

This is a tribute I wrote about my favorite professor at Harvard Law School, who once totally destroyed me in class, on the occasion of his passing in 2007.

Tribute to Clark Byse

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Introduction

You may have read or heard about the trials and tribulations of the first year at the law school from a popular book, *The Paper Chase*, by John Jay Osborn, Jr., later made into a movie of the same name. The book was published by Houghton Mifflin in 1971, and the movie released in 1973. John Osborn was a year behind me at Harvard and a member of the Class of 1970. His descriptions of the loneliness, the intellectual harshness, and the intensity of it all present a rather accurate picture of HLS during that era. There is, however, one glaring inaccuracy, not necessarily in the book, but certainly in the movie. It has to do with the casting of John Houseman as Professor Kingsfield, the aristocratic, condescending Contracts professor, and antihero of the movie who absolutely destroys one of his students in class early in the year. While there was such an aristocratic professor at Harvard at the time, A. James Casner, associate dean and Weld Professor of Law, he taught the first year Property course. He was renowned for his work in real property, and generally recognized as one of the nation's foremost experts in that area. He was always impeccably dressed and quite aristocratic in bearing. He, however, was only the second most feared of the first-year teachers.

By far the harshest and most terrifying professor—and the one described to a “T” in Osborn's book—was Professor Clark Byse, a thin, intense, hard-bitten man with bushy eyebrows who actually did teach Contracts to first-year students. The one distinction that was obvious to anyone who knew Professor Byse was that he was not an aristocrat or the least bit concerned with family heritage. No, Clark Byse was born in Oshkosh and graduated from Wisconsin State Teachers College. He had gotten his professorship at Harvard because of his fierce dedication to teaching and his sheer intellectual brilliance. He expected comparable effort from his students. You had best go prepared to his class, having read, briefed, and thought about the assigned cases, or he would tear you limb from limb with a searing intellectual intensity that terrified everyone who might be called upon next.

If you went to Harvard—and particularly if you were fortunate enough to be in Byse's class for the opening-day discussion of the first case, *Hawkins v. McGee*, you would have no doubt that it was Byse who was the Professor Kingsfield about whom *The Paper Chase* was written, the very same Byse who was my Contracts professor—when I was cast as the student who was totally humiliated—destroyed—by him in class.

All 130 of us in Section II took the same classes together for the entire year—without writing papers, without taking exams, and without getting much feedback. The

law school itself did not have to urge us to dedicate every waking moment to the study of the law; our competitiveness with our equally gifted classmates did that for us. Before I got to Harvard, I sincerely believed I could tell how smart other students were simply by looking at them—how they dressed, how they combed their hair, the way they walked, and the look in their eyes. Since Harvard based admissions on only three things (college grades, LSAT scores, and not having been expelled from college) that had little to do with personality or appearance, the drooling idiot in the next row might well be every bit as smart as you were. Many of my classmates may not have had a pleasing countenance or a winning smile, or have shaved often enough, or even spoken proper English, but they had been chosen for their ability to run on the fastest track in the law school community. You were not expected to like them: You were expected to compete against them.

For those of us in Section II, the first class on the first day of our law school careers began at 8:00 AM in Austin Middle—and it was Contracts, taught by the notorious Professor Clark Byse. Austin Middle was arranged in about fifteen cascading rows, choir fashion, with the professor down in the center below and each of us in an assigned wooden chair behind a long, curved writing bench. Byse explained that he had come equipped with a large cardboard seating chart with pictures of us glued to the location of our assigned seats. The very best way to get us to think like lawyers, he said, was first to expose and put an end to the sloppy approach to thinking we had relied on in the past, then to instill in us an unbiased, analytical approach, devoid of emotion or preconceived ideas. Echoing Dean Griswold's welcoming address, he said that while it might be a long, painful journey for some of us, it would—if we were to participate fully—ultimately result in our becoming the sort of lawyers that the law school was famous for producing.

Having finished this brief introduction, Professor Byse said that, as the first assigned case, *Hawkins v. McGee* had already been posted; he was ready to begin a detailed discussion of it. He added that we would always remember the name of the one student in our section who, on their very first day of class, was called upon to recite the facts of this first case. He then circled his hand dramatically above the seating chart, dropped his finger, and announced that it had landed on the picture of Phil Caesar. As no one who was in that class will ever forget, poor Phil let out an involuntary high-pitched yelp of fear, but he did manage to recite some of the facts of the case before Professor Byse moved along to call on others.

Hawkins v. McGee, for those of you not familiar with it, is known as the case of the Hairy Hand, and as so many of the cases studied in law school, it had taken place in the late 1800s. The plaintiff had injured his hand in a fire, and the defendant, his physician, had assured him that he could make it as good as new by grafting skin onto it from elsewhere on his body. Unfortunately for both of them, the skin the doctor grafted from Hawkins's hairy chest onto his hand later sprouted a great deal of hair. The issue in the case was whether possible recovery lay in tort, a civil wrong not involving a contract

(like almost all personal injury cases are), or in contract (because the doctor had *promised* to make the hand as good as new). One may not really have cared, especially since the case had been decided almost a century before, but exploring—in exquisite detail—the reasoning behind the court’s analysis of which recovery method was appropriate was what law school was all about.

In spite of poor Phil Caesar’s shock, what was surprising was that, for the first couple of weeks, Byse belied his reputation as a holy terror and was very nice to us. And as we went on learning, via the Socratic Method, the differences between tort and contract, Phil’s outcry slowly faded from memory.

The Terrifying Event

I had been well warned by others *never* to volunteer in class, but one fine morning in the third week of school I failed to heed this advice. At the end of Contracts class the previous day, Professor Byse had given us a hypothetical case to ponder overnight. Since I was at least a week ahead on all my homework, I decided to draw on my previous summer’s experience in Litton’s law department and do a little legal research into the case. Incredibly, at least to me, I found the actual case on which Byse had based his facts: *Groves v. John Wunder*. How simple, I thought; I now know the decision of the court in the case and could contribute knowledgeably in class. Then it occurred to me, that exciting night in Langdell Library, that this was Harvard Law School, and all of my classmates would no doubt find this same case too. Ah, but I had spent the summer as an intern in a corporate law department and learned how to do something else: to Shepardize.

Shepard’s Citations, well in advance of the computer-aided searches of today, published volumes of citations, listing with the original citation of the case any references to it which were made in later cases. Perhaps a particular case had been overturned on appeal, or had been cited with supporting commentary, or was significant for not being in the mainstream of legal thinking. My attorney friends from Litton Industries, where I had interned, had been most attentive in teaching me how to Shepardize, not only because my name was spelled the same way (and I may have been related to the author), but because it was something I could readily learn how to do whereby I could help them with their own legal memoranda.

Of course, I Shepardized *Groves v. John Wunder*, a Minnesota case, and found that it was commented upon—but not followed—in a later decision by the Utah Supreme Court. Because *Groves v. Wunder* had been decided in Minnesota, this later decision in Utah did not actually overturn it; in a case that involved relatively similar facts the Utah court just decided not to follow the reasoning in *Groves v. John Wunder*. In stating their reasons for coming to a different conclusion, the Utah judges took pains to point out that the vote of the judges in the *Groves* case was only 3 to 2—not only a close decision, but one rendered in the absence of two of the seven sitting judges.

The next morning, I was really looking forward to Contracts class. After all, now I actually had something to say. Byse began by quickly outlining the issue he had left us with the day before, and took a couple of comments from other volunteers. My hand was up toward the end, but he didn't notice me. He closed the discussion saying it was an interesting issue and that if we wanted to read the actual case, it was *Groves v. John Wunder*, at 286 N.W. 235 (1939), adding, "For whatever it's worth, it was a 3 to 4 decision of the court."

Just then, he saw my raised hand and said, "I realize you want to say something but we've ended the discussion and I want to go on." I saw three hours of solid research going out the window as I dropped my hand and swore softly to myself. Byse must still have been watching me, because he said, "You seem so disappointed, we may as well hear what you have to say." I was so scared that he might have heard me swear I said the first thing that came into my head: "Well, in the first place, that particular decision was 3 to 2."

Let me tell you, my friends, that was not a wise thing to have said to Clark Byse—and it *really* set him off. First, I had deigned to correct him; second, my correction concerned a rather minor point, so I was wasting valuable class time; and third, I had committed these errors at the beginning of class, so he could vent his intellectual wrath on me for the full remaining hour, without leaving me any hope of being saved by the bell.

"You're right, of course," he responded, "the Minnesota Supreme Court has only seven members." I remembered that two of the judges had not participated in the decision, but I had forgotten that it was not a standard court of nine seats. He went on, "but let me ask you something, Mr. Shepard: So what? What earthly difference does it make that the decision was 3 to 2 instead of 4 to 3? This, Mr. Shepard, is a mere debater's point, something of no significance at all—and you have wasted the class's time, and mine, in bringing it to all our attention."

I tried to respond with some of the thinking of the Utah court which had disagreed with the decision, but Byse knew the subject matter far better than I did—and he wasn't going to let me come up for air. I kept trying to say that the 3 to 2 ratio seemed significant to the Utah court, but he was having none of it. This went on for about thirty very lonely, painful minutes, which ended only when he decided he would nickname me "3 to 2 Shepard" so the class might better remember me and my monumental waste of his time. He then announced that we would go on to the next case, which was what he'd wanted to do before my useless comment. To the surprise of no one at this point, he decided I should be the one to recite the facts of the next case.

I turned the page in my case book to where I had put my typewritten notes from the night before (you actually typed your versions of case summaries on onion skin

paper, gummed on one margin, so they stayed in their proper place in the case book), and with trembling hand read what I had written were the essential facts of that particular case. I don't remember the actual case but I do remember that my summary was not quite good enough for Byse, nor was my reasoning during our continuing discussion, which lasted for the *entire* remainder of the class hour.

When that interminable class finally did end, none of my classmates, even the ones from my own dorm, were the least inclined to walk out of the classroom door with me—out of fear, no doubt, that whatever I had might somehow be contagious. In something of a fog, I did manage to make it through the other classes that day, but word spread quickly that Byse had outdone even his own reputation and really finished off some poor 1L. I went back to my room to prepare for yet another day, now understanding quite clearly why we had been warned never to volunteer in class. It hadn't occurred to me that, to Professor Byse, the issue was the *thinking behind* the court's reasoning, not the *holding* of the court—the difference between which, again, is what law school is all about. I decided I would never be volunteering again, in any class, under any circumstances.

The next morning, bright and early at eight o'clock, I was again in my assigned seat in Contracts class. My head was down and I was carefully reviewing my case notes from the night before. I had spoken to no one that morning—nor had anyone spoken to me. I sensed that Byse had entered the room and was ready to start, and I decided I'd better look up and face him. He was staring directly at me: "Well, Mr. Shepard, let us begin with you—and see if you can redeem yourself for yesterday. Please give us the relevant facts of _____." This case, the name of which escapes me, was the example by which the concept of "reasonably equivalent" was introduced to the class. Of course no one told you that was the issue; if you hadn't gotten a hint from someone else, you'd only be prepared with the facts of the case itself.

In any event, the facts of the case had to do with someone's job having been improperly eliminated and the question was how high the pay should be in an equivalent job, such that they should have been obligated to accept it rather than to sue for damages. The lost job, as this case would have it, paid \$35 a week. During the course of the second day, Byse began the bidding (with me) for what might be an acceptable replacement job at \$30 a week, which I found unacceptable as substitute compensation. The concept Byse was developing, albeit by the Socratic Method, wasn't all that obvious to me, and he walked me all the way up to \$34.99—which I was finally able to say was sufficiently equivalent to the pay for the job that had been lost. It was at this point that he offered to call me "\$34.99 Shepard," but decided he liked "3 to 2 Shepard" better.

It is possible—and quite likely—that Byse called on other students later in that class, and in all of the classes for the ensuing two weeks, but everyone knew and

anticipated that at some point in the Contracts hour he would return to good old “3 to 2 Shepard” just to check on what he was thinking.

If you’ve seen the movie *The Paper Chase* you may well recall the point at which Professor Kingsfield crucifies the 1L by suggesting he come forward and take the offered dime to call home and tell his parents that he is not cut out to be a lawyer. It’s a well-known story, told in almost every law school and certainly better understood and appreciated by audiences than what really happened to me that day in Contracts. So, while the facts were changed to protect the innocent, no one who was anywhere near Byse’s class that year has any doubt but that I was the basis for that part of *The Paper Chase* story. Millions saw the movie, thousands read the book, hundreds went through Harvard Law School in that era, dozens were in Section II of contracts on that fateful day. For them, it was, “There but for the grace of God go I”: Only *I* was on the receiving end of Professor Byse’s humiliating public castigation, and it was an experience to last a lifetime.

The Aftermath

After about three weeks of constantly being called upon in Contracts, I decided I had better seek out Professor Byse—outside of class—to make amends and beg forgiveness, before he drove me out of law school entirely. After all, I had no friends left, certainly no reputation—except for absorbing punishment—and apparently, no future as a lawyer.

When I found him in his office, he had no idea why I’d come. I asked him if I had offended him in some way, and told him how devastating it was for me to be singled out for abuse in his class. He softened immediately. He told me that he thought we had merely engaged in intellectual jousting—for our mutual enjoyment. He knew I would be prepared and was genuinely hurt to learn that I was almost sick with fear of him and of going to his class. Beneath that very gruff exterior (and totally unlike Professor Kingsfield), beat a soft and caring heart.

As it turned out, he became my mentor and best friend on the faculty, and his insights and approach were a critical part of my legal education. I got my highest grade in school for Byse’s class, but that part I earned (I can still recite the details of virtually all of those early contracts cases); I also became Byse’s research assistant for the next two years, and when he became chairman of the law school’s joint student faculty committee, established following the undergraduate takeover of the administration building in Harvard Yard, I provided all the staffing for his work there, too. I did my third-year paper under his tutelage, and relied heavily on him that year for recommendations and guidance in my successful pursuit of a White House Fellowship.

Conclusion

Clark Byse was easily among the most respected and caring members of the faculty. He had taught Contracts at the University of Pennsylvania Law School before he was recruited by Harvard, where he taught for over thirty years before he reached their mandatory retirement age. Then he went on to teach at Boston University.

As luck would have it, my 35th class reunion—in 2004—was held at the same time as a law school dinner to celebrate Byse's fifty years of teaching. As the high point of the dinner, they showed the very portion of *The Paper Chase* in which Professor Kingsfield crucifies the hapless law student. But this time, I was allowed to stand and reveal to the audience yet another reason for the great admiration for Clark: the real ending to the story—where, having destroyed me in class, he had become my friend, counselor and mentor.

Clark died in October of 2007 at the ripe old age of ninety-five. He had become the dominant academic in the field of Administrative Law—and his case book, Gelhorn and Byse—remains the text of choice in most law schools. Clark's teaching career spanned more than fifty years—and the real stories of this man's contributions to the law would dwarf those of most other prominent teachers, even at Harvard.

A celebration of Clark's life and contributions to teaching was held at Harvard's Memorial Chapel in April of 2008. Five of his colleagues from the law school faculty paid tribute to this distinguished and dedicated professor. It was important to me to be there, too.