn't done a thing in twenty-five years. Every year his Report to the Dean reads "up-dating class materials."

"What I'm saying is that he doesn't meet our standards. He is a miserable failure when it comes to service. (Bile was big on service, which, like many an academic scoundrel, he used to justify his slothful experience.) Never goes to faculty meetings, never shows for committees, and never circulates memorandums. At best he is an

antisocial bastard. He is not collegial!"

Snopes snorted. Of course Tugwell didn't go to those things. I don't either, but for different reasons. I can't stand Bile and the gang shoveling smoke—faculty meetings are a joke. But Tugwell doesn't attend because he is so damned busy. The guy is a big draw on the lecture circuit.

"That's not his problem; his problem is that he is not a Brother. Cyrus Tugwell is a low-life version of Clarence Thomas. Like Derrick said about Randall Kennedy, he may look black, but he thinks white. I guarantee he will never get my vote for tenure."

Snopes almost choked on a sip of brandy. So that was it, those deadbeat academic lounge lizards were planning to do a number on Tugwell. Why? Under every conceivable P&T criterion he was a sure thing—and he was Black. What the hell had gone wrong? From experience, Snopes knew that the ungodly alliance of Moot, Bile, West, and Buckman could tear Scoff Law School apart without blinking an eye. An alliance of the meanest academic terrorists ever assembled. Smyth-Symes was, however, a joke—he must be furious because Tugwell was law review at Yale and he didn't make it.

Snopes had never noticed it before but Tugwell looked a lot like Derrick Bell. They both had the capacity to draw you into some sort of evangelical bond. But that is where the similarity ended. Tugwell often said Bell should have gone into preaching "where he couldn't hurt anyone." They were sitting in Snopes' office, a curmudgeon's museum packed with the residue of over thirty years of making life unpleasant—pure hell—for his colleagues. He kept the dogs off his ass, as they say in Mississippi, with an article every now and then, plus op-ed pieces to irritate his "friends." Essays like "PC Worms Gnawing in Law School" generate nasty glares plus numerous complaints to the Dean.

Tugwell was as perplexed as Snopes. "I think that I can account for one of them, but not the others. I barely know them. But Buckman is another thing. I know her—too well." Snopes knew where the conversation was going and didn't like it.

"You dumb SOB, you slept with her, didn't you. Even Smyth-Symes has sense enough to stick with students. Of all people, she is a head case. They don't call her 'Speedy' for nothing."

"She came on to me—strong. It was my second year and she was very helpful. Buckman knows where the skeletons are buried. Incidentally she said to stay away from you; in fact everyone told me that. The Dean reminded me again yesterday. But then she went into her Glenn Close act. And don't let that Dworkin-style dress fool you, there's plenty underneath. Started showing me off to her radical feminist friends as the answer to Tom Sowell; I was supposed to be a Shelby Steel with compassion. When I realized that my role was to be her ticket to fame—she wanted me to co-author an article—I bailed out. I haven't been near her in two years but she obviously is not going to let go."

"I am not," mused Snopes, "worried about what *she* can do. No one listens to her noise, but Bile and Moot can be trouble. They know how to play a tune on the rules. Especially Moot."

What happened next came out of the blue. It came indirectly through the efforts of Smyth-Symes, who persuaded his current squeeze, the head of the Womyn's Caucus, to plaster the school with posters targeting Tugwell:

- *FEMINIST ALERT. COLONIZATION ALERT. BACKLASH ALERT.*

The Womyn's Caucus has reviewed Professor Tugwell's syllabus for Law and Economics and protests its marginalization of women. The use of Richard Posner's book, ECONOMIC ANALYSIS OF LAW, with its emphasis on male signifiers of objectivity, neutrality, and analysis, is particularly offensive to womyn. We deplore the use of value, utility, and efficiency to define our roles in society. Posner's text is crammed with sexist comments like: "The prohibition of bigamy (polygamy), which by limiting competition of men for women increases the sexual and marital opportunities of younger, poorer men." He seeks to convert the vagina into a supply and demand equation. He is pressing the heel of economic analysis against our throats!

Some of our sisters complain that the scientific theme of economics excludes the feminine voice. We therefore demand that Professor Tugwell add our perspective to his course with material such as Ms. Sandra Harding's THE SCIENCE QUESTION IN FEMINISM.

The Dean's response was quick and, as usual, to the point:

- *The administration vigorously defends the right of every professor to select her/his teaching materials. This right comes from the heart of academic freedom and I therefore guarantee Tugwell's complete freedom to teach his course as he sees fit. At the same time we also recognize the importance of diversity and multiculturalism. Womyn speak in a unique voice which results in a wide range of womyn-male encounters. We honor that voice. African Americans, like Professor Tugwell, likewise speak in a distinctive voice which we must honor. I implore everyone in the Scoff community to respect all voices.*

As Snopes predicted, the Feminist Alert poster had a minus zero effect; for one thing, the student evaluations of Tugwell were positive and everyone knew about the role Smyth-Symes played in instigating the poster. No one read the Dean's memo; few students even knew who he is. "You can count Bile out too," Snopes told Tugwell. "He has a nasty mouth, but no bite. After his record of shirking, Bile has lost standing to criticize someone like you. You won't even get a memo out of him." He again was on the mark. Bile pestered a few of the Promotion and Tenure Committee people, but let it drop when they ignored him. Moot on the other hand, was a horse of a different brand, and true to character he released his bomb three weeks later, just when Snopes and Tugwell had relaxed and stopped counting votes.

- To: Tenured Faculty

From: Rosco Moot

Re: Promotion and Tenure of Cyrus Tugwell

By a 4-1 vote the P&T Committee recommends that Professor Tugwell be granted tenure. I disagree and for the following reason will vote in the negative. Our rules specify that the candidate must demonstrate a record of outstanding teaching, produce scholarly work that makes a significant contribution to our understanding of a legal field, and exhibit a willingness to contribute to the service component of the law school and the profession. Tugwell fails to satisfy the scholarship category. I do not address the other two categories, although I am willing to concede for the record that he satisfies both.

On paper Tugwell has compiled an impressive record; the publication of two long, heavily-footnoted articles, one in the Stanford Law Review, the other in the Chicago Law Review. In addition, he has published four book reviews, three in reputable economics journals and the other in the California Law Review. All outside reviews of his scholarship were positive. Professor Dali-Jones of Michigan said: "If Professor Tugwell continues at his present pace of development he will, within five years, become a member of a select group of scholars." I am told that he is a highly prized participant at the "best" conferences. Not that it should matter for our judgment on Tugwell but it is clear that whatever we do here will not have a serious impact on his career. He is destined to move up to a higher level school.

Now, for the issue: in light of what I have said about his impressive record, including the vigorous support of the reviewers, how can I vote against Professor Tugwell?

If you dig deeper into his record you will get a very disturbing message: Tugwell is not producing legal scholarship. I repeat—he is not producing legal scholarship. He writes economic articles which have tangential connection to law. His comparative analysis of efficiencies in the airline and trucking industries is, I am told, "outstanding, an important contribution to the literature." The person who made that appraisal was an economist. And that is the problem: Tugwell writes in economic language for economists; he does not have anything to say to judges and lawyers. Check his footnotes: rarely does he cite legal material; instead he refers to equations and economic journals. I suggest that you examine the outside reviewers' credentials; you would discover that three are full time economists, another has a joint law school-economics department appointment, while the fifth is a law professor. The obvious conclusion is that we are **ABDICATING OUR REVIEW FUNCTION TO OUTSIDERS, PEOPLE WHO HAVE NO INTEREST IN ADVANCING LEGAL KNOWLEDGE.**

There is the definite likelihood of more abdication. It is reaching the tipping point in the classrooms with the cafeteria menu of law and banana courses. In most of these courses professors and students learn to defer to the expertise of the

banana outsiders. I have serious doubts about law professors possessing sufficient knowledge of the banana material to compose a credible syllabus. In my judgment, the most serious pressure for abdication comes from the Critical Race Theory movement with its Black perspective strategy. I suspect most of our tenured people are unaware that several of our young folk are presently experimenting with narratives of race and gender experiences. These are stories—like you see on TV. In fact, Professor Bell's short story about space invaders bartering scarce products for the nation's entire Black population was made into an HBO movie. And who can evaluate these stories as scholarship? Not me, not you, thus leaving the final authority to the Critical Race Theory people. That is why this vote is so important. If we capitulate to the economist outsiders, we are virtually stopped from denying Critical Race Theory people the ultimate responsibility for evaluating Black "perspective" storytelling.

I hate to end this memorandum on a pessimistic note but reality leaves me no choice. The law academy has conceded too much, tolerated intellectual foolishness, and sold our souls to the "go go" years of the 1980s. Whatever chance we had to preserve the integrity of the system was lost when our trade association, the Association of American Law Schools, became a de-facto companion to the Modern Language Association, a group dedicated to a deconstructed postmodern utopia. The AALS is more interested in workshops on "Integrating Lesbian/Gay/Bisexual Perspectives into Other Courses" than ways to teach the practical core material. The 1996 annual meeting was a lesson in the nontraditional curriculum, with workshops on Critical Legal Studies, Critical Race Theory, Feminist theory, Gay Lesbian Theory, and Storytelling. But the real damage came from the Special Committee on Tenure who recommended new standards that specifically recognize nontraditional scholarship: "The school should commit itself to avoiding prejudice against any particular methodology or perspective used in teaching or scholarship. When evaluating any work embodying innovative or less widely pursued methodologies or perspectives, the standard should be neither higher nor lower than the standard used for evaluating more traditional work."

For the continued integrity of Scoff Law School, and to renew our commitment to the traditions of legal education, I urge you to oppose Professor Tugwell's promotion and tenure.

"Damn, that will change things, Tugwell." Snopes was still in a Wild Turkey haze from last night and now had to acknowledge that Moot had won a round in their long standing battle of office politics. "Remember, Scoff Law School is second tier, meaning that we take the core values seriously. And traditional scholarship—the vocational and doctrinal article—is what our people know and hold to be a core commitment. I told you not to underestimate Moot. He used our own scholarship to whip our butts."

"What is it with that guy? He keeps turning out those tedious articles that only a handful of people read. It's always 'this case holds,' 'this is precedent for,' 'the rule is.' He sure as hell has never advanced the knowledge of anything."

"What Moot did is to get the faculty, especially the seniors, to see your articles as outside the sphere of traditional scholarship. They now look at you as the house radical. That's right, Tugwell, the house Posnerian is now the house radical. You and I know that what you write comes within the government regulation genre but—don't you understand, and this is what Moot was counting on—THEY NEVER READ YOUR WORK! Never! They don't write, and if you don't write, you don't read—or teach, something my friends conveniently forget. After his memo, they didn't want to read your stuff. As for his motivation, Moot is a very insecure and frightened man. He and his friends see this new style of writing and they panic. It tells them they are becoming obsolete. And that's why I have to give Moot credit for the comments on AALS.

"It is scare tactics—and it worked. Most of the tenured people, the group that counts as far as your vote is concerned, haven't attended an AALS meeting in years. I haven't been to one in over twenty years. My memory, shared I'm sure by the others, is going to workshops on contracts or property during the day and long parties at night gossiping over petty politics. They have no idea the extent to which the organization has been genderized, racialized, and radicalized. Subverted by the politically correct hordes. So Moot brought them up to date and in the process planted a subliminal association between young Cyrus Tugwell and the loony AALS agenda. Subconsciously to them, your economics is just another version of storytelling. No difference.

"It's going to be close, we could probably get a majority but it's doubtful on the necessary two-thirds majority that we need. You can opt for an extension to give us time to call in a few I.O.U.s. The Dean needs your promotion for brownie points, and no doubt could call in a few votes."

Tugwell forced a smile. "I feel like I was sucker punched. I don't know, maybe it's time to move on. I've got a fistful of feelers."

"There is," Snopes quietly said, "a final option, guaranteed to be successful. It's worked at other schools. Here it is: come out of the closet, or get someone to out you."

Tugwell exploded. "You old fart, I'm not gay! Why should I pull that preposterous ploy?" "Simple—you get tenure and no one can ever bother you again. Think what it opens up for your career. You can speak in the Black voice on white topics such as economics, speak in a Black perspective voice in narratives, and top it off with a homosexual voice. You would be a legitimate triple threat in legal scholarship."

Tugwell stared at Snopes for a full minute, then slowly walked out.

ENDNOTES

* Edgar A. Hahn Professor of Jurisprudence, Case Western Reserve University, Franklin Thomas Backus School of Law, Cleveland, Ohio. B.S., 1958, University of Virginia; LL.B., 1963, Tulane University.

1. Derrick Bell, *Confront Authority: Reflections of an Ardent Protester* 75 (1996).