

In Memory of Tom Emerson

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Tom Emerson was, without question, the leading civil liberties scholar of his generation. Indeed, this understates his special contribution to the law and the legal community: Tom may have been the first law professor in the country to combine scholarship with Supreme Court litigation, congressional appearances, and organizational leadership in a comprehensive effort to further the Bill of Rights. In recognition of this record, the American Civil Liberties Union honored Tom in 1983 by awarding him the organization's first Medal of Liberty for "distinguished lifetime service to the cause of civil liberties." But Tom Emerson was not always admired for his efforts; early in his career, Tom found himself a persistent voice of dissent against a variety of government invasions of individual liberty.

Above all, Tom Emerson was, in the words of Justice Douglas, "our leading First Amendment scholar."¹ He wrote searchingly on almost every aspect of the subject,² fitting each piece into an overall "system"³ that has yet to be matched by First Amendment theorists in its comprehensiveness and analytical power. He explored such issues as the denial of benefits and jobs to persons because of their opinions, the subversion of free expression by the FBI and the armed forces, the misuse of the investigative power of Congress, and the regulation of students' rights. Dean Mark Yudof of the University of Texas Law School, who wrote what was to become the foremost work on government expression,⁴ related that when he began his research, Emerson was the only scholar to have addressed the subject. In a compliment that any author would cherish, Dean Yudof stated that Tom had provided "the rich topsoil in which his successors would attempt to grow more elaborate theories of government expression in a democratic order."⁵ A similar observation was made by Judge Louis Pollak when he wrote that Emerson's works "are more than merely authoritative: they are works which reordered the lines of inquiry for those who

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1. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 151 (1973) (Douglas, J., concurring).

2. See *Writings of Thomas I. Emerson*, 101 YALE L.J. 327 (1991).

3. Tom entitled his major work *The System of Freedom of Expression*.

4. See MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS* (1983).

5. Mark G. Yudof, *Personal Speech and Government Expression*, 38 CASE W. RES. L. REV. 671, 673 (1988).

have come after.”⁶ As I recently commented, whatever the fate of Emerson’s opinions on particular First Amendment issues, his work will live on because of his masterful exposition of the underlying reasons to protect expression, the “intensely practical” nature of his analysis, and his imaginative search for ways “to immunize as much speech as possible from government restrictions”⁷

But Tom did not confine his energy and scholarship to the First Amendment. His writings and other activities touch on almost every issue of individual liberty—contraception and abortion, academic freedom, racial and sexual discrimination, voting rights, freedom of the press, legislative reapportionment, the intelligence community, and labor policy, among others. Often Tom tackled the most controversial questions. For example, soon after he began teaching law, he testified against the regulation of “communist” speech before the House Committee on Un-American Activities⁸ and joined the Brief of the Committee of Law Teachers Against Segregation in Legal Education in a pre-*Brown* desegregation case.⁹ He was especially determined to gain for women the rights and privileges to which they are entitled, and he was deeply moved when he was the only man invited to sit on the dais at a Washington dinner celebrating congressional passage of the Equal Rights Amendment in 1972.¹⁰

In my eyes, perhaps his finest hours came early in his academic career. In 1948, Tom and David Helfeld published a penetrating article criticizing the Federal Loyalty Program and the FBI.¹¹ Hoover responded harshly, stating that the article contained “inaccuracies, distortions, and misstatements [concerning] the FBI,” and that the article’s opinions were “most frequently expressed on the pages of *The Daily Worker*.”¹² Those were not years in which one lightly took on J. Edgar Hoover. At about the same time, Tom was the pivotal force that saved the National Lawyers Guild from extinction under the bludgeons of

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

7. Norman Dorsen, *Commentary on Thomas I. Emerson, Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963), in Fred R. Shapiro, *The Most-Cited Articles from The Yale Law Journal*, 100 YALE L.J. 1449, 1476, 1477 (1991).

8. *Legislation to Outlaw Certain Un-American and Subversive Activities: Hearings on H.R. 3903 and H.R. 7595 Before the House Comm. on Un-American Activities*, 81st Cong., 2d Sess. 2252 (1950).

9. Brief for Committee of Law Teachers Against Segregation in Legal Education, *Sweatt v. Painter*, 338 U.S. 629 (1950) (No. 49-44), reprinted in 34 MINN. L. REV. 289 (1950). Also signing the brief were John P. Frank, Alexander Frey, Erwin N. Griswold, Robert Hale, Harold Havighurst, and Edward Levi.

10. The honor was based on his victorious argument before the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and two influential articles supporting the Amendment.

11. Thomas I. Emerson & David M. Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1 (1948).

12. J. Edgar Hoover, *A Comment on the Article “Loyalty Among Government Employees,”* 58 YALE L.J. 401, 401, 410 (1949). This led to a reply by the authors, Thomas I. Emerson & David M. Helfeld, *Reply by the Authors*, 58 YALE L.J. 412 (1949).

McCarthyism.¹³ His behavior in these and other periods of stress¹⁴ was almost too native to his character to be called courageous.

Whatever the issue and whatever the forum, Tom's work throughout his life exhibited not only intellectual power but painstaking craft. As much as anyone's, his career demonstrates that there is no war between the creation of a soaring idea—much less “justice and decency”¹⁵—and the less glamorous task of domesticating the thought in the sentences and pages of books, articles, briefs, or testimony. So too with his teaching. As Judge Patricia Wald, one of his early students, said:

Tom Emerson is a stubborn educator. His nemesis is intellectual sloth. The rigor he imposes upon his own thought compels his students, his readers, his allies and, ultimately his opponents, to toe the same mark. Any student who thought that the way to Tom's heart and grading book was simply to recite liberal ideology, learned differently fast.¹⁶

As a human being, no less than as a scholar, teacher, and activist, Tom was a paragon. An English writer, in describing someone in a novel, used words that capture Tom's character: “the best and firmest of friends, that rarest of gems in the seams of humanity: a genuinely good man. Never down-hearted, never reproachful, never less that those who know him hope to find him He faces all the missiles of life with cheerful defiance.”¹⁷ As for myself, I cannot improve on what I wrote to celebrate Tom's career when he retired from active teaching at Yale Law School in 1976:

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

13. See Victor Rabinowitz, *The National Lawyers Guild: Thomas Emerson and the Struggle for Survival*, 38 CASE W. RES. L. REV. 608 (1988). Among the other organizations to which Tom devoted himself were the American Civil Liberties Union, the First Amendment Foundation, the National Committee Against Repressive Legislation, the National Emergency Civil Liberties Committee, and the Society of American Law Teachers.

14. In addition to the controversies surrounding McCarthyism and the FBI, he participated in major constitutional litigation, including the Pentagon Papers case, *New York Times Co. v. United States*, 403 U.S. 713 (1971), and the Nixon tapes case, *United States v. Nixon*, 418 U.S. 683 (1974).

15. See Guido Calabresi, *Tom Emerson: Law in the Service of Justice*, 38 CASE W. RES. L. REV. 477, 477 (1980).

16. Patricia M. Wald, *Thomas I. Emerson: A Dedication*, 38 CASE W. RES. L. REV. xv, xv (1980).

17. ROBERT GODDARD, TAKE NO FAREWELL 54 (1991).

have never heard him raise his voice in anger. He is no ordinary professor of law.¹⁸

In his last years, Tom was dismayed by the state of public affairs, and civil liberties in particular. His major concern was not the virtual destruction of the courts as “palladiums of liberty.”¹⁹ However steep the recent decline, Tom took comfort in the extraordinary progress that had been made in the protection of individual liberties since he entered law school in 1928. As of that year, the Supreme Court had upheld but a single free speech claim, had rejected all but a very few equal protection claims of racial minorities, had rejected almost all pleas under the Due Process Clause from persons accused of crime, and would have regarded the idea of protecting sexual privacy under the Constitution as nonsense.

What most distressed Tom was the evidence that an increasing number of Americans had become uninterested or unsympathetic to dissenters, poor people, and racial minorities—indeed to the concerns of others generally. Religious and ethnic divisions leading to concentration on parochial goals and to intolerance, if not so severe as in some other parts of the world, are on the rise in American society. The undisguised greed and rampant corruption of the 1980's characterize a society indifferent to altruism or countermajoritarian concerns. These trends give credibility to the intermittent opinion polls revealing that contemporary Americans would not vote for the Bill of Rights if the issue were presented today—polls that used to be cited almost as a stunt, but no longer.

In such circumstances, leadership is essential to galvanize public opinion in favor of individual rights and to ensure that members of the judiciary—whether Republican or Democrat, conservative or liberal—are committed to the preservation and expansion of the liberties that have come to distinguish this country. But the opposite has been our fate. For almost a quarter century, national administrations have been at best lukewarm and at worst dead to the principles to which Tom Emerson dedicated his life.²⁰

Thus, at a time in which Tom should have been able to reflect on the triumph of his vision, he was dismayed to find himself, once again, a persistent voice of dissent. Tom's leadership and dedication in these troubling times will be sorely missed. Tom Emerson will be sorely missed.

18. Norman Dorsen, *Thomas Irwin Emerson*, 85 YALE L.J. 463, 466 (1976).

19. *Illinois v. Allen*, 397 U.S. 337, 346 (1970) (Black, J.).

20. Sometimes short, informal writings, provide special insight into a person. For two pieces that reveal much about Tom, see Thomas I. Emerson, *Fowler Vincent Harper*, 74 YALE L.J. 601 (1965); Thomas I. Emerson, *Rights of Minorities and Children*, 53 N.Y.U. L. REV. 1240 (1978).