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Thomas Irwin Emerson

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The passage of time and the passing of a milestone cannot fail to stir some sober thoughts. The imminent retirement of Tom Emerson, still prolific and engaged, is no exception. It is a sad occasion for the future students of Yale Law School, who will not be exposed to this intelligent and decent man. It must also be sad for his colleagues, who will miss his principled influence as a person whose roots at the Law School go back to the 1920's and whose effect on the law is still unfolding.

The Yale Law School has been the focal point of Emerson's life. As a student he was broadly influenced by Hutchins, Clark, Sturges, Douglas, Corbin, and above all Professor Lee Tulin, who shocked him out of what he later called "fuzzy complacent thinking."¹ Emerson became analytical and liberal and served as Editor-in-Chief of the *Law Journal*. After a brief stint in private practice and distinguished service in the New Deal, he returned to Yale in 1946 and now rounds out 30 years of teaching.

I first heard of Tom Emerson when I was a student at Harvard Law School in 1952, the year that David Haber and he published the first edition of *Political and Civil Rights in the United States*.² It was not an auspicious year for the subject matter of the book. It was a time when Emerson, in the interest of full disclosure, would describe his background to his students and state that he "probably could not gain government security clearance today."³

There is no need to recount in detail the extraordinary scholarly contribution that Emerson has made. In the words of Dean Louis Pollak, his former student and colleague, *Political and Civil Rights*

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1. Waltuch, *Thomas I. Emerson*, 3 YALE L. REP. NO. 1, at 32, 34 (1957).

2. T. EMERSON & D. HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* (1952).

3. Waltuch, *supra* note 1, at 33.

and *The System of Freedom of Expression*⁴ "are more than merely authoritative: they are works which reordered the line of inquiry for those who have come after."⁵ Higher praise for a scholar there cannot be. *The System* is a deceptive book because it is so straightforward and unspectacular in style. There are few metaphorical flourishes and the analysis proceeds in an orderly, almost inevitable way. But when one reads it for the help it can provide in tackling an elusive problem, one soon discovers unsuspected depths. It is a commonplace among teachers of constitutional law that free expression is a difficult area to teach. It is even more difficult to write about. Emerson has done so with a richness that places *The System* beside Chafee's great work⁶ as a twin tower of First Amendment scholarship.

I have had opportunity to observe Emerson at close range. I am still in awe of his incredible diligence, his painstaking and systematic research, and his willingness to examine all sides of a question dispassionately without compromising his personal values. As the junior author of the third edition of *Political and Civil Rights*,⁷ I often marveled that it was he who took on the largest load, who was always prepared to do a little extra, and who, again and again, met impossible deadlines calmly and efficiently. The novelist Joseph Conrad has well expressed Emerson's qualities as a scholar:

[T]he moral side of an industry . . . is the attainment and preservation of the highest possible skill on the part of the craftsmen. Such skill, the skill of technique, is more than honesty; it is something wider, embracing honesty and grace and rule in an elevated and clear sentiment⁸

Do not overlook the word "moral." I can think of no law teacher whose life and work more plainly reflect ethical ideals. Perhaps the most dramatic evidence was his refusal to withdraw from a leadership position in the National Lawyer's Guild after that organization was attacked during the McCarthy period as a Communist front. Or per-

4. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

5. Pollak, *Thomas I. Emerson, Lawyer and Scholar: Ipse Custodiet Custodes*, 84 *YALE L.J.* 638, 638 (1975).

6. Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941).

7. T. EMERSON, D. HABER & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* (3d ed. 1967). Volume 1 of the fourth edition of this work has recently been published. The authors dedicate it "[t]o Professor Thomas I. Emerson who pioneered the scholarly examination of these problems and whose devotion to civil liberty has never flagged." 1 N. DORSEN, P. BENDER & B. NEUBORNE, *EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* (4th ed. 1976).

8. J. CONRAD, *THE MIRROR OF THE SEA* 36-37 (1906).

haps it was his break in 1950 with the Progressive Party over its stand on Korea; at the time he said, "I am a man without a party."⁹

Emerson also has courageously confronted the systematic abuse of governmental power, particularly through improper investigative techniques. In 1949, he and David Helfeld published a long and biting article criticizing the Federal Loyalty Program and the FBI.¹⁰ J. Edgar Hoover responded by stating that the article contained "inaccuracies, distortions, and misstatements"¹¹ concerning the FBI, and that its opinions were "most frequently expressed on the pages of *The Daily Worker*."¹² 1948 and 1949 were not years in which one lightly took on J. Edgar Hoover. A generation later, history was repeated. Emerson prepared two of the major papers at the 1971 Princeton conference on the FBI, discussing among other things constitutional abuses that the Bureau had perpetuated.¹³ Director Hoover declined an invitation to attend, stating that some of the pre-conference statements of the participants were "obviously partisan" and that the "FBI is a lawfully composed and operated public agency."¹⁴ We now know that the Princeton conference aired merely a fraction of the lawlessness engaged in by the FBI and its late Director.¹⁵ Emerson, with courage as well as prescience, anticipated the truth by decades.

It would be like plucking stars to discuss all the constitutional and public issues that Emerson's craft has influenced. He can take much credit both as scholar and lawyer for the development of a right to privacy, grounded in the Bill of Rights. Dean Pollak has described¹⁶ how the first edition of *Political and Civil Rights* anticipated the Supreme Court's decision in *Griswold v. Connecticut*,¹⁷ and how Emerson the lawyer, carefully sorting out the theoretical complexities and tactical alternatives, briefed and argued the case in the Supreme

9. Waltuch, *supra* note 1, at 33. Emerson had been National Secretary of the Progressive Party, which supported Henry Wallace for President in 1948. He quit when the Party executive committee took the position that South Korea was the aggressor in the Korean War. Henry Wallace resigned six days after Emerson.

10. Emerson & Helfeld, *Loyalty Among Government Employees*, 58 *YALE L.J.* 1 (1948).

11. Hoover, *A Comment on the Article "Loyalty Among Government Employees,"* 53 *YALE L.J.* 401, 401 (1949). This led to a *Reply by the Authors. Id.* at 412.

12. Hoover, *supra* note 11, at 410.

13. Emerson, *The FBI as a Political Police*, in *INVESTIGATING THE FBI* 239 (P. Watters & S. Gillers eds. 1973); Emerson, *The FBI and the Bill of Rights*, in *id.* at 412.

14. Letter from J. Edgar Hoover to Duane Lockard (Oct. 7, 1971), *reprinted in* *INVESTIGATING THE FBI, supra* note 13, at 466, 475.

15. *See, e.g.,* *THE ABUSES OF THE INTELLIGENCE AGENCIES* (J. Berman & M. Halperin eds. 1975); *COINTELPRO: THE FBI'S SECRET WAR ON POLITICAL FREEDOM* (C. Perkus ed. 1975); *N.Y. Times*, Feb. 23, 1975, at 1, col. 2 (Attorney General Levi details the secret files of derogatory information kept by J. Edgar Hoover on Presidents, members of Congress, federal officials, and others "who simply tried to oppose him").

16. Pollak, *supra* note 5, at 640-53.

17. 381 U.S. 479 (1965).

Court. More recently, Emerson has been a leader in providing the intellectual underpinnings for the still-pending Equal Rights Amendment.¹⁸ He was proud, though slightly embarrassed, to be the only man invited to sit on the dais at a Washington dinner celebrating congressional passage of the Amendment.

There is no way to do justice to a man so deep and humane as Tom Emerson. He is as addicted to concepts of fairness and equality as he was 45 years ago. He has never wavered; he has never been diminished; he has never permitted transitory events to affect his philosophy or his actions. Yet he has managed to retain a soft and conservative style. I have never heard Emerson say a personally unkind word about anyone, and I have never heard anyone who knew him disparage his qualities as a man. I have never seen him trim a position to suit the fashion, the company, or his career. I have never heard him utter a syllable that was designed to promote or publicize himself. I have never heard him raise his voice in anger. He is no ordinary professor of law.

These thoughts prompt me to suggest, even as we reluctantly witness Professor Emerson's retirement, that the occasion is not altogether sad for lovers of people and lovers of liberty.

18. See Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971); Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 225 (1971).

Writings of Thomas Irwin Emerson

Writings of Thomas I. Emerson

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