

CLYDE SUMMERS AND THE IDEAL OF THE ACTIVIST SCHOLAR

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Clyde Summers' retirement from the University of Pennsylvania Law School is just the sort of formal change of status, unaccompanied by real effects, that Clyde would normally dismiss as unworthy of analysis.¹ Clyde still teaches, writes prolifically, and addresses the major labor law problems of the day.

However, Clyde's impact on the law has been sufficiently extraordinary as to be worth celebrating on whatever flimsy excuse. These remarks aim to summarize Clyde's enduring contributions to American life and law; to survey the constant values and methods that have guided Clyde's scholarship over the years; and to see to what extent Clyde's impact may derive from his values and methods.

I. CLYDE SUMMERS' CONTRIBUTIONS TO AMERICAN LAW

Clyde Summers has had his greatest impact on five areas of American law. The first was as a litigant advancing the freedom of religious exercise as against governmental orthodoxy. Three others came through his highly influential scholarship advocating democratic rights for union members; protection of employees against unjust discharge; and collective bargaining for public employees. Finally, Clyde's one article on contract law may justly claim parenthood over what has become known as "relational" contract law.

A. *Religious Liberty; Admission to Practice Law*

Clyde's earliest significant contribution to American law came neither as scholar nor counsel but as litigant. Clyde was a conscientious objector, on religious grounds, during World War II. Solely for that reason, he was denied admission to practice law in Illinois.

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¹ See, e.g., Summers, *The Right to Join a Union*, 47 COLUM. L. REV. 33, 33 (1947) (adequate discussion must include "more than a mere analysis of court decisions, for the legal problems involved can not be divorced from their social and economic context").

He pursued his claim to the United States Supreme Court, which by a 5-4 vote upheld the exclusion.²

While the lawsuit did not succeed in getting Clyde or other conscientious objectors admitted to practice law, it contributed to the growth of American law in at least three significant ways. First, Justice Black wrote a dissenting opinion, stressing the importance of the right to practice one's profession and the constitutional necessity that this privilege be denied only "for what they do or fail to do and not for what they think and believe."³ Justice Black returned to these themes in later opinions in which he wrote on behalf of majorities or pluralities, ordering states to admit those excluded from the practice of law.⁴ Second, Clyde's case made jurisdictional law, by permitting Supreme Court review of constitutional defects, even in state court decisions styled "informal" and "non-judicial."⁵

Third, and to my mind most importantly, Justice Black's dissent preserved for posterity the idealistic voice of the young Clyde Summers.⁶ Some may feel we do Clyde no service by recalling these youthful enthusiasms. To be sure, Clyde has written more tempered, legalistic statements. He has even stirred up a few lawsuits in his time.⁷ Yet what a wonderful treasure is this early statement of his

² See *In re Summers*, 325 U.S. 561 (1945).

³ *Id.* at 578 (Black, J., dissenting).

⁴ See, e.g., *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) (plurality opinion); *Application of Stolar*, 401 U.S. 23 (1971) (plurality opinion). While *In re Summers* has never been overruled, it is quite difficult to reconcile with the aforementioned cases, particularly *Schwartz*.

⁵ Clyde's application was denied by a letter over the signature of the Chief Justice of Illinois and sent to the Secretary of the Committee on Characters and Fitness. See *In re Summers*, 325 U.S. at 564 n.4. While the substantive holdings of *In re Summers* may be bad, see *supra* note 4, the jurisdictional holding is quite well-established and frequently cited. See, e.g., C. WRIGHT, *THE LAW OF FEDERAL COURTS* 739 & n.22 (4th Ed. 1983).

⁶ Justice Black noted of Clyde Summers that:

Because he thinks that "Lawsuits do not bring love and brotherliness, they just create antagonisms," he would, as a lawyer, exert himself to adjust controversies out of court, but would vigorously press his client's cause in court if efforts to adjust failed. Explaining to his examiners some of the reasons why he wanted to be a lawyer, he told them: "I think there is a lot of work to be done in the law . . . I think the law has a place to see to it that every man has a chance to eat and a chance to live equally. I think the law has a place where people can go and get justice done for themselves without paying too much, for the bulk of people that are too poor."

In re Summers, 325 U.S. at 574 (Black, J., dissenting).

⁷ The net effect of Clyde's efforts on behalf of union democracy leading to the enactment of the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act (LMRDA), Pub. L. No. 86-257, § 2, 73 Stat. 519 (1959) (codified as amended at

ideals, for who can deny that its fierce heat lends light and warmth to the later works of his career?

B. *Union Democracy Law*

It is possible that the United States Congress might have enacted union democracy law without Clyde Summers, but it is certain that, had it done so, the results would hardly resemble the law we have.⁸ The corruption and abuse of power revealed in the McClellan hearings might have called for reporting and disclosure, as the eventual statute is named; or government audits and occasional receivership; or legislated responsiveness on the model of state corporation statutes; or detailed administrative regulation. Instead, the statute called for union democracy: freedom of speech and assembly for union members; equal rights to participate in union governance; due process in union discipline; mandatory election of union officers; limitation on national inroads into local autonomy.

This model of institutional reform was intellectually "available" in 1959 because Clyde Summers had spent over ten years creating it. He had traced its outlines through masses of fumbling common law cases in state court.⁹ When the state court cases did not yield up their grounds of decision, he dug into the unreported records, court files, and full interviews with lawyers, in the masterly syntheses of New York law which continue to be as methodologically distinctive as they are definitive of the subject matter.¹⁰ He developed legisla-

29 U.S.C. §§ 401-531 (1982)), *see infra* notes 8-12; and on behalf of employees discharged without cause, *see infra* note 13, has undoubtedly been an overall increase in litigation.

⁸ *See* Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, § 2, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. § 401-531 (1982)). The title is a misnomer; the legislation goes well beyond reporting and disclosure. It is sometimes called the Landrum-Griffin Act, after two legislators who freighted the legislation with amendments expanding union unfair labor practice liability under the earlier Taft-Hartley Act, and thereby brought with them enough Republican and conservative Democratic votes to make enactment possible. Clyde Summers has often stressed the unlikely confluence of factions which made possible the "political miracle" of the LMRDA. *See* Summers, *Some Historical Reflections on Landrum-Griffin*, 4 HOFSTRA LAB. L.J. 217 (1987); Summers, *American Legislation for Union Democracy*, 25 MOD. L. REV. 273 (1962).

⁹ *See* Summers, *Judicial Settlement of Internal Union Disputes*, 7 BUFFALO L. REV. 405 (1958); Summers, *Political Liberties of Labor Union Members*, 33 TEX. L. REV. 603 (1955); Summers, *Disciplinary Procedures of Unions*, 4 INDUS. & LAB. REL. REV. 15 (1950); Summers, *Disciplinary Powers of Unions*, 3 INDUS. & LAB. REL. REV. 483 (1950); Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951).

¹⁰ *See* Summers, *Judicial Regulation of Union Elections*, 70 YALE L.J. 1221 (1961);

tive proposals and advocated legislative reform.¹¹ He has continued to probe the theoretical basis of what was decided in 1959.¹² Union Democracy continues to be the field in which Summers' contributions remain best-known.

C. *Unjust Discharge*

Clyde was not the first to call for generalized American protection against the unjust discharge of nonunion employees, but his 1976 article on the subject seems to have had more influence than its predecessors in sparking the astonishing efflorescence of common law restrictions on discharge during the 1980's.¹³

D. *Public Employees*

Clyde's articles advocating collective bargaining rights for public employees also were successful in their impact. Perhaps today's younger scholars have forgotten how controversial was the extension of such collective bargaining in the 1960's. Clyde's articles examined the issue with his customary shrewd eye for how institutions function in the real world. He advocated public employee unionism as a way of protecting interests otherwise unrepresented in the political process. This "political perspective" may have helped the spread of public employee unionism.¹⁴

E. *Contract Law*

Clyde's sole article about contract law draws on his experience with the law of collective agreements to make a series of breathtaking assertions about the general law of contracts.¹⁵ First, there may in

Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175 (1960).

¹¹ See AMERICAN CIVIL LIBERTIES UNION, *DEMOCRACY IN LABOR UNIONS* (1952) (authored by Clyde Summers); Summers, *The Public Interest in Union Democracy*, 53 NW. U.L..REV. 610 (1958); Summers, *Legislating Union Democracy*, 10 PROC. IRRRA (1957).

¹² See Summers, *Democracy in a One-Party State: Perspective from Landrum-Griffin*, 43 MD. L. REV. 93 (1984).

¹³ See Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); see also Summers, *The Rights of Individual Workers: the Contract of Employment and the Rights of Individual Employees*, 53 FORDHAM L. REV. 1082 (1984).

¹⁴ See Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. TOL. L. REV. 265 (1987); Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. CIN. L. REV. 669 (1975); Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974).

¹⁵ See Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525 (1969).

fact be no such general law apart from the law of specific identified transaction types (such as "long term requirements contracts, dealerships and franchises, restrictive covenants in deeds and long term leases of business properties, condominiums and cooperative housing arrangements, or even the common transaction of student registration in a university"¹⁶), together with "the law of leftovers, of miscellaneous transactions, the rag-tag and bob-tail which do not get treated elsewhere."¹⁷ Second, the principles unifying the area, and particularly the enumerated relationships, must be broad, rather abstract, inchoate principles resting heavily on concepts like "good faith" and the protection of the relationship.¹⁸

Contracts scholars will immediately recognize this as the program for the synthesis of the law of "relational" contracts, a project particularly identified with Ian Macneil, although in recent years involving contracts scholars as diverse as Charles Goetz, Robert Scott, and Roberto Unger. Macneil in particular has always acknowledged the influence of this article of Clyde's in his own project.¹⁹ Nevertheless, it seems to me as a contracts teacher that few contracts scholars have found their way to this pathbreaking article which is commonly misattributed or ignored.

F. *Legal Process Issues in Labor Law*

Clyde Summers has also written in a number of areas where his work, though less obviously influential than in the areas already mentioned, is methodologically original and may yet come to have more impact on law and legal scholarship. Two worth particular mention are the series of scholarship on labor law issues which adopt either a legal process or comparative law perspective.

Clyde has often illuminated vexed issues in labor law through careful focus on the peculiarities of the precise institutions involved.²⁰ In his hands, legal process has never been the trite reci-

¹⁶ *Id.* at 564.

¹⁷ *Id.* at 565.

¹⁸ *See id.* at 568-74.

¹⁹ *See* Macneil, *Reflections on Relational Contract*, 141 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT / JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS 541, 541 n.1 (1985); Macneil, *Restatement (Second) of Contracts and Presentations*, 60 VA. L. REV. 589, 609 n.60 (1974).

²⁰ This focus pervades his casebook, *see* C. SUMMERS & H. WELLINGTON, *LABOR LAW* (1968), with its case-studies of the process of making labor law and its frequent criticism of cases because of their ignoring sound principles of interaction between courts, legislatures, administrative agencies, and arbitrators. It shapes his recent elegiac, *see* Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB.

tation of formulas concerning the essential attributes of institutions. Rather, his analysis of institutions is always experiential and often shrewd.

Two of my leading nominations for most-unjustly-neglected-Clyde-Summers-article fall into this category. His 1954 speech (!) on the National Labor Relations Board has lost nothing in the intervening thirty-five years. There is very little 1954 scholarship of which this can be said, and probably none which takes the form of criticism of a particular agency. Clyde's observation and analysis of administrative deficiencies remains penetrating.²¹

A second neglected article in the legal process genre deals with judicial not administrative lawmaking. It took some boldness to use the special issue of the *Yale Law Journal* celebrating Felix Frankfurter's seventy-fifth birthday as an occasion to celebrate judicial activism. Yet Clyde's remarks illuminate more recent debates on the legitimacy of judicial activism.²² The article's trenchant analysis of the particular features of labor legislation and its model of the politi-

L. REV. 7 (1988), on the secular decline of collective bargaining and increased reliance on courts and legislatures to protect weaker parties in employment relationships.

²¹ See Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93 (1954). The article first puts NLRB decision making in the context of deep, insoluble conflict between unions and management on basic philosophic principles. Today this may appear the most banal of observations, but at the time it was made, and to some extent even today, it was fashionable to describe this view as obsolescent and to assert by contrast the fundamental common interest of unions and management.

Clyde denies that the Board can, as it often claims, "administer the statute as written and as intended by Congress." "In many of the most critical areas neither the words nor the intent are clear. The Board must spell out whole bodies of law from meager terms or no terms at all." *Id.* at 95. Moreover, the Board cannot be "impartial." "Its decisions inevitably strengthen either unions or management in their underlying dispute." *Id.* at 96-97. Since Board members deny, even to themselves, their own legislative authority, they too easily ignore underlying statutory policies that are comparatively clear and substitute their own policies, denying they are doing so.

One suggested reform is the greater use of rule-making by the NLRB. This suggestion became commonplace in academic literature over the next couple of decades. Clyde's 1954 speech is the earliest reference I have found advocating rule-making, yet for some reason it is rarely cited.

²² "To measure a judge's role according to that which can be safely entrusted to puny men is to reduce the whole Court to a pageant acted by bit players. Neither the Constitution, our traditions, nor our existing structure treats the Court so casually. Judicial humility does not demand asceticism but suggests that judges meet the responsibilities which the system of their day requires." Summers, *Frankfurter, Labor Law and the Judge's Function*, 67 YALE L.J. 266, 303 (1957).

cally realistic interpretation of labor statutes have lost nothing in two decades.²³

Clyde's models of activist administrators and judges have not unambiguously carried the day. In fact, his legal process writings have not had the influence of his writings on union democracy or unjust discharge. It is true that labor law cases often contain discussions of comparative institutional competence, but these tend to be result-oriented. When the lawmaking institution is approved, its processes are denigrated, often by the same Justices.²⁴ Clyde's careful analyses, of institutional strengths and weaknesses, surface only occasionally in judicial or administrative decisions or others' academic writing.

G. *Comparative Labor Law*

Clyde's career has encompassed a brief period when American scholars shook off their usual provincialism to seek to learn from Western European systems of Labor law. Clyde, among others, contributed to this movement with a brilliant cautionary methodological essay²⁵ and a long series of careful comparative studies.²⁶

²³ See *id.* at 286-90.

²⁴ On judicial deference to arbitration, compare *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (arbitration inappropriate to decide claims of race discrimination and arbitral rulings entitled only to such deference as courts think appropriate; defects of arbitration catalogued: arbitrator not permitted to apply norms external to collective agreement; record incomplete; rules of evidence do not apply; reasons for award need not be given; union retains exclusive control over individual's grievance) with *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975) (African-American employees seeking to bargain outside their union over job discrimination issues are not protected by the NLRA against discharge; only protests through the union's grievance and arbitration system would be protected; no catalog of defects in arbitration process found); and *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974) (miners' strike, protesting reinstatement of foreman convicted of falsifying safety reports, may be enjoined pending arbitration; no catalog of defects in arbitration process found).

On judicial review of National Labor Relations Board, compare *Pattern Makers' League v. NLRB*, 473, U.S. 95 (1985) (approving Board policies despite expressed doubts about their wisdom and concurrence with statute; heavy emphases on Board's discretion in administering statute) and *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) (same) with *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (reversing longstanding Board policy without any reference to acceptable range of Board policymaking under Act).

²⁵ See Summers, *American and European Labor Law: The Use and Usefulness of Foreign Experience*, 16 BUFFALO L. REV. 210 (1966).

²⁶ See Summers, *An American Perspective of the German Model of Worker Participation*, 8 COMP. LAB. L. 333 (1987); Summers, *Comparisons in Labor Law: Sweden and the United States*, 7 INDUS. REL. L.J. 1 (1985); Summers, *Worker Participation in the United States: Some Comparisons from an American Perspective*, 133 U. PA. L. REV. 175 (1984); Summers,

It is not easy to point to the direct influence of these studies on American law or scholarship, which has not tended to follow European models. Nor is it easy to say why interest has waned, even among scholars, in comparative labor law. Other advanced capitalist economies offer many interesting models to American scholars.

Perhaps a future generation of scholars and policy makers may one again turn to the comparative study of labor law. When they do, Clyde's careful and cautionary studies will continue to be a model for future scholarship.

II. SOURCES OF CLYDE SUMMERS' INFLUENCE

In short, we celebrate an extraordinary career, one to which any young scholar might aspire, irrespective of political values: an extraordinary influence on federal and state legislation, common law changes, and the scholarship in one's fields and related fields. Are there specific features of Clyde Summers' scholarship, apart from the innate attractiveness of the substantive proposals, which help explain its extraordinary emphasis?

Values clearly stated. Clyde is never elusive or Aesopian about his underlying ethical and political values. His commitment to liberalism, to free inquiry, to the protection of weaker individuals, is often explicitly stated.²⁷ Such professions of liberal values may have gone out of fashion in legal scholarship among self-described progressives. The current fashion seems to call rather for the nihilistic denial of values or an insistence that the law permits free choice among a range of values, with nothing but taste governing the choice. Perhaps these are descriptively correct statements about the nature of legal argument. Still, open profession of values doesn't seem to have done Clyde Summers' influence any harm.

Concrete proposals advocated. Clyde's articles typically move beyond general values to quite specific models of law reform. This is particularly true in his two areas of greatest influence. Both his 1950's articles on union democracy, and his 1976 article on unjust

Individual Protection Against Unjust Dismissal: Time for a Statute, 62 VA. L. REV. 481 (1976); Summers, *Freedom of Association and Compulsory Unionism in Sweden and the United States*, 112 U. PA. L. REV. 647 (1964); Summers, *Collective Power and Individual Rights in the Collective Agreement: A Comparison of Swedish and American Law*, 72 YALE L.J. 421 (1963).

²⁷ See, e.g., Summers, *The Sources and Limits of Religious Freedom*, 41 ILL. L. REV. 53, 68-69 (1946). This, one of Clyde's earliest articles, contains a manifesto of liberalism from which Clyde had not deviated since.

discharge, make very specific proposals, specific both as to substantive values and as to institutional responsibility.

Political realism. Clyde early committed himself to a mode of scholarship calling for politically realistic proposals, although arguably no alternative mode existed as a model in the 1940's.²⁸ In today's intellectual climate, this self-limitation is often equated with pulling punches, accommodation, or cowardice. Yet Clyde's career shows how proposals in fact quite radical when made can nevertheless be put forward as politically realistic, and eventually triumph.

Wide range of ideas. As we have seen, Clyde's concrete proposals often draw on his comparative knowledge of other systems of labor law. His proposals on unjust discharge and on public employees particularly show this influence. Today's legal academy is by contrast often influenced by systems of thought, such as law-and-economics, which deny the significance of cultural differences and do not overtly draw on comparative law, assuming that it will only instantiate economic forces postulated as uniform across cultures.

Stick to principles; don't be reactive. Early in his career, Clyde articulated his political principles and his terrains of combat. Thereafter, he continued to advance his principles in a broad collection of proposals. The scholarship is never reactive. It is not distracted from its chief end by a beguiling Supreme Court case, an amusing administrative problem, someone else's felicitous article. The project rolls on, incorporating useful matter from cases and statutes as it finds them.

It must be said that Clyde incorporates very little of other people's scholarship. To his credit, there are none of the petty scholarly interchanges we now accept as normal, no critiques of or responses to other people's articles. On the other hand, perhaps there were occasions when feelings were hurt by Clyde's failure to acknowledge other scholars' efforts. All in all, it would be difficult to find a similarly-sized body of legal scholarship *less* reactive to the work of others. The overwhelming cumulative effect of his work stems in part from this refusal to be drawn into scholarly debate.

CONCLUSION

Open articulation of progressive political values; concrete proposals; political realism; wide incorporation of ideas from other legal

²⁸ See, e.g., Summers, *supra* note 1, at 33 ("It is ultimately a political problem of finding a solution that is sufficiently acceptable to the parties concerned to have a fair chance of adoption.").

cultures; comparative lack of concern for debates internal to the academy. This is far from the model of legal scholarship prevalent among younger academics these days. Still and all, younger scholars who aspire to Clyde Summers' influence might consider adopting his method.