

In Memory of Gene Rostow

Anthony T. Kronman[†]

In the vault of St. Paul's Cathedral in London, where many notables are buried, there is a simple memorial to Sir Christopher Wren, the architect who designed the Cathedral. "Si monumentum requiris, circumspice," the tablet reads. "If you seek a monument, look about." And so one might say, with equal truth, as we gather in the Yale Law School to recall and celebrate the life of Eugene Rostow: "If you seek a monument, look about." For this is the school that Gene built, and though it is the work of many hands, of no one can it be said, as fully and truly as it can of Gene, that he gave the place the shape it has, and defined its special spirit.

When Gene arrived at the Law School in the fall of 1934, the building was barely three years old, and was occupied by a brilliant and iconoclastic faculty known collectively as the legal realists. At war with the established conventions of legal scholarship, with the University administration—which viewed them with alarm—and even, I suspect, with themselves, the legal realists gave to the study of law an excitement, a range, a freshness of purpose and possibilities it had never had before and has never lost since. In the years that followed, the spirit of legal realism, once so horrifying to the academic establishment, became the spirit of the establishment itself. Today its radical ambitions have become conventional truths, and the restless and unconventional law school that Gene Rostow came to in 1934 has become the leading law school in the world, without ever losing touch with the enthusiasm, the irreverence, the inventiveness and curiosity that made this school the wild place it was when Gene arrived, and makes it wild still.

This is the miracle of the modern Yale Law School—that it has kept its wild heart and won the world's respect—and the magician who performed the miracle is the man we remember today. "If you seek a monument, look about." Count up the features of the place we take for granted, the elements of its life and culture that are as solid as the stones of the building itself, and

[†] Dean and Edward J. Phelps Professor of Law, Yale Law School. This Tribute is an edited version of oral remarks given at a memorial service for Eugene V. Rostow at the Yale Law School on May 4, 2003.

vastly more important. They are all Gene's handiwork, the product of his imagination and persistence. If this building fell down tomorrow, would the Yale Law School survive? Yes, of course it would, though perhaps not under such comfortable conditions.¹ Even if its faculty and students had to meet in tents on the New Haven Green, the Yale Law School would be the place it is. But would it survive the abolition of the small group program for first-term students—one of Gene's inventions—or of the graduate program for foreign students, to which he gave new energy and purpose? Would it survive the dissolution of its ties to all the other schools and departments of the University, ties that Gene either strengthened or built from scratch? Would the Yale Law School survive—could it survive—if its graduates did not provide the material support they do, and have been in the habit of doing, ever since Gene launched the school's first capital campaign in 1960? The loss of any one of these would do more damage to the school than a hurricane that blew it down, for buildings can be rebuilt long before the traditions they house, once lost, can be recovered.

Those of you who know what Gene accomplished in his deanship know that I've barely touched the surface of his legacy to the school. Above all, there are the great appointments that came, in a torrent, during his first years as dean. Yes, of course, the faculty he inherited had diminished in size and some replacements were in order. But nineteen appointments in four years—and most of those in the first two? How was such a thing possible? How did Gene manage to persuade the President of the University and the Corporation to go along? How did he persuade his own faculty to agree to so many appointments in such rapid succession? In the nine years of my own deanship, we have made twelve appointments to the faculty—a rate of about one and a third a year. Nineteen appointments in four years!

Only the most determined dean, with a steely and implacable will, could do it. And if that weren't miracle enough, just remember who it was that Gene appointed. I suppose that mere determination, were it strong enough, could push nineteen appointments through. But only an exquisitely discriminating eye, a genius for selection, could have produced, in one long breathless rush: Alex Bickel, Charles Black, Bob Bork, Harry Wellington, Guido Calabresi, Ellen Peters, John Simon, Abe and Joe Goldstein, Leon Lipson, Ralph Winter, Clyde Summers, Lou Pollak, Quintin Johnstone, Ward Bowman, Joe Bishop, Frank Coker, Bayliss Manning, and the great Librarian Harry Bitner. *Res ipsa loquitur*. "The thing speaks for itself." Here is a list one has only to read to understand the magnitude of Gene's achievement. We know now the greatness of the group. But how did Gene know? With one exception, they were pups, untested and unproven. And

1. Indeed, the resilience of the Yale Law School in the face of physical destruction was tested—and affirmed—in the aftermath of its bombing on May 21, 2003.

how did he know they would make a faculty—which takes more than individual greatness? Or perhaps I should ask, how did Gene make them into a faculty, which he did as surely as he spied their talent, one by one?

In large measure, he did it through his own commanding graciousness, his elegance and civility, his sociability—to use an old word that fits Gene exactly. Gene had strong views about all manner of things, and never shied away from expressing them. But he did it in a way, and with a style, that made it easy to believe that even the sharpest disagreements could be borne by friends, and joined with affection. This took more than charm. Gene was famously charming, but charm is not enough. And it took more than a talent for parties, though Gene and Edna had a famous talent for parties too, elevating the faculty dinner party to a high art and creating new forms of party-giving—like the children’s Christmas party—that survive to this day.

It required, in addition, an interest in other people, a curiosity about them and their lives, a respect for their minds and an attention to their needs, that one either possesses or does not, and which can never be faked. Gene had it in abundance. It was part of his makeup, a gift of nature that he enjoyed and that made him attractive to others, even when they violently rejected his views while wishing they didn’t still find him so humanly appealing. But they did, and in doing so were drawn into that community of affectionate regard that has characterized the Yale Law School ever since. The newly arrived student enters this community the moment he or she comes through the door. The staff who support the school belong to it and share in it as well. And the faculty, who are as fractious as they were a half-century ago, and as volatile and self-absorbed in the way great scholars are, share in this community too, a community of committed and argumentative souls held together by ties of affection that Gene exemplified and forged, and on whose powers of consolidation we rely to this day. “If you seek a monument, look within.”

Of course, Gene was not only a dean. First and last, he was a thinker and writer, and the proposition that a thinking dean is not an oxymoron is part of his legacy too. No one could summarize, in a few moments on an occasion like this, the range and subtlety of Gene’s intellectual work, but two attitudes seem to me characteristic of much of what he thought and wrote. The first is an unbending confidence in law. Gene believed in law. He put his faith in it. He saw the law not just as an instrument of policy, as a means to other ends—though he certainly saw it as that too—but as an end in itself, as the expression of the highest ideals of our civilization, the ideals of individual dignity and liberty, to which, in the West, over a long and tumultuous course of development, an unprecedented moral prestige has attached. Gene passionately defended the expansion of law. He saw it as the expansion of civilization itself, and of the respect for individual

dignity on which the moral standing of our civilization depends. Gene was an idealist—a legal idealist—a member of the party of Mill and Kant.

But Gene was also a realist, and realism is the second great theme of his work. As deeply committed as he was to the values of law, Gene understood the limits of law as well. He understood that law can only accomplish so much, and that every great human enterprise, including the civilization to which he was loyal, must contend with lawless power, its enemies' and its own. He grasped the abysmal truth that we human beings are made, as Kant once said, of crooked timber, and that the institutions we invent must always exhibit the imperfections of those who make them—their weakness and ambition and love of power, their fear of freedom and ignorance and destructive zeal. Gene knew the world to be a dangerous place and that the moral power of law is inadequate to overcome its dangers. He knew that resolve—the willingness to use violence on behalf of law—is sometimes needed too. He was a student of Thucydides as well as Kant, and absorbed the lessons of the one as deeply as the ideals of the other.

The remarkable thing, of course, is that Gene managed to combine these things in a way that seemed entirely natural, avoiding both the cynicism of the realist and the unworldliness of the idealist, championing instead a liberal view of life at once moving and mature. No one would say that Gene always got the balance right, and people disagree about how often he did. But can anyone imagine a better illustration of the highest ambitions of the Yale Law School, which seeks to instill in its students an indomitable confidence in the moral authority of law and of the civilization it sustains, while teaching them to understand the limits of the law and the frailty of all that rests upon it? Gene combined these thoughts with effortless grace. He gave us a living picture of the kind of person the Yale Law School aims to produce—buoyed by ideals but never carried away, clear-eyed but undiscouraged, an idealist without pretensions or the need for self-deception who never loses faith in the power of ideas or the strength to face facts as they are.

And he gave us something else to admire and imitate. He gave us an example of courage. Gene's famous *Yale Law Journal* article on the Japanese internment cases is a triumph of legal and political analysis, informed by deep historical knowledge and a detailed understanding of the social circumstances of the Japanese Americans who were imprisoned in the 1940s.² But most of all, Gene's article is an act of courage. In the spring of 1945, when the article was published, it could not have been clear what reaction it might provoke. But there is not a single wavering sentence in its forty-four pages, not a hint of self-protective caution, only clarity and

2. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

confidence and the kind of brilliant polemical argument one finds, for example, in Edmund Burke's great speech at the opening of the impeachment of Warren Hastings, the corrupt governor of the East India Company.³ It is one of those statements about which we say, after the fact, "I hope I would have had the courage to make it."

Later in his career, after the deanship and a tour of duty in the State Department, Gene returned to the Law School to teach. The students who met him were, for the most part, fiercely opposed to the war in Vietnam and viewed Gene with hostility. I know. I was one of them. Gene could have ignored us. He was a great man and could have closed himself in his study. But he didn't. He met with us and talked to us, day after day, long after any other person's patience would have been exhausted, receiving our endless assaults and replying with calm and confidence in the reasonableness of his position. I can't say that Gene made many converts, but he acquired a large number of admirers. I know. I was one of them. And what we admired most was Gene's willingness to do something we praise all the time as a central virtue of academic life but see only on rare occasions—his willingness to defend a really unpopular view with friendly attention to the claims of his attackers and reasoned arguments of his own. What we admired was Gene's courage—more than I have ever seen in any professor before or since—and so he became, for many of us, a most unexpected hero. But a deep thing, like courage, is generally there from the start, and looking at Gene's life as a finished work, which it is our sad privilege now to be able to do, I cannot help but see the continuity of character that links his brave essay on *Korematsu* to those long afternoons in the dining hall when we harangued him endlessly and he replied with more decency than we deserved.

The Romans believed in the wisdom and authority of their ancestors, and they explained the dignity of adulthood, and the even greater dignity of old age, on the grounds that the more one increases in years, the closer one comes to those who have gone before. We are all on our way toward Gene. I find this a comforting thought. If we can preserve the school that Gene built, if we can keep faith with its purpose and spirit, it will endure and prosper. And if we can, each of us, find the nerve to stand as cheerfully in the wind, we will be saved, and our civilization with us.

3. See Edmund Burke, *Speeches on the Impeachment of Warren Hastings*, in *THE PORTABLE EDMUND BURKE* 388 (Isaac Kramnick ed., 1999).
