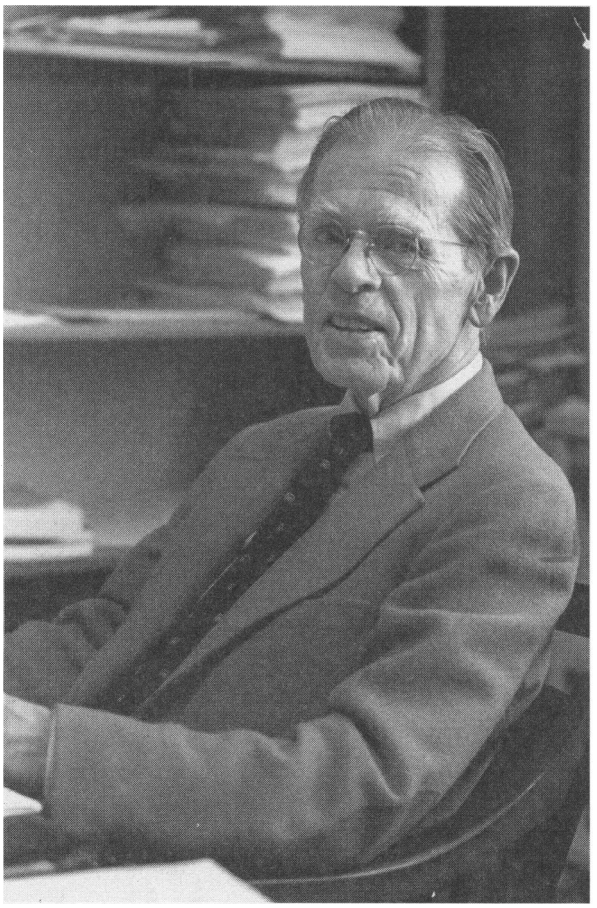

Harvard Law School Office of Communications

CLARK BYSE

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HARVARD LAW REVIEW

IN MEMORIAM: CLARK BYSE

The editors of the *Harvard Law Review* respectfully dedicate this issue to Professor Clark Byse.

*Justice Stephen G. Breyer**

Clark Byse was a member of that great generation of scholars that created administrative law. He worked with Walter Gellhorn, Louis Jaffe, Kenneth Culp Davis, Nat Nathanson, and a handful of others. They began with a few traditional common law rules, a new federal statute, a group of New Deal agencies, and a growing number of judicial decisions. They formed these materials into more coherent legal principles, approaches, and systems of interpretation. They helped to define the proper relationship between citizen and government in a world that must rely upon administrative expertise to translate the electorate's desires into effective policy and action. In a word, Clark and those few others were the intellectual architects of the modern democratic administrative state.

Clark Byse as *scholar* participated fully in that great enterprise. His casebook with Walter Gellhorn, now in its tenth edition, is a legal classic.[1] He did not limit his writing to administrative law, however, for he also wrote much of value about, for example, contracts, civil procedure, and academic freedom.

Clark Byse as *teacher* taught administrative law and contract law to generations of law students. His object was to transmit what we call "legal thinking" — the disciplined, critical, purpose-oriented approach that underlies American law. Indeed, Clark made a point of telling his students, "[N]ever forget that the emphasis in this class is on what and how *you* think, not on what some judge or treatise writer or

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* Associate Justice, Supreme Court of the United States.

[1] *See* PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, GELLHORN AND BYSE'S ADMINISTRATIVE LAW (rev. 10th ed. 2003).

your instructor thinks."[2] As a teacher of legal thinking, Clark was a giant, a master of the trade.

Clark Byse as *colleague* was ever ready to discuss an issue, to take the time necessary to help others, including many fledgling colleagues such as myself. When I would barge through the door, concerned about an administrative law problem, Clark would spring to life, pace back and forth with me, arguing, discussing, provoking, as we wore out the carpet, and he would eventually come up with the suggestion or thought that made the difference. He loved discussion; he respected the right to dissent; he was a champion of academic freedom, in his words and in his deeds.

Clark Byse as a *friend* was a personal treasure. He was a perceptive, acerbic commentator about the world that surrounded him, always with a twinkle in his eye and a constructive suggestion on his lips. He was patient and generous. His heart was gold. I am sad to have lost Clark. But I take pleasure in the vivid memories I have of the remarkable man. And I am delighted that the *Harvard Law Review* is dedicating this issue to a great teacher and scholar, my friend and colleague, Clark Byse.

*Elena Kagan**

Clark Byse is widely believed to be the inspiration for the character of Professor Kingsfield in the novel *The Paper Chase* by John Osborn, Jr., and so he may have been.[1] Like Kingsfield, Professor Byse was a brilliant and legendary teacher, a genius at using the Socratic method to hone students' intellects, and an uncompromising scholar who demanded the best of both his students and himself. In the course of an extraordinary career spanning more than sixty years, his name became synonymous with the very highest standards of law teaching and scholarship.

But for all these similarities to his fictional counterpart, Clark Byse was far more than this comparison would suggest. Like Kingsfield, he was passionate about Harvard Law School's traditions, but he was also a man ahead of his time, with an almost uncanny prescience

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[2] Clark Byse, Essay, *Introductory Comments to the First-Year Class in Contracts*, 78 B.U. L. REV. 59, 59 (1998).

* Dean and Charles Hamilton Houston Professor of Law, Harvard Law School.

[1] *See* JOHN JAY OSBORN, JR., THE PAPER CHASE (spec. anniversary ed., Whitston Publ'g Co. 2003) (1971).

about the future of legal education. His goal was not tradition for tradition's sake. To the contrary, he was relentless in his efforts to build upon the past, thinking critically and deeply about the needs of a changing world.

One of the places this prescience is most apparent is in his article *Fifty Years of Legal Education*, a remarkable piece published more than twenty years ago in the *Iowa Law Review*.[2] Reading through this essay, I was struck by the extent to which Professor Byse anticipated the evolution of legal education at Harvard Law School and elsewhere over the next two decades. Among the topics he addressed: the growing significance of legislative and administrative law (his own field of expertise); the importance of complex problem solving skills; the expanding role of clinical education; the need for more focus in the upper-level curriculum; the push towards lower student-faculty ratios; the introduction of perspectives from nonlegal disciplines such as history and economics; and the vastly expanded representation of women and racial minorities on both student and faculty fronts, coinciding with far more selective admissions standards. In these ways, Professor Byse essentially identified much of what we aspire to in the twenty-first century, both in terms of curriculum and in terms of the kind of community that we are working to build.

A man of strong feelings and strong convictions, Clark Byse was also committed to doing his part to make the world a better place. In 1959, Professor Byse publicly urged that Harvard University refrain from administration of the loyalty oath and so-called "affidavit of disbelief" required of all students who received loans under the National Defense Education Act of 1958[3] to signal their rejection of antigovernment organizations and beliefs. Castigating this requirement as "a perversion of the function of a university in a free society," he observed that "this affidavit is to be executed by students, the very persons whose minds and spirits should be directed toward free, not inhibited, inquiry."[4] More recently, he was seriously shaken by the 2002 shooting rampage that claimed three lives at the Appalachian School of Law, including Dean Tony Sutin, and he traveled to Virginia to present a framed resolution of condolence to the school on behalf of the Harvard Law School faculty. To me, this trip speaks volumes about Clark Byse — about his strength of purpose, his empathy, and his deeply caring heart.

Throughout his long and storied career, Clark Byse was known as a rigorous teacher, but it was always rigor with a purpose — rigor

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[2] *See* Clark Byse, Essay, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063 (1986).

[3] Pub. L. No. 85-864, § 1001(f), 72 Stat. 1580, 1602.

[4] Robert E. Manley, *Byse Speaks Up About the Oath*, HARV. L. REC., Nov. 25, 1959, at 3, 4.

aimed at eliciting the very best from his students. He both loved and respected his students, and they loved and respected him. Along with his exacting standards came reservoirs of patience. "Of course, mistakes will be made," he wrote in a memorandum distributed to his first-year contracts classes.[5] "This is why there are erasers on pencils. There is nothing wrong about making a mistake. What would be wrong is not learning from one's mistakes."[6] In the year 2000, upon receiving the Harvard Law School Association Award, he took issue with the notion that he had employed tough love with his students. "It was love," he said, "pure and simple."[7]

While I never had the privilege of being taught by Clark Byse, I have benefited from his wisdom, experience, and generosity in countless other ways. One incident in particular comes to mind. Shortly after my predecessor, Bob Clark, resigned as dean, Professor Byse asked me to come by his office. At the time, he was over ninety, one of the Harvard faculty's most eminent senior members. He told me the word was out that I was being considered as a candidate for dean and then, looking at me — a woman in my early forties, still fairly new to the law school — he said: "I'm inclined to think you're the right person for the job, but I want to know one thing. Are you tough enough?" What I love about this question is how it shows Professor Byse's commitment to qualities that served him throughout his life — toughness being one of them — along with a capacity to look beneath the surface, to see those qualities in someone very different from the deans of his generation. I later learned that he wrote a long letter to President Larry Summers on my behalf. I was — and remain — both grateful for and honored by his support.

I owe a great deal to Clark Byse. As a scholar of administrative law, I have followed in his footsteps, and his magisterial casebook — which in many ways defined the field — now sits on my desk. As a law school dean and faculty member, I am inspired by his vision, example, and kindness. Clark Byse was one of a kind. I am deeply thankful to have known him.

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[5] Clark Byse, Essay, *Introductory Comments to the First-Year Class in Contracts*, 78 B.U. L. REV. 59, 59 (1998).

[6] *Id.*

[7] *Byse Receives HLSA Award*, HARV. L. BULL., Fall 2000, at 66.

*Andrew L. Kaufman**

The legal profession, the Harvard Law School, generations of former students, his family, and his friends have suffered an irreplaceable loss with the death of Clark Byse. I must have been asked to offer a tribute to Clark as a friend. I graduated before he came to teach at Harvard, and so I was never his classroom student; I never even saw him teach in the classroom. Eventually I did become his student, but only after I had become his friend. That took a long time. I was his colleague for thirty-seven years but his friend for only about twenty-five. When I returned to teach at Harvard Law School in 1965, Clark was almost twenty years older than I, and nothing occurred then to bring us together. I knew Clark only as a legend — and it was difficult, at least for me, to establish a close relationship with a legend, especially a legend with whom I did not share subject matter interest and with whom I never even sat on a committee.

But when it did happen, I constantly marveled at the fact that I had a twenty-five year friendship with Clark that began when he was seventy years old. I was therefore a friend of Clark the Elder. I did not know the rambunctious Clark the Younger whom people, including Clark himself, often spoke about. Clark the anti-authoritarian, Clark the oppositionist, Clark the fighter for principle, were before my time. But the fires were not banked, and they burned enough so that I was able to get strong glimpses of Clark the Younger, Clark the passionate expounder of what he believed in.

The breakthrough in our relationship came, I believe, around 1980, when Clark moved a few houses down the street from me and my family. Geography began the process of making us friends, and economics and family relations helped. Clark came to dinner, and then he employed our teenage son David as gardener and general helper around the house. Soon we had frequent reports about Clark as an employer — one who was interested to find out what David knew and what his interests were. David especially appreciated how funny Clark was — not funny with a constant flow of jokes, but funny with a constant flow of wry remarks. In addition, Clark paid so well that we sometimes had trouble finding David when similar jobs needed to be done at home. Indeed, I thought about applying for a job with Clark myself.

Then we had our own business dealings with Clark when he decided to move closer to the Law School, and we were able to see the Master of Contracts in action in the real world. We were the parties of the second part and Clark was the party of the first part in a contract

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* Charles Stebbins Fairchild Professor of Law, Harvard Law School.

negotiation. Our houses were identical, Harvard-designed, pseudo-Bauhaus, Cambridge-protected, stretched-out three-bedroom apartments with stylish 1940s casement windows that Clark had furnished with special air conditioners that would be useless in his new home. Rather than sell them to the new Harvard tenant, he offered to sell them to us. The question is: Would you buy used air conditioners from Clark Byse? There was no warranty of merchantability — not even a warranty that the goods were suitable for their intended purpose. But the negotiations lasted about ten seconds, as I remember. He made an offer we could not refuse, and those used air conditioners are still running strong twenty-five years later. And they are not even Maytags. We think of them as Byses, which means that they are pure gold.

At all events, I suddenly found that Clark was my friend, the kind of friend whose office I would visit many times a week for hours and hours. Once I was his friend, I was also his student. I do not know what I contributed, if anything, to those conversations, but I certainly remember learning a great deal. The talk was of institutional matters, and he had strong views about the direction of the Law School and its many personalities. The talk was about politics, and I always marveled that a man of strong views about everything could articulate his views in a way that expressed understanding of, and occasionally even affection for, opposing views. The talk was about academic freedom, for Clark was that rare creature, a longtime Republican who was also a member of the ACLU and a president and general counsel of the American Association of University Professors. Perhaps his Wisconsin farmer background and his Catholic upbringing furnish partial explanations for the conservative-progressive combination of his politics and the complexities of his views about the world. I prefer to think that much of the underlying explanation lies in Clark's personality, with its streak of populist cussedness. The talk was also often about legal education. He had views about every new movement and theme, and he was always ready to share them.

Occasionally the talk was about contracts and administrative law, the two substantive areas of law in which he made his name. I used to tease him that he and I actually shared a professional tie in one of the narrow specialties of commercial law. Early in my teaching career I had stumbled upon, and read, Clark's scholarly work exposing a defect in Wisconsin's Automobile Title Registration law. I must be one of the few living people, perhaps the only living person, who has read his comment which appeared seventy-one years ago in the 1936 *Wisconsin Law Review* when Clark was a second-year law student. I must, however, leave the assessment of Clark's later scholarship to others who are more familiar with his major contributions, some of which were path-breaking.

In the end, the talk always came back to teaching, which was the core of what he saw himself doing, and especially teaching in the classroom. He had many outstanding traits, but the ones that made him memorable were his teaching and his creed of teaching. His college degree from State Teachers College in Oshkosh proclaimed his role in life. But he did not need that degree. Clark was born a teacher. His job, he always said, was not to be nice to students in the classroom, and he abominated what he saw as pandering. His job was to train students to think — not necessarily, as the phrase goes, "to think like lawyers," but to think rationally and clearly, to articulate one's thoughts, and then to defend the result. It was a talent to be cultivated for use not just in one's professional life but in one's personal life as well. In expounding and defending his own teacher's creed, he was of course exhorting his listeners to go out and do likewise.

When Clark reached his eighties, he and I shared a difficult task, one that I believe cemented our friendship. Clark was always caring, without fanfare, and especially when someone was in real need. One such event that I know about occurred when our retired colleague, Vern Countryman, returned from California to Massachusetts after his wife Vera died. Vern was in failing health, with no family to turn to, and in real need. Vern's former assistant Maura Kelley took charge. But Clark was right behind, visiting Vern at least once a week for several years and bringing a little cheer, a little interest, into a life that had essentially shut down. Those visits were exceedingly hard work, but Clark never thought about them that way. There was a human being who needed help, and Clark elected himself helper. Other events could trigger the same emotion and action. At the age of ninety, Clark was a leader in the public outpouring of support for the community of the Appalachian Law School in the wake of the tragedy that occurred when a student killed the Dean, a faculty member, and another student. Clark had no prior connection with Appalachian but saw the tragedy as an assault on his community of teachers.

A specialist in performing kindnesses large and small, Clark enjoyed recounting the kindness of others. A favorite tale involved Erwin Griswold, not known as an A student in social relations. Clark liked to counter that perception by recounting the story that Dean Griswold, when stuck between flights in Oshkosh, went to a pay telephone and called Clark's mother, whom he had never met, to tell her how well Clark was doing in his new job at Harvard Law School.

I should also speak of the relationship between Clark and my wife Linda. For several months she and he, along with Bernie Wolfman and Hal Scott, secretly arranged a small party for me in connection with the publication of my book on Cardozo. When Churchill cabled F.D.R. during World War II, he often referred to himself as "former naval person." Clark also used a communications pseudonym. He used to leave messages for Linda at her school referring to himself as

"secret admirer," and in that way he and his wife Elizabeth established themselves as members of our family. Indeed, they are members of many families at the Law School. If there had been more hours in the day, I am sure they would have been members of most families at the Law School. You will note that I have slipped from talking about Clark to talking about Clark and Elizabeth. From the moment they reconnected in 1997, Elizabeth made Clark younger as he got older.

When I was a young lawyer in my early twenties, I also had a friendship with a man in his seventies, Felix Frankfurter. Byse and Frankfurter were very different people, but they shared many similar, life-giving qualities. They were both great teachers who cared deeply about teaching, engaged in it outside as well as inside the classroom, and left lifelong impacts upon their students. They were both men of great passion who cared about law and about ideas and fought for their vision of each. And they cultivated friendships with young and old and were deeply loyal to their friends. A measure of comparison to one another is a tribute to each.

Everyone should be fortunate enough to have a friend like Clark. His friendships were not casual. They were deep and affectionate and embraced the members of his friends' families as well. He was passionate about a great many things but most of all about those he loved. He was fiercely loyal and endlessly caring about those near and dear, but his embrace also extended to legions of former students who were attracted and retained by his magnetic personality.

Clark retired from teaching at Harvard Law School in 1983. Although he continued teaching at Boston University Law School for almost twenty years, he retained his office at Harvard Law School until his death. During that time, he continued to provide advice to students who aspired to become teachers, assistance to younger teachers who sought him out, and friendship to many parts of the Harvard community. Even in retirement he was a cementing, centripetal force in a community where centrifugal forces are strong. Personally, professionally, and institutionally he will be greatly missed.

Todd D. Rakoff[*]

Clark Byse's office at Harvard Law School was on the main floor of the central corridor, and his door was almost always open. And so

* Byrne Professor of Administrative Law, Harvard Law School.

I, like many others, would drop in. (Clark, I am quite certain, did the biggest drop-in business in the School, with clientele young and old, left and right.) Sometimes he and I would talk current events or politics, although his disconcerting habit of holding public officials to standards of intelligence and lucidity made it hard to gossip seriously. Sometimes we talked about who we were and what had happened to us in life. Probably the high point on this score was the day he showed me what he had received from some federal agency — I am not sure which — in response to his Freedom of Information Act request for all information they had on the subject of "Clark Byse." He was, I think, proud to have stirred up such a ruckus over the course of his career, especially regarding academic freedom, that the federal government had a considerable file on him, complete with passages that had been blacked out for, apparently, "security reasons." But most often we talked about contract law or administrative law, the subjects we both taught. And it was not accidental that we talked about the subjects we taught, because mostly what we talked about was the teaching — what the point of particular case analyses ought to be, how to handle concepts students found difficult, and how to have the class reach intellectually satisfying results while still giving the students the experience of doing the hard work for themselves.

As one walked into Clark's office, taped to the side of a filing cabinet that stood right next to the doorway one found a newspaper clipping that got yellower as the years went by, but which was never removed. It had some text, a pretty-good-sized picture of Clark, and a large headline which read something like (I wish I could remember exactly) "Is He Kingsfield?" or "The Real Kingsfield?" The reference, of course, was to Professor Charles Kingsfield, the dominating character in *The Paper Chase*, John Jay Osborn's novel of life at the Law School, and more particularly to the image of Kingsfield that had been created by John Houseman in the movie that had been made from the book. As thus portrayed, Kingsfield (in the words of Wikipedia) "was an imperious professor of contracts at Harvard Law School, known for his unrelenting use of the Socratic method on his students."[1]

Now of course it was Clark who had chosen to post the article in a place where you had to see it. While I never discussed it with him, I do not for a minute think that he did that as an exercise in simple humor, as if saying, "Can you believe they wrote this?" He posted it because he wanted those who entered to think, "This might really be Kingsfield." But was that just another example of the (possibly ironic) sensibility that wanted me to know that the government had a security

[1] Wikipedia, Professor Charles Kingsfield, http://en.wikipedia.org/wiki/Professor_Charles_Kingsfield (last visited Nov. 10, 2007).

dossier on him? Or was it a statement of the simpler truth that Clark was in fact Kingsfield?

When I first met Clark Byse, in 1973, I was a 1L arguing before the bench in moot court; he was chief judge. I presented what I considered a brilliant analysis of the decided cases; his face — and especially his expressive, bushy eyebrows — told me that he had a different opinion. It was a glower worthy of Kingsfield. And when I took his class in administrative law the following year, he certainly put us on the spot to know the assigned cases and be ready to recite concerning them. I was called on for the great Frankfurter chestnut, *Universal Camera Corp. v. NLRB*[2] — and whatever the intellectual impact, it is a tribute to the psychological impact of Clark's questioning that I can remember what case it was, after thirty-some years. In later years Clark would tell me that he once had a psychologist sit in on his class and afterwards tell Clark that what he saw was Clark making love to his students. Let's just say that from our point of view it was tough love.

By his rigor, by his preparation, and by his humor, Clark conveyed how much it mattered to him that we learn the law. I suppose Kingsfield conveyed that too. But where Clark departed from Kingsfield was in the intellectual quality of what he offered and demanded. For Kingsfield, at least as played by Houseman, taught on the assumption that he was the expert, that he knew the answers, and that his students' obligation was to know them as well. He asked questions with convergent answers. Clark, who knew as much about administrative law as anyone did, instead invited students to join him on a joint quest for an open-ended truth. His approach involved taking two stances, both of which were (and are) controversial: first, that the matters that the law is concerned with are matters of fundamental and continuing debate, not susceptible of having unique right answers; second, that even so, within that debate there are better considered — or at least worse considered — positions. His ability to maintain the tension between these two propositions, to require us to reshape what we thought and said so that it was better considered, without suggesting that he knew, or that there was, a unique answer, was exceptional.

And Clark acted as a participant in this process. He often started a class by revising what he had said the day before, or by reporting some research on the topic that he had conducted in the intervening twenty-three hours. One day he told us that, worried about some matter of regulatory policy we had discussed in the prior class, he had spoken with Paul Samuelson — a recent Nobel laureate in economics — to see what he had to say. We were, of course, impressed. But I do not think

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[2] 344 U.S. 474 (1951).

this was just an act. I think Clark was most alive when he was in the classroom or thinking about what was happening there. For him, teaching in the classroom was the heart of the Law School. For us, he was the heart of the heart.

*Peter L. Strauss**

Clark Byse was a benefaction to my life through Walter Gellhorn, who had seen him through two graduate degrees at Columbia[1] and then his first law-teaching job, before making him for thirty years his partner in their extraordinary administrative law teaching materials. Clark joined the book in 1954, with its third edition, right after confirming Walter's respect with his J.S.D., and continued through his entire service at Harvard, retiring with the eighth edition in 1986.[2] Thanks to his influential scholarship, Clark held the book's responsibilities for issues concerning the judicial review of administrative action, and he shaped the statutory rationalization of nonstatutory review, mandamus, venue, and sovereign immunity in administrative law.[3] Yet, fair to say, Clark's life was dominated by his concern for justice — particularly within university communities — for teaching, and for his students. Active in the American Association of University Professors (AAUP) from 1953, he wrote *Tenure in American Higher Education* with Louis Joughin in 1959,[4] served from 1960 to 1962 as AAUP's General Counsel, and from 1966 to 1968 as its President. He wrote deeply and persuasively about law teaching, as when, shortly after retiring from Harvard, he undertook a fifty-year retrospective of American legal education[5] — a typically balanced and yet incisive account of the changes he had witnessed on a visit to Iowa, the school where he had taught in 1939 before a wartime interlude of public service and then his years at Penn.

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* Betts Professor of Law, Columbia Law School.

1 Clark studied under Walter for his LL.M. in 1939 and his J.S.D. in 1952.

2 From the ninth edition forward the book, most recently edited by Cynthia Farina, Todd Rakoff, and myself, has been titled *Gellhorn and Byse's Administative Law*.

3 *See* Clark Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962); Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).

4 CLARK BYSE & LOUIS JOUGHIN, TENURE IN AMERICAN HIGHER EDUCATION: PLANS, PRACTICES, AND THE LAW (1959).

5 Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063 (1986)

A small subset of exacting taskmasters love and are loved by those they usher into task. Clark was a consummate member of the group, and he basked in it. One could know this from any visit to his office in Langdell, where the souvenirs of student appreciation were on proud display; from conversations about the way in which he approached the classroom; and from the loving care with which he saw into print his colleague and good friend[6] Phillip Areeda's notes on the Socratic method, as good an account as has ever been written about the subject.[7] Those notes, like Clark's own essay a decade earlier, reflect a deep appreciation of the contribution *appropriate* demand and discipline in the classroom can bring to legal education. Clark delighted in recounting to his friends that at one point Harvard's School of Education had undertaken a survey of anxiety among beginning Harvard Law students, comparing his contracts class with that of a colleague self-consciously working to put his students at ease. The study found the students in the two settings to be equally anxious, differing only in what they were anxious about. In Clark's class: Am I well enough prepared? Have I mastered these materials? If called on, will I win Professor Byse's approval? And in the other: What the hell is going on here? Clark was clear as to which he preferred, and delighted in the results.

Never Clark's student in the conventional sense and only briefly his Harvard colleague, I thought to ask Ron Cass, his dean at Boston University after Clark became a late victim of mandatory retirement from Harvard, how he saw Clark. Here is his response:

> Clark was a wonderful colleague, mentor, and teacher. He taught at Boston University School of Law for seventeen years. Although these years were the twilight of his teaching career, Clark brought his trademark enthusiasm, wit, and style — demanding the best of his students, while giving the best of himself. He never coddled the students, never told them that a mediocre answer was good or that an ill-formed question was interesting. He never said he learned as much from them as they did from him. But Clark made the students think, made them learn, and communicated in so many ways his love of them and of teaching that the students universally responded with warmth, affection, and abiding respect for this wonderful man. Having served as Dean of the school during Clark's last decade of teaching, I had the opportunity to read every student review and comment. The students found many ways to express their delight at having the opportunity to learn from this legendary figure in the law, but the review that touched Clark the most — for reasons his friends will appreciate — was a remark from one anonymous student that "the old screw still

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[6] Clark Byse, *In Memoriam: Phillip E. Areeda*, 109 HARV. L. REV. 894 (1996).

[7] Phillip E. Areeda, *The Socratic Method (SM) (Lecture at Puget Sound, 1/31/90)*, 109 HARV. L. REV. 911 (1996).

has it."[8] Characteristically, Clark left on his own terms. While still a thoroughly wonderful classroom presence, in his late eighties, Clark informed me one day that he decided to stop teaching because he was afraid that at his age he might get sick and have to miss too much class. He did not stop because it was boring or because he had lost a step — but because he cared so much about his charges. I wish they made more teachers like Clark Byse. Legal education would be much the better for it.

I was privileged to work with Clark on two editions of the administrative law teaching materials he had long coauthored with my Columbia mentor, Walter Gellhorn. What a sharp and kindly eye Clark brought to the work of his new junior colleague! During the weeks we were preparing new editions for publication, Clark also welcomed me as a guest in his home and shared the concerns of his life in the years before Elizabeth so wonderfully found him and brought such joy to it. In his editing, too, what students would take away was always at the fore. "How do you expect this to work in class?" "What are the central issues students need to confront, and how can we sharpen what's here to make that happen?" Putting the materials in ways that would capture their interest and advance their understanding was the watchword, and not exploiting a captive audience for advancement of his own scholarship; students could hardly know (unless paying close attention to what they were learning) what a shaper of the field he, in particular, had been. And Clark was generous not only with his junior colleague. He and Walter for years had developed an extraordinary Teacher's Manual — not the common "how to" or set of suggested answers to casebook questions, but rather a compendium of additional resources, fully half the size of their book, that by expanding on what the students saw would help the newly minted teacher understand the complex subject and shine in the classroom. How often one heard that that teaching manual, a good-will offering to which he had devoted countless hours, had made the course for its instructor.

Clark also contributed for years to the Administrative Conference of the United States and to the ABA's Section of Administrative Law and Regulatory Practice. Here he brought his important work on judicial review of administrative action to ground. And again, he made himself a trusted and respected counselor, not only by the acuity of his work, but as importantly by its selflessness. Clark had the professional's capacity to understand the needs of others and work for their

[8] On this subject, another friend of Clark's recalls his telling this story on himself: He was using a restroom stall at Boston University one day when a couple of students came in. One of them remarked, "The old guy is losing it, isn't he?" and the other laughingly agreed. Clark recognized the student's voice, and in the next class put him through his paces. He then gave the class a helpful hint: lawyers should be discreet in places like elevators and restrooms; "You never know who might overhear your comments."

achievement without *amour propre*, to an extraordinary degree. He dealt with lawyers and their practical problems with the same modesty of self and sharp-eyed commitment to their success as he brought to the legions of his students. His contributions were enormous; he will be greatly missed.

Richard K. Willard[*]

Clark Byse wanted to be a teacher before he even knew he would go to law school. He planned to work as a schoolteacher after graduating from Wisconsin State Teachers College in Oshkosh. His father thought a law degree would provide better job security, and so Clark went to law school. In 1939, after an additional year of graduate legal study, Clark began a career of teaching law that extended over sixty years.

Indeed, apart from a few years of military and government service at the time of World War II, Clark continued teaching generation after generation of law students, until he was ninety years old. From 1972 to 1975, I was one of his mid-career students at Harvard Law School. I took every course he taught during those years, and he advised me on my law review note. There were many giants on the Harvard faculty in those days, but Clark was my favorite.

Clark taught my very first law school class, Contracts, and the first case was the classic case of the hairy hand.[1] Clark was scary at first, and it was easy to believe he was the model for Professor Kingsfield in *The Paper Chase*. He seemed to know the name of each of the 130 students in his class, and we were all in constant jeopardy of being called upon.

Of course, Clark's primary field of expertise was administrative law, and his class on that subject was less theatrical than his first-year contracts class. One thing, however, was the same: Clark never lectured. Every class was a dialogue with his students. Like all great Socratic instructors, Clark was a great listener, and he knew how to use whatever answer was offered to stimulate thought and understanding. Clark wanted his students to learn to think for themselves, not to adopt his particular ideology or viewpoint. Of course, Clark had opinions, but he also had a healthy skepticism of fanatics and a commendable open-mindedness to other points of view.

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[1] Hawkins v. McGee, 146 A. 641 (N.H. 1929).

As time went on, Clark's mask began to slip, and we realized he was all bark and no bite — and in fact even the bark became more gentle. Students began to visit him in his office and found him to be a patient and sympathetic mentor. I never called Clark by his first name until after graduation, but some other students dared to do so. Clark was amused, not offended, and remarked, "The next thing you know, they will be calling me Clarksie."

In class, as well as in life, Clark's sense of humor was often evident. A plain-spoken Midwesterner, he was often amused by pomp and pretension. He could find a humorous element in many cases, such as the homeowner who insisted that Cohoes pipe was not good enough for his new house and that only Reading pipe would do.[2] I remember his evident pleasure in teaching *Morgan v. United States*[3] and relating the testimony of the Secretary of Agriculture on the extent to which the administrative record had been considered:

> [The Secretary] did not hear the oral argument. The bulky record was placed upon his desk and he dipped into it from time to time to get its drift. He decided that probably the essence of the evidence was contained in appellants' briefs. These, together with the transcript of the oral argument, he took home with him and read. . . . We assume the Secretary understood [their] import.[4]

To Clark, the notion of a cabinet secretary hauling home a huge administrative record and later justifying his decisional process was too entertaining to pass by quickly.

In time, Clark's masterful teaching extended well beyond his own students. Though Clark's contribution to scholarly journals was thin, his casebook on administrative law was a gold mine. Originally coauthored with Walter Gellhorn and later joined by other distinguished scholars, *Gellhorn and Byse's Administrative Law* was widely adopted in classrooms throughout the country and shaped the way thousands of lawyers and judges came to understand this field of law. In my thirty-two years of law practice, I have always had a recent edition of this casebook in my office, together with the fifth edition that contains my student annotations. The casebook has changed considerably over the years. For example, the section once entitled "The Men at the Top" is now "Formal Adjudication at the Agency Level — Issues of Role."[5] Still present, however, is a photograph of the administrative

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[2] *See* Jacob & Youngs, Inc. v. Kent, 129 N.E. 889 (N.Y. 1921).

[3] 304 U.S. 1 (1938).

[4] *Id.* at 17–18.

[5] *See* PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, GELLHORN AND BYSE'S ADMINISTRATIVE LAW 393 (rev. 10th ed. 2003).

record in a Federal Power Commission gas case, which threatens to overwhelm the poor hearing examiner.[6]

Clark's sense of humor did not fade with age. I once had the privilege of arguing a case in the Supreme Court on the enforceability of a form contract. The contract (a steamship ticket) was preprinted and could have been viewed as a contract of adhesion. My client was the steamship company, and we won.[7] Clark later ruefully remarked that he had taught contracts to three of the Justices, as well as petitioner's counsel, and none of us got the case right. I think Clark was (mostly) joking, but the truth is he took great pleasure in the later accomplishments of his students.

After nearly forty years of full-time teaching, nothing became Clark so well as his active retirement. Though Clark became an emeritus professor at Harvard Law School in 1983, he continued to teach Contracts at Boston University Law School for nearly twenty years, much to the delight of his students. He also served as Harvard's adviser to alumni interested in pursuing a career of teaching law. And even after his second retirement at age ninety, Clark continued to take an active interest in the law and in his professional colleagues.

No description of Clark's retirement would be complete without mentioning his late-in-life romance. In his personal life over the years, Clark certainly faced times of sadness and loneliness. However, his fortunes took a turn for the better when he was briefly mentioned in the 1994 movie *Quiz Show*. This led to Clark's reunion with and marriage to a lovely woman, Elizabeth Anne Myers, whom he had known some fifty years earlier during his wartime military service. Clark and Elizabeth were married in 1997, and over the last ten years they have shared a warm and welcoming home in a retirement community in Lexington. They regularly entertained faculty colleagues and friends until shortly before Clark's death.

One does not often think of Harvard law professors as modest, self-effacing, and sweet. But Clark was. More than that, he was a dedicated and skillful practitioner of the art of teaching law. We can be grateful that he was allowed to practice that art for so many years, and through his students (and their students) his memory will endure for many years to come.

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[6] *Id.* at 406.

[7] *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).