“A VISION OF THE LAW IN ACTION . . .”

LOUIS H. POLLAK†

I.

A state which can boast that lawyers of the caliber of Lincoln and Darrow have been practitioners in its courts ought not, one would suppose, have reason to apologize for the standards it sets for admission to the bar. But Illinois has twice cut off its nose to spite its face. The first occasion was in 1869, when Myra Bradwell was denied admission to the bar because she had the civic irresponsibility to be a woman. The second occasion was in 1944, when Clyde Summers was turned away because he had the temerity to be a pacifist and hence could not, so Illinois said, in good conscience swear allegiance to a state constitution that authorized the legislature to require wartime service in the state militia—a militia into which Illinois had drafted no one since the Civil War. Myra Bradwell took her case to the Supreme Court, which sustained Illinois’ perversity;¹ more noteworthy than Justice Miller’s brief affirmance² was Justice Bradley’s concurrence, an opinion that can claim pride of place in the literature of misogyny.³ Clyde Summers also made an unsuccessful plea to the Supreme Court. Justice Reed’s affirmance for a five-Justice majority is one of the preeminently forgettable opinions in the Court’s annals.⁴ But Justice Black’s dissent is an essay on liberty of conscience that resonates in our constitutional memory.⁵ Of particular pertinence, for present purposes is Justice Black’s profile of Clyde Summers at the age of twenty-six:

† Judge, United States District Court for the Eastern District of Pennsylvania. The author was privileged to be one of Clyde Summers’ faculty colleagues both at Yale and at the University of Pennsylvania.

¹ See Bradwell v. The State, 83 U.S. (16 Wall. 130) (1873).

² Justice Miller, relying on his opinion of the day before in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), concluded that the right to practice law is not a privilege of national citizenship protected by the Fourteenth Amendment.

³ Justice Bradley, joined by Justices Field and Swayne, all three of whom had dissented in Slaughter-House, see supra note 2, was of the view that, pursuant to “the law of the Creator,” Bradwell, 83 U.S. (16 Wall.) at 141, women should stay home. Chief Justice Chase, who had also dissented in Slaughter-House, dissented in Bradwell “from the judgment of the court, and from all the opinions.” Id. at 142 (Chase, C.J., dissenting).

⁴ See In re Summers, 325 U.S. 561 (1945).

⁵ See id. at 573 (Black, J., dissenting).

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The State does not deny that petitioner possesses the following qualifications:

He is honest, moral, and intelligent, has had a college and a law school education. He has been a law professor and fully measures up to the high standards of legal knowledge Illinois has set as a prerequisite to admission to practice law in that State. He has never been convicted for, or charged with, a violation of law. That he would serve his clients faithfully and efficiently if admitted to practice is not denied. His ideals of what a lawyer should be indicate that his activities would not reflect discredit upon the bar, that he would strive to make the legal system a more effective instrument of justice. 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.”

II.

In the forty-four years that have elapsed since In re Summers⁷ was decided, Clyde Summers has been fulfilling what Justice Black—himself a lawyer for the poor before he went to the Senate and thence to the bench⁸—called Summers’ “vision of the law in action.”⁹ Illinois’ myopia did not keep Summers out of court for long—New York subsequently admitted him to the bar—so he has represented his share of conscientious objectors, aliens who have run afoul of the INS, and others whose non-conformist views or diminished status have gotten them in trouble with the authorities. But the principle focus of Summers’ professional endeavor has, of course, been as a labor law teacher and scholar and, derivatively, as a labor arbitrator. Among the active labor law professoriate, Summers is the senior partner. To have become emeritus is, for him, not to have become less active. On the contrary, it is a mandate to work harder: unceremoniously

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⁶ Id. at 574 (Black, J., dissenting).
⁷ 325 U.S. 561 (1945).
⁹ See In re Summers, 325 U.S. at 574 (Black, J., dissenting).
stripped of the faculty committee responsibilities he has addressed with such relish for almost five decades, Summers now has time to teach, write and arbitrate more.

Others contributing to this issue of the Law Review describe and appraise aspects of Summers’ scholarship. I will not undertake that daunting task. Rather, I will let Summers speak for himself, by setting forth an excerpt from one of his early articles. In Union Powers and Workers’ Rights, Summers in 1951 charted, defined, and focused the profession’s attention on a broad and theretofore substantially unexplored problem area: the rights of an individual worker as against the union that purports to speak in the worker’s name and bargain in the worker’s behalf. I offer the following excerpt in evidence because I am convinced that much of the impact of Summers’ writings derives from the power of his prose—prose in which the strength of the syllogism is matched by the strength of the suffusing moral premises, and in which logic and morality alike are given added urgency by simple syntax and the right words:

On January 1, 1944, the Trailmobile Company of Cincinnati absorbed the Highland Body Manufacturing Company, taking over all of its assets and business. All of the Highland equipment was moved to the Trailmobile plant, and all Highland employees were transferred to the Trailmobile payroll. The Highland workers claimed seniority as of their dates of employment with Highland, but the Trailmobile workers insisted that the Highland men were new employees as of the date of transfer. Since both groups were affiliated with the A.F. of L., the dispute was submitted to national representatives of the A.F. of L. When they held in favor of the Highland group, the Trailmobile employees, who outnumbered the Highland employees ten to one, immediately reorganized into a C.I.O. local and petitioned for an N.L.R.B. election. The new C.I.O. local, of course, won and immediately negotiated a contract providing that seniority of Highland employees should date from January 1, 1944.

10 In the case of Summers, and in the cognate case of his Penn co-emeritus, Leo Levin—and, soon, in the law school world generally, as it becomes more common for emeriti to be induced to remain at their lecterns—the transition from tenured to emeritus status may seem to be marked chiefly by loss of membership in such favored faculty sub-enclaves as the admissions committee and the library committee. To the outside observer it may not be immediately apparent that such a deprivation should be characterized as more than damnum absque injuria. But those within the academy know that the slightest slights are often the most difficult to bear. Whether such a deprivation should trigger AAUP censure, or give rise to cognizable legal (including, at a state-related institution, constitutional) claims, is beyond the scope of this essay.

This contract brought forth a series of suits by Highland workers seeking protection of their seniority status. One of them, Hess, brought a class suit in the Ohio courts to compel the union to restore him and his fellow workers to their seniority rights. The Ohio courts refused to give relief, holding that seniority rights arose solely from contract, and the union was empowered as the certified representative to fix those rights by the collective agreement. A second suit was brought by a returned veteran, Whirls, who claimed that because of this clause he had been demoted in violation of his rights under the Selective Service Act. He, too, failed to obtain relief in the courts. In the meantime, the union retaliated by expelling Whirls for conduct unbecoming a union member and demanding his discharge under the closed shop contract. Not daunted, the Highland employees brought still another action in the federal courts, this time to enjoin enforcement of the seniority clause as discriminatory and in violation of the union's duty to represent them fairly. The circuit court of appeals denied relief, holding that this "discrimination was in pursuance of the bargaining process, and was not without some basis." The Highland men should not complain, said the court, for they had obtained the closed shop (in the C.I.O.) and other "advantages."

The plight of the Highland group is not the product of labor strife, but of collective bargaining; not of employer discrimination, but of union power. It symbolizes in an extreme form the potential fate of an individual worker within the structure of unionization and collective bargaining. It sharply reminds us that contracts apply to workers, and that unions consist of members. It warns us that we must not become so obsessed with the glamor of studying mass action that we ignore the fact of those who make up the mass and in whose name the action is taken.12

III.

The key is integrity.

After more than twenty years as his working colleague, first at Yale and later at Penn, I think I have come to know Clyde Summers pretty well. I have sat in a Summers seminar—and had my head handed to me for making a profound observation that wholly missed the point. I have climbed the Vermont hillside on which Clyde has planted thousands of evergreens. I have walked the stone wall he built in Pennsylvania. I have heard him toast Evelyn at a daughter's wedding.

12 Id. at 805-06 (footnotes omitted).
I think I know what Clyde is made of: Humanity. Wisdom. Perseverance. And the key is integrity.