POWER AND POLICY IN QUEST OF LAW

Essays in Honor of
Eugene Victor Rostow

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The law according to Yale

Eugene Rostow's first words to me were in the form of a letter. The letter was written in the spring of 1965, in response to an article I had just published in the Harvard Law Review.[1] The subject of the article was school desegregation and in it I attacked the distinction between de facto and de jure segregation and argued for a constitutional duty to remedy racial imbalance in the public schools. In the first part of his letter Rostow generally embraced the argument that I was advancing. He was one of the first to raise his voice against *The Japanese Relocation Cases*[2] and his work had influenced my thinking.[3] The second part of his letter was critical and more puzzling.

The article was written in the early 1960s, while I was a student at the Harvard Law School. The nation was then being swept by the civil rights movement and the struggle for racial equality, but the intellectual milieu at Harvard was set by Herbert Wechsler's famous article on "neutral principles," in which he announced that *Brown v. Board of Education* was wrongly decided.[4] Wechsler taught at Columbia but his spirit filled the classrooms of Harvard and his views became associated with that school. The article appeared in the Harvard Law Review; it was first delivered as part of the prestigious Holmes lecture series at Harvard; and Wechsler was largely known to students from his collaboration with the dominant intellectual figure of Harvard at the time, Henry Hart. Within the academy it was left for Yale to defend *Brown* and Yale discharged that noble duty through the words of Charles Black[5] and Louis Pollak.[6] One could not help but be moved by the eloquence and logic of the Black and Pollak responses to Wechsler – to this day I can remember my experience in reading their articles for the first time – but working in the stacks of Langdell Hall in the early 1960s I nevertheless found it necessary to go back to Wechsler's article and once again prove that *Brown* was rightly decided – indeed compelled by "neutral principles." The point of my article was, after all, to move *Brown* from the South to the nation at large.

The second part of Rostow's letter was addressed to my discussion of Wechsler, and the criticism that Rostow voiced in it seemed peculiar, at least to a recent graduate of the Harvard Law School: He chided me for taking Wechsler's account of "neutral principles" so seriously. Rostow was not asking me to accept what Black and Pollak had said on faith – as I later came to learn, Gene loves nothing more than a debate – but he was expressing his pride

of place. He resented the fact that I let Harvard dictate the terms of the debate. He made allowances for my educational handicap (his familiar twinkle was there between the lines), but such allowances paled against the intense pride Eugene Rostow felt for Yale. The letter was written just as Rostow's ten year tenure as dean was drawing to a close. During that period the Yale Law School emerged as a great national institution, and in his criticism Rostow was affirming his belief in the preeminence of Yale and expressing his regret that I had not seen it that way – not yet anyway.

I

Legal education is probably the most successful form of graduate education in America. There is an excitement to legal education that is without parallel in the great graduate departments of the nation. Some of the excitement is no doubt due to a number of extrinsic factors: the jobs that will become available to our students, the unique and highly publicized pedagogic technique (in its *Paper Chase* form, the so-called Socratic method is practiced by very few at Yale), and the scintillating personalities of the faculty (no doubt found in abundance at Yale). I suspect, however, that the key to the success of legal education – not just at Yale but at all law schools – stems from the subject matter. Law is an unusual blend of the academic and the professional. Legal education requires that the insights of sociology, history, philosophy, economics and the other subjects considered in graduate school be brought to bear in a disciplined way on the concrete problems raised by the exercise of power by a professional group.

The subject of study at Yale is law, not political philosophy. Yale adamantly adheres to the view that law is a complicated blend of the academic and the professional, but seeks to forge the identity Rostow so celebrated by emphasizing the academic. Yale's preeminence stems from the fact that it is an academic law school. In describing Yale as an academic law school, I am not referring to the career patterns of our graduates. An enormously large number of the law teachers in America have come from Yale, and the Law School accepts a special responsibility in preparing people for a teaching career, but the would-be teachers represent a relatively small portion of the student body. The vast bulk of our graduates become practicing lawyers. For them an education in an academic law school consists not of teacher training, but developing a broad and critical perspective on the law – the kind of perspective we often associate with the academic.

The assumption of an academic law school is not one of nonengagement. We assume our students will spend their lives fully engaged in the process of exercising the power that will devolve on them through the law. But we also believe that lawyering takes many forms. Advocacy on behalf of a narrow set of interests – lawyering in the style of Perry Mason – is only one among many forms of engagement. Some of our graduates will be judges; some will be concerned with proposing and drafting legislation; some will be government lawyers, prosecuting cases on behalf of the United States or managing the vast prosecutorial agencies of the modern state; some will construct the great private enterprises and associations of the day; some will be engaged in

international trade and will be trying to secure world peace; some will staff and lead administrative agencies; some will be so-called "public interest" lawyers. In any of these endeavors a lawyer must be able to manipulate the levers of power, which are often shrouded in technical detail, but he or she must also be able to reflect upon the ends of the legal system and design organizational structures to fulfill those ends. Can it be any wonder then that our curriculum – to take a sampling from this year's catalogue – includes such courses as Tragic Choices, Federal Tax Policy, The Political Philosophy of Hannah Arendt, The Limits of Law as an Instrument of Social Control, Nuclear Arms Control, Theories of Contract, Immigration and National Purpose, Public Order of the World Community, Alternatives in Enterprise Organization, Psychoanalytic and Legal Perspectives on Attorney-Client Relations, Toxic Chemicals, and Myth, Law and History?

We are not unmindful of the advocacy role, but even here the academic perspective seems essential to a proper legal education. Advocacy is more than the mere manipulation of a set of technical rules and doctrines on behalf of certain interests. First, it is often necessary for the advocate to define and identify the client's interests, especially when the client turns out, as is usually the case with the graduates of Yale, to be a large-scale organization, such as a corporation or a union, or a social or political group. The lawyer must decide who speaks for the organization or the social group, and how the various conflicts of interests that divide the client are to be resolved. Second, effective advocacy requires an understanding of the purposes of the rules or doctrines the lawyer is seeking to invoke on behalf of his client (or to protect his client from). A lawyer cannot, for example, effectively represent a client in an antitrust case without fully understanding economic theory and the history of the Sherman Act and the politics of the 1890s. Third, the kind of advocacy society allows a lawyer is a limited one. Some of the limits on what a lawyer can do or say on behalf of a client are imposed by criminal statutes, liability rules, or professional canons; others by personal scruples; and still others by a true understanding of the purpose of the legal system and the role of the lawyer in that system. All of these limits vary from time to time, and from context to context; they cannot be understood without a regard for the teachings of moral philosophy, economics, sociology, history – and probably theology.

None of this is meant to obviate the need for training in the skills of advocacy. It would be a sad irony if the academic emphasis, which started as a way of broadening our perspective, became in its own peculiar way a source of narrowness. We do have a required first year course on procedure, to take the most obvious example (and the one closest to my heart).[7] We expect our students to master the technical rules of procedure, and for that purpose, we give them an opportunity to draft pleadings, work through discovery problems, write briefs, and argue cases. The point of Yale, however, is that although training in the skills of advocacy might be necessary, it is not sufficient, and even more, that it should not be the emphasis of a first-year procedure course. Education in the art of rulesmanship should be only one part of a larger, more intellectually ambitious course. That course might seek to compare the rules of various procedural systems, examine the relation between the substantive ends and procedural rules, and, on a more heretical note (given that Yale boasts Charles Clark as a former professor and dean),

ask whether the institutional arrangements that have produced the plethora of federal procedural rules since the 1930s are either wise or constitutional. The structure of law is embedded in the intricate details of professional rules, and a mastery of those details is essential for any general inquiry. An academic law school acknowleges this point, and at the same time insists – maybe "hopes" is the better word – that the more theoretical inquiries be at the center of the educational enterprise, and that the mastery of the specific be in the service of the general.

II

The quality of any academic institution ultimately depends on the depth and range of its faculty, who shape the curriculum of the school and are responsible for its scholarly output, the character of its library, and the kind of students that are attracted to the institution. It is the faculty who define the school. Eugene Rostow knew this, and by word and example identified faculty recruitment as the highest duty of the dean. During his tenure as dean, Rostow increased the size of the faculty by one third and in the late 1950s brought to the Law School a remarkable group of young lawyers, euphemistically known as "Rostow's Dozen." They built on the traditions of the School and helped create several of Yale's many Golden Ages (as Grant Gilmore saw it, the Golden Age at Yale always lies in its immediate past, or its immediate future – for Harvard it is always the present). These individuals and the successors they appointed are responsible for much of what is known as Yale today.

This is not, however, the whole story. The character of an institution is not reducible to the people who happen to populate it at any one point of time, or even across time. The institution also helps shape the character of the people. The faculty of any great law school in America consists of strong-minded and independent people (to engage in a gross understatement), but no one could deny the influence of Yale as an institution upon the faculty's research agenda, their course offerings, their methods of inquiry, and even what they finally come to say.

The institutional influence of which I speak is felt in many ways. One is through the transmission of its ideals. The aspirations of Yale for the academic perspective guides staffing policy; it helps determine who is invited to join the faculty and who accepts the invitation. It explains, for example, why the Yale faculty includes a large number of people who have completed graduate or professional training programs in economics, philosophy, political science, history, psychoanalysis and sociology – not, mind you, that any of us perceives the absence of such training as a limitation on our capacity to profess on those subjects (at the moment we all seem to be cultural anthropologists). The academic ideal is also reflected in the size of the faculty. Yale has one of the most favorable faculty-student ratios in the nation because instruction in an academic law school invariably includes the kind of writing and research that can take place only in an extensive seminar program. And the ideals of the institution define, in subtle and complex ways, the scholarly and pedagogic ambitions of the faculty. No one could be at Yale for more than a moment without knowing that he or she is expected to produce, not the practitioners'

digest, understood in the most respectful fashion, but a meditation on the purposes of the law and a magical synthesis – always slightly beyond our reach – of the technical and the theoretical.

The influence of the institution is also felt through certain institutional structures, which, as I suggested on another occasion altogether, make Yale something of an organized anarchy.[8] The anarchical element consists of the freedom – relinquished only at the rarest moments to the dean and others concerned about high matters of state such as accreditation – of each faculty member to decide what he or she teaches, how to teach the course and even when to teach. Faculty freedom is honored in most law schools in matters of scholarship, presumably out of a recognition of the individualistic aspects of creative work, but at Yale a similar freedom is extended to the classroom: We believe teaching makes the same demands on our creative capacities as scholarship and even more important, we believe in the essential unity of teaching and scholarship. The classroom is a workshop from which our scholarship springs and to which it returns.

There are, of course, costs to this freedom. There are virtually no classes offered late Friday afternoons. Last fall there were five seminars on judicial review (several called just that, and others hidden behind more Yale-sounding course titles such as "Constitutional Theory" and "Slavery, the Constitution and the Supreme Court"). There was no offering on patents. It is also difficult for a student to construct a program that cumulates knowledge, or that involves a sequence of courses leading to greater and greater proficiency in some particular subject.

Of these problems, overlap is of no concern to the faculty because it seems to be an issue of form rather than substance. The educational experience consists of the exchange of ideas between student and faculty, and the character and quality of that exchange depend on what each participant has to say. Every member of the faculty could teach a course on judicial review, and indeed teach the same cases and material, and yet, I can assure you, there would be no overlap. The issue of gaps, on the other hand, is more substantial, especially if the concern be with disciplines (e.g. statistics), not just areas of the law, and we look to the future and consider the needs of a lawyer who will reach the peak of his or her career twenty-five years from now. Subjects which in all rights should be taught will not appear in the Yale catalog. Gaps will exist. The question is what should be done about them.

The anarchy declares that it would make no sense to abandon our instructional freedom and allow the dean or even worse, some committee, to assign the faculty to teach particular courses; such an arrangement would require a collective definition of the gaps and that is an almost impossible task. Each of us has very strong views as to what is missing from the curriculum. Such an arrangement would also rely on reluctant (and maybe unqualified) recruits to fill gaps and thereby ignore the subtle and somewhat fragile dynamic between student, teacher and subject matter that is at the core of effective teaching. Students learn from the love a teacher brings to his or her subject and the kind of curiosity that love engenders. The solution to the problem of gaps, the anarchy insists, lies therefore not in the surrender of our instructional freedom to some central authority, but in a recognition by each faculty member of a sense of responsibility for the overall education of our

students and in the maintenance of a rich and diverse faculty, knowing full well that defining the desired diversity will be almost as problematic as identifying particular gaps, and that the faculty will never be rich enough and large enough to teach all that must be taught.

With gaps, the root of the problem is not anarchy, but the limitation on our resources and the infinitude of our ignorance. In the case of sequencing, the freedom of the faculty to decide what to teach and how to teach plays a more decisive role. In Rostow's day the desire to cumulate knowledge and develop a measure of expertise led to the Divisional Program, which sought to organize the faculty into mini-departments that would be responsible for the sequences of courses in various fields.[9] But even that minimal structure proved too intrusive for the faculty, and all that remains of the Divisional Program today is the requirement that every student do a number of papers prior to graduation, including one that involves so substantial a measure of faculty supervision and student research as to be virtually tantamount to a masters thesis. The emphasis on writing allows the student to acquire the depth promised by an institutionally imposed sequence of courses and, at the same time, it acknowledges the individualism that inheres in the creative processes that lie at the core of both teaching and learning.

Yale is not, it must be admitted, all anarchy. There are institutional structures that do not emphasize the individual but rather the communal nature of an educational enterprise. I am not referring to the obligation to report our offerings to the Registrar, nor the occasional committee meeting, but rather those occasions that gather the faculty for discussions – morning coffee; lunch; and to take an example that requires even greater institutional support, faculty workshops. During Rostow's deanship, the principal faculty workshop was called the Non-Hohfeld Society. In the mid-1970s the same impulse took a more somber turn and we established the Legal Theory Workshop. It survives to this day and has been followed by other schools throughout the nation. Within the last year or two a new wave of workshops has also arisen at Yale – one on civil liability; another devoted exclusively to the presentation of work of the faculty. And plans have just been formulated for a faculty-edited journal principally devoted to the application of economic and organizational theory to legal problems (We are still squabbling over the title).

Serious intellectual discussions among colleagues are difficult to sustain. We are all very busy, and the individualism that we celebrate in our academic endeavors necessarily draws us off in many different directions, both in terms of subject matter and methods of inquiry. Sometimes the only common denominator is the daily newspaper. The ostensible function of an institution like the Legal Theory Workshop is to provide scholars throughout the nation with a forum to present their work in progress, with an eye toward revision and further improvement, but its true function lies in less exalted domains – to spur discussions among ourselves. I am not just referring to the two hours every other Thursday night during which the workshop formally meets – it is often impossible for our invited guest to get in a word edgewise – but to the debates among the faculty over the paper that inevitably occurs in the days preceding and following the workshop. The paper provides the common text that is necessary to provoke and unify serious discussion among colleagues – it is a

welcome substitute for *The New York Times*, and even more typically, for Masterpiece Theatre.

Talk about ideas relieves some of the loneliness inherent in academic life. It is fun, I am duty bound to admit. Talk about ideas is also a form of continuing education, a source of intellectual renewal and growth, in which we are forced to reexamine our premises; learn of new developments in other fields, and even sometimes in our own; and combat the narrowness and staleness that often inflict academic inquiry. For most, our undergraduate education and professional training ended some twenty or thirty years ago. We thus confront a continual danger of becoming obsolete, and as though that were not enough, we are often tempted to narrow our focus in order to achieve a measure of expertise in an increasingly complex world. It therefore seems imperative, if we are to do justice to our fields and to ourselves, to find ways to broaden our horizons and renew our critical capacities.

Reading helps. So does the constant flux into our classrooms of the young. Some of us even take courses elsewhere in the university. It seems to me, however, that a vital component of the process of renewal and growth consists of the discussion that goes on at workshops, or at lunch, or in the dingy corridors of the Sterling Law Building. As a form of continuing education for educators such discussions seem compelling: They honor the collegial character of the faculty and convey their lessons with an immediacy and a vibrancy that can stir even those who sometimes purport to speak with authority. Serious discussions among colleagues emphasize the "democratic character" of the educational process, to borrow an idea Gene once formulated in another context. They promise to transform the entire Law School into a "vital national seminar."[10]

III

Somewhere in St. Augustine there is a line about the passion of a convert. It always appears greater, he thought, than that of someone born into the faith. Eugene Rostow has been at the Yale Law School all his life, as student, professor and dean, but I did not enter the fold until the mid-1970s, after a Harvard education and after I left the University of Chicago faculty to join Yale. This difference in our careers means that the Yale I know first hand and about which I have spoken encompasses but a short period of Gene's association with the institution. It means that I largely had to discover for myself, without Rostow's tutelage, what legal education means at Yale, for by the mid-1970s Gene turned away from the internal affairs of the Law School, as he was more than entitled to do, and adressed himself to the politics of another sphere altogether. It also means, if St. Augustine is to be believed, that I am moved with a passion and devotion to Yale that might even surpass Gene's (as though that were possible). This passion is, I realize, as likely to blind as to inspire, and yet I must say that it at long last makes Gene's first critical words entirely understandable.

NOTES

1. Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 *Harv. L. Rev.* 564 (1965). For more on the origins of that article see 14 *Current Contents* 20 (1982).
2. Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944).
3. Rostow, The Japanese American Cases – A Disaster, 54 *Yale L.J.* 489 (1945).
4. Wechsler, Toward Neutral Principles of Constitutional Law, 73 *Harv. L. Rev.* 1 (1959).
5. Black, The Lawfulness of the Segregation Decisions, 69 *Yale L.J.* 421 (1960).
6. Pollak, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 *U. Pa. L. Rev.* 1 (1959). Jan Deutsch's article on the subject had not yet appeared. *See* Deutsch, Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science, 20 *Stan. L. Rev.* 169 (1968).
7. *See* R.M. Cover & O.M. Fiss, *The Structure of Procedure* (1979).
8. Making Coffee and Other Duties of Citizenship, 91 *Yale L.J.* 224 (1982).
9. *See* Freilich, The Divisional Program at Yale: An Experiment for Legal Education in Depth, 21 *Journal of Legal Education* 443 (1969).
10. Rostow, The Democratic Character of Judicial Review, 6 *Harv. L. Rev.* 193 (1952). In its original context Gene used the educational ideal, as he saw it, to define and defend the political: "The discussion of problems and the declaration of broad principles by the Courts is a vital element in the community experience through which American policy is made. The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar." (p. 208).