

CLYDE SUMMERS: THE CONSUMMATE SCHOLAR

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Teaching and scholarship in the field known as Labor Law have focused upon the right of workers to unionize and the adjustment of conflict between labor and management through collective bargaining. The field has come to embrace principally federal legislation dating back to the 1930s and 1940s, with the basic Supreme Court decisions dating from the 1940s and 1950s. The legal scholars who rose to prominence in the 1950s and 1960s contributed seminal and influential articles on such subjects as union organizing, strikes and lockouts, bargaining in good faith, the enforcement of labor agreements, and the operations of the National Labor Relations Board. Clyde Summers is one of those prominent legal scholars. His first published article, dealing with the NLRB, was written in 1943!

But Clyde, characteristically cutting new trails, devoted the bulk of his scholarly energies between 1945 and 1960 to the relationship between the individual worker and his union. He was a pioneer in his early and comprehensive writings on the state laws governing union membership, union elections, and union discipline. These writings proved to be enormously influential in shaping the attitude of courts. So too have been his writings on the Landrum-Griffin Act, which brought these issues of union democracy and internal union affairs within the realm of federal law.

All of Clyde's articles in this "early" period bear the Summers trademark: they examine a pressing and complex problem in employment law, they provide a comprehensive and insightful analytic framework, they are scrupulously fair and exhaustive in their treatment of legal materials, and they are fueled by a commitment to just and compassionate treatment for working men and women.

Had Clyde's labor law writings ceased in 1960, he would surely be ranked among the giants who were shaping the field at that time, among them Archibald Cox, Benjamin Aaron, Bernard Meltzer, and Harry Shulman. But the past thirty years have seen Clyde pursue at least a half-dozen other innovative directions for the study of labor law. Surely no one could dispute that Clyde has had no peer in influencing such a large number of significant areas within the field.

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Clyde's concern for the rights of the individual within the union has carried over to his writings on individual rights under the collective bargaining agreement and on the duty of fair representation. It was Clyde, for example, who argued more forcefully than anyone else in the 1960s and early 1970s that individual workers derived from the collective agreement rights that were directly enforceable by the individual in court actions, whether or not the union was prepared to advocate those rights. When the Supreme Court declined to endorse that view as fully as Clyde would have urged, he proceeded to make a compelling case, in provocative articles between 1975 and 1985, that the union—through its duty of fair representation—remains obliged to afford protection to a wide variety of individual contract claims. Clyde's articles on that duty, which subtly explore the triangular relationship among the contract, the union and the employee, remain classics on the subject.

The same is true of Clyde's articles on labor relations in the public sector. The 1960s witnessed the rapid extension, to federal employees and state and local employees, of many of the guarantees to unionize and bargain that had previously obtained only in the private sector. This emergence of public-sector labor law was reflected in scholarly writing in the journals, and in the development of new teaching materials and courses in the law schools. Most of these writings and materials focused upon the extent to which public-sector and private-sector labor law were different, in their premises and in the developing legal doctrines. Clyde's writings did more than explore these differences. They introduced an original perspective based on Clyde's firm grounding in the law of state and local government. He saw that public-sector labor law could be especially well understood by viewing unionization and collective bargaining as elements in a larger process of decisionmaking in a world of politics and public accountability.

Even in the more familiar area of private-sector labor law, Clyde's work is distinguished only in part by his masterful treatment of the governing legal doctrines. Perhaps more important and lasting has been his emphasis upon labor law as a case study in the operations of legal institutions. Never much below the surface is his persistent concern with issues of institutional competence and fair process, with questions of the respective roles of legislature, administrative agency, and courts in fashioning substantive industrial relations policy. Clyde's innovative and probing casebook—coauthored with his Yale colleague Harry Wellington and more recently with

Alan Hyde of Rutgers—persistently forces students to grapple with these more enduring institutional questions.

Another path that Clyde has pursued—not quite alone in the United States, but nearly so—is that of comparative labor law. For nearly thirty years, Clyde has studied and written about European labor law, particularly the law of Sweden and Germany. These writings have a way of “opening the mind” of the reader to new perspectives and alternative solutions for fundamental questions of employment law.

In this country, for example, we take for granted the doctrine of exclusive representation, which gives sole bargaining rights to the union selected by a majority of workers in an appropriate bargaining unit. We also take for granted the sharp division between workplace decisions in which unions are thought properly to have a voice and those subjects—typically, such “large” ones as relocations, plant closings and business terminations—on which management has exclusive decisionmaking power. Comparative labor law compels us to reexamine these fundamental assumptions and to consider the adaptability of foreign solutions to our own economic, social and political conditions. A particularly striking example is Clyde’s work on what is known as co-determination or worker participation in major business decisions as practiced in such countries as West Germany. Of course, the rapidly growing linkages between the United States economy and workforce and those of other nations make it all the more imperative to explore issues of comparative labor law. Clyde’s writings—and his coeditorship of the *Comparative Labor Law Journal* with Janice Bellace of the University of Pennsylvania—have helped to illuminate our understanding of foreign law and thus of our own.

Yet another area of labor law in which Clyde has been the standard-bearer concerns the non-union worker. As the non-union sector of the United States workforce has grown over the past twenty years, workers have turned to the courts and to state and federal legislatures to seek greater economic benefits as well as protections against unjust treatment in the workplace. Nearly fifteen years ago, Clyde wrote a classic article on unjust dismissal and proposed the enactment of protective legislation. He convincingly discredited the theory of employment at will, and used examples from foreign law to highlight the failure of U.S. law, unique within the industrialized world, to assure fair treatment to discharged workers. This article has also been enormously influential—in the scholarly literature, in the courts, and even now in the halls of state legislatures. At the

time, Clyde was almost alone in identifying the ailment and having the vision to propose a feasible cure. Since he wrote, there has been perhaps no single area of the common law that has developed so explosively—in much the direction that Clyde had urged—as that of protection of the non-union worker against wrongful discharge.

Over the past half dozen years, Clyde has come to see the need for the coherent law school curriculum to include courses that deal with worker's rights in the non-union workplace. Again, Clyde's pioneering efforts have borne fruit in an important and seminal set of teaching materials. In late 1989, he along with Matthew Finkin and Alvin Goldman published a new casebook on that subject. The materials are challenging and wide-ranging, as were Clyde's earliest writings nearly fifty years ago!

What I have already recounted might have been unearthed by anyone with a scholarly index or a handy research computer. What is perhaps not so widely known is the fact that Clyde has managed to produce all of this scholarship while at the same time consistently and voluntarily teaching a course overload, co-editing the *Comparative Labor Law Journal*, devoting countless hours to our graduate program and particularly to LL.M and S.J.D. candidates requiring extensive supervision in their work on labor law topics, contributing his wisdom to the deliberations of important committees and at faculty meetings, serving as a highly respected arbitrator, tending the hearth in his country homes, and being always available to yours truly and others on this faculty as an endlessly patient, fully informed, wise and witty colleague. For fifteen years, Clyde has made an incalculable contribution to the life of the University of Pennsylvania Law School. I shall close this appreciation by borrowing from a recent book that I dedicated to Clyde; I referred to him there as "Exemplary Scholar, Teacher and Colleague—Whose Probing, Farsighted, Constructive and Compassionate Writings Provide a Model for All in the Field of Labor Law."