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On retiring, Gene Rostow terminates the active installment of an association with Yale that commenced when he entered Yale College as a freshman more than fifty years ago. Gene has been a cyclone of energy throughout the forty-five years of our acquaintance, and unless the law of entropy has operated in reverse in his case, I assume that he generated at least as much excitement as an undergraduate. Evidence of his views in those days can be gleaned from the *Harkness Hoot*, an irreverent Yale College publication with which he was associated and which, unlike most of yesteryear's undergraduate effusions, is entertaining even today. One of its targets, which it repeatedly attacked with vigor and zest, was "all that is smug, ornate, and ridiculous in Yale life," especially Yale's "architectural chaos." The chaos, as the publication's name implies, consisted of Yale's residential colleges and the other "girder Gothic" buildings that Vincent Scully (and perhaps Gene as well) would today protect against the bulldozer with his own body. Is it possible that Mother Yale knew best, and that yesterday's rear guard has become today's avant-garde? Whether the answer is yes or no, Yale has clearly had the last word: The *Harkness Hoot* is not preserved in the functional simplicity of Seeley Mudd Library, but in Sterling's architecturally chaotic Yale Manuscript and Archives Room, on shelves that are protected by sliding doors made up of glass that was cut carefully into panes, only to be reassembled and held together with mock-medieval leading.

The *Harkness Hoot*, both when Gene was a contributor and later under his editorship, did not confine its attentions to the campus. When its staff looked beyond the Yale Fence, they saw a "decadent capitalism,"

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but on the horizon beyond this discouraging prospect, there loomed up "the concept of a managed state" (the New Deal in embryo?), which fortunately was "crystallizing rapidly." Crystals are, of course, sometimes difficult to distinguish from fossils. But whatever the ultimate fate of the managed state, Gene's early enthusiasm for it may have led, years later, to his involvement in a regular feature of the Yale Law School's curricular menu—Public Control of Business. This staple was offered not merely as such, but in such intriguing varieties as PCB I, PCB II (later split between PCB IIA and IIB), PCB III (also later divided into sub-courses), PCB IV, and PCB V. Although many members of the faculty were recruited from time to time to teach these courses, Gene was one of PCB's few career officers, so to speak.

On graduating from Yale College, Gene entered the Yale Law School, where he became Editor-in-Chief of the *Yale Law Journal*. An examination of Volume 46, over which he presided, discloses affinities between it and the *Harkness Hoot*. To be sure, Volume 46 did not suggest that Yale's buildings should be demolished because they violated an emerging constitutional right to be free from architectural pollution. But this, I take it, merely reflects the conviction of the student editors that both decadent capitalism and the managed state were more obviously in need of legal advice. Thus, the *Journal* addressed such problems as the woes of the railroad industry and its investors, stock market manipulations, protection of homesteads against foreclosure, bankruptcy reform, marketing of distressed agricultural products, and protection of debenture holders (usually assumed, in those days, to be widows and orphans). At first blush, a Note entitled "Organized Baseball and the Law" seems to be a frolic and detour, but it turns out to be about peonage, a despicable device to make "more money for the [baseball] magnates."¹

On getting his LL.B., Gene spent a year in New York City, working for "Cravath" (Cravath, de Gersdorff, Swaine and Wood, as it then was). To the best of my knowledge, Gene accepted full personal responsibility for this decision; this was, of course, before students began to blame the faculty for brainwashing them into accepting the rewards of corporate law practice.

A year later Gene returned to New Haven to join the Law School faculty, a move that coincided with (inaugurated?) one of the school's Golden Ages—1938–1941 (i.e., my own student years). Scarcely more than a year older than we were, Gene dazzled us in class, and not merely because of his much-admired scarlet suspenders, whose resplendence I can recall even after the passage of forty years. Gene's most bravura perform-

1. Note, *Organized Baseball and the Law*, 46 YALE L.J. 1386, 1390 (1937).

ance was in Debtors' Estates, which was called "Creditors' Rights" at Harvard; the difference in labeling was said to symbolize an ideological difference between the two schools. He took over this course on short notice from Wesley Sturges, who, if not this school's most spectacular classroom juggler in those years, surely had few peers. It was a hard act to follow, but Gene proved equal to the challenge.

Most of the faculty hobnobbed with students in our day, Gene notably so, and we felt personally deprived when he took a leave of absence in 1940-41 to spend a semester at the University of Chicago Law School. His discussions in class of economic theory, I am informed, are remembered there as tinged with monetarism. If so, perhaps he was using the local patois only as a courtesy to the natives. Had he stayed, would the Chicago School of Economics be famous today for teaching Public Control of Business and thereby helping to bring about the managed state?

As things fell out, Gene moved on for a stint in Washington, though only after chastising Robert Hutchins, then President of the University of Chicago, for expounding views about war that ignored the attempt by Nazi Germany to conquer Europe. By this time, we were on the brink of war, and the focus of legal action in Washington was industrial and military mobilization. One of the magnets for ambitious, impatient, and aggressive lawyers was the Lend-Lease Administration's legal staff, which graduates of this school dominated from top (Oscar Cox, Gene, Myres McDougal, and Lloyd Cutler, among others) to bottom (Ernest Jenness, Louis Hector, and the undersigned).

One of my assignments was to work for Gene on a report to Congress, for the President's signature, describing the lend-lease program. Since I was already fifteen months out of law school, I naturally regarded this task as demeaning; after all, my secretary—this was before paralegals had been invented—could compile a list of the military supplies, grain, industrial equipment, and other material furnished by lend-lease to our allies. I quickly learned, however, that Gene's roving eye for targets of opportunity had seen that these quarterly reports might be converted from conventional recitals of statistics into instruments to influence the post-war reconstruction period by renouncing in advance, once and for all, any U.S. claim for repayment of the dollar amount of the supplies that the Lend-Lease Administration was shipping to our allies. This strategy, Gene hoped, would help to avoid a repetition of the tangled and embittered war debts imbroglio that had followed World War I, which had evoked President Coolidge's simplistic question, "They hired the money, didn't they?"

As a high school debater in the 1930's, I was familiar with the war debts issue. But I thought it was as dead as the other subjects of our oratorical excesses, such as the unicameral legislature, the postal savings

bank system, and the Kellogg-Briand pact renouncing war as an instrument of national policy. Gene, however, opened my eyes to the possibility of *influencing* the course of international events, and we spent long hours trying to couch a legally enforceable general release in prose suitable for the ears of Congress.

Months later, after my induction into the army, I heard that the report had stirred up a firestorm in Congress, some of whose members entertained the quaint notion that settlement of the lend-lease accounts was reserved to the people's elected representatives. Undaunted, Gene returned to the fray in January of 1945, with a conspectus of postwar reconstruction entitled "The Great Transition," published in *Fortune*. In this broad-ranging and influential article, Gene quoted with approval an extract from a 1943 report of the Senate Foreign Relations Committee:

The purpose of weapons, and the materials from which they are made, is to inflict harm upon the enemy. When we send these materials [under lend-lease] to our allies, as when we send them to our own troops and factories, the benefit we seek and receive is their use against the enemy. This is not a commercial transaction. It is a military move.

There is no adequate way to value such military moves in dollars, pounds, or rubles. There is no way to compare the price of an American tank with the life of its Russian, British, or Australian crew. Our supplies which go to the war are paid for on the battlefield in the damage they do our enemies.²

The hand responsible for circulating these admirable thoughts may have been the hand of Senator Tom Connolly, chairman of the committee, but methinks the voice is the voice of an unelected civil servant who later became Dean of the Yale Law School. *Se non è vero, è ben trovato*.³

On another occasion, Gene's conviction that the rule of law could be preserved even in wartime—a passion illustrated by his courageous article on the Japanese exclusion orders, which I will discuss shortly—was brought home to me when I was assigned as the junior member of a team assigned to persuade a Congressman to withdraw a bill authorizing treason trials in absentia for U.S. citizens who were broadcasting war propaganda for Germany and Japan. In retrospect, this idea seems so hare-brained as to collapse on being exposed to public view. But its sponsor was the Chairman of the House Judiciary Committee, a long-time associate of President Roosevelt in New York politics, and he had obtained—as

2. S. REP. NO. 99, 78th Cong., 1st Sess. 9 (1943), quoted in Rostow, *The Great Transition*, FORTUNE, Jan. 1945, at 142, 179-80.

3. The Dean-Designate of the Yale Law School will gladly translate, I believe.

we learned only after assuring him that the proposal was clearly unconstitutional—an approving, albeit unauthorized, opinion from a high-ranking official of the Department of Justice who later became a federal judge. Gene was not directly involved in our mission, but he feared, quite rightly, that we might be seduced by the drama of a trial for treason of defendants who were operating abroad. This led Gene to hammer away at the need to be firm, urging us to reject compromises, such as an acceptance of the legislation on the assumption that any convictions thereunder would eventually be overruled by the courts. After some resistance, the bill's congressional sponsor agreed to let it die in the legislative hopper.

Taking time out from his major concern in 1944–1945 with postwar reconstruction, Gene made an exhaustive study of the 1942 evacuation of persons of Japanese ancestry, both citizens and aliens, from the West Coast and their internment in detention camps, reporting his conclusions in this *Journal* (“The Japanese American Cases—A Disaster”⁴) and in *Harper's Magazine* (“Our Worst Wartime Mistake”⁵). Prefacing his *Journal* article with Clemenceau's aphorism that “war is too serious a business to be left to generals,” Gene wrote: “The course of action which we undertook was in no way required or justified by the circumstances of the war. It was calculated to produce both individual injustice and deep-seated social maladjustments of a cumulative and sinister kind.”⁶ After excoriating the commanding general for the “findings” adduced to support the exclusion orders (“[H]is motivation was ignorant race prejudice, not facts to support the hypothesis that there was a greater risk of sabotage among the Japanese than among residents of German, Italian, or any other ethnic affiliation.”⁷) and the Supreme Court for upholding “an expansion of military discretion beyond the limit of tolerance in democratic society,” Gene called for “generous financial indemnity” for the indignities and losses inflicted on the victims of “a program which violates every democratic social value, yet has been approved by the Congress, the President and the Supreme Court.”⁸

Lest it be thought that Gene selected an easy target, it should be noted that the internment program was supported by such high-minded and public-spirited citizens as Henry L. Stimson and John J. McCloy, and that it set off a protracted and bitter debate within the American Civil Liberties Union, during which such unnatural bedfellows as Corliss Lamont and Morris L. Ernst joined in opposing ACLU action to challenge

4. 54 *YALE L.J.* 489 (1945).

5. 191 *HARPER'S MAGAZINE* 193 (1945).

6. Rostow, *supra* note 4, at 489.

7. *Id.* at 520.

8. *Id.* at 533.

the exclusion orders in court. Earl Warren, then Governor of California, was evidently not troubled by a brief filed by his state as *amicus curiae* in *Hirabayashi v. United States*,⁹ which argued that the military's judgment about national security should not be questioned, and described for the Supreme Court "the characteristics" of the West Coast Japanese population—"an unassimilated, homogeneous element," "a fifth column in assisting in sabotage or espionage," "a group apart and inscrutable to their neighbors," practitioners of "Emperor worship." The brief was signed as lead counsel and was presumably written, or at least read, by the Attorney General of California, shortly after his unanimous re-election as President of the National Lawyers Guild, an event that he celebrated with an inaugural address containing almost as many appeals for "racial equality" as there were racial slurs in his brief. In rejecting this ecumenical enthusiasm for giving the military the last word on the basis of racial mythology, Gene was far ahead of his time, and in the intervening years, the gap has been narrowed, but not closed.¹⁰

On returning to Yale after his Washington service, Gene offered courses on corporate reorganization, antitrust and trade regulation law, and national economic policy (all listed in the catalogue under murky labels, of course), but he wrote on many other subjects, ranging from the legal aspects of the use of alcohol (doubters can inspect the *Quarterly Journal of Studies on Alcohol* for themselves) to constitutional law. Like all teachers of constitutional law, Gene felt an irresistible urge to respond to James Bradley Thayer's 1908 essay on the legitimacy of judicial review of federal statutes.¹¹ In "The Democratic Character of Judicial Review,"¹² Gene extolled the practice, and he excoriated the Supreme Court for excessive timidity in *Dennis v. United States*,¹³ which upheld the conviction of leaders of the Communist Party for teaching and advocating overthrow of the government. To reach this result, Gene's article argued, the Court was forced to water down the clear and present danger test. (When Gene later participated in organizing the Committee on the Present Danger, was the qualifying adjective "Clear" omitted from the group's name because the perceived Soviet threat to our national security was not thought sufficiently serious or self-evident to meet the *Dennis* case's standard?) A central theme of the article—reminiscent of Gene's article on the Japanese detention orders of World War II—was that much

9. 320 U.S. 81 (1943).

10. See COMMISSION ON WARTIME RELOCATION, PERSONAL JUSTICE DENIED (1983); P. IRONS, JUSTICE AT WAR (1983).

11. J. THAYER, *The Origin and Scope of the American Doctrine of Constitutional Law*, in LEGAL ESSAYS, 35-41 (1908).

12. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

13. 341 U.S. 494 (1951).

of the reasoning in the *Dennis* opinion rested on “the [erroneous] premise that the power of judicial review is somehow tainted, and of undemocratic character, and that the courts should not interfere with the attempts of Congress and the President to deal with wars and emergencies.”¹⁴ In conclusion, he asked: “Do we really protect the state against spies and saboteurs by making professors of music take oaths, and by combing through the lives of all Government employees for scattered episodes of sin, enthusiasm, and folly?”¹⁵ If a seminar on national security matters were to be offered by the National Defense University, where Gene is now serving a two year hitch as a research professor, the instructor could teach the course with little more than these two articles as pedagogical fodder.

My role in this tribute to Gene was to end with his entry upon the deanship of the school he graced for so many years as student and teacher, but I cannot refrain from looking briefly forward to a later period that affected us almost as much as World War II—the Vietnam years. A great gulf separated us during that period, but, on reviewing our correspondence, I am struck by how mildly Gene responded to my heated and acerbic letters. He launched no personal anti-missive missives, preferring instead to bombard me with copies of his speeches, which were notable for their copious references to international law, the United Nations Charter, and the Southeast Asia Treaty Organization. His soft answers and my vitriol cancelled each other out, leaving our disagreement unscathed—except that he is belatedly entitled to an Award for Civility, with oak leaf cluster.

On Gene’s return from Washington, he lived temporarily in a Law School guest suite until his tenants vacated his New Haven home. For several months, he took his meals in the Law School dining room, where he indefatigably debated the Vietnam war with all comers—morning, noon, and night. That much discourse with our students would have tried the patience of even those of us who agreed with them, but Gene seemed to relish these encounters. Should an American College of Heralds wish to design a coat of arms for Gene, I would suggest: On a campus, azure, a gothicized dovecote, surmounted by a Hawk Rampant, offering an olive branch to a flock of angry doves.

Back now to Gene’s ascension to the deanship in 1955. In his first report as dean, he called law “the universal social science.”¹⁶ Since Gene has always been more interested in seizing new territory than in colonizing a conquered area, this comment was probably intended not as a statement of what law is, but rather as a vision of what it should—and with

14. Rostow, *supra* note 12, at 223.

15. *Id.* at 224.

16. Rostow, *Law School Report of the Dean*, 52 BULL. YALE U. 2, 2 (1956).

help from the Yale Law School could—become. To convert this dream into reality, however, Gene needed more troops: the faculty he inherited from Dean Shulman consisted of only 23 members, and not all of them were interested in assaulting such high grounds. To take up the story from here, I pass the baton to Abe Goldstein, one of Gene's early recruits.