

"Tried tonight to read a case for the first time. It is harder than hell."

5.1 ONE L: AN INSIDE ACCOUNT OF LIFE IN THE FIRST YEAR AT HARVARD LAW SCHOOL

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9/3/75

(Wednesday)

They called us "One Ls," and there were 550 of us who came on the third of September to begin our careers in the law. For the first three days we would have Harvard Law School to ourselves while we underwent a brief orientation and some preliminary instruction. Then, over the weekend, the upper-year students would arrive, and on Monday all classes would officially commence.

A pamphlet sent in August to all first-year students—the One Ls (1Ls) as they are known at HLS—instructed me to be at the Roscoe Pound Classroom and Administration Building at 10 A.M. to register and to start orientation. I took the bus into Cambridge from Arlington, the nearby town where my wife and I had found an apartment. . . .

At 2 [P.M.] I went to the first meeting of Legal Methods. Rather than a full-blown law school course, Methods was regarded as an introductory supplement to the first-year curriculum. It would run for only ten weeks, a little longer than half of the first term, and the instructor would be a teaching fellow, instead of a member of the faculty. For the next three days, though, Methods would be at the center, concentrated instruction aimed at bringing us to the point where we could start the work of our regular courses, which would begin meeting on Monday.

Normally, Legal Methods would gather in classes of twenty-five, but today for the introductory session three groups had been joined and the small classroom was crowded. There was a lot of commotion as people went about introducing themselves to each other. . . .

At the front of the room the instructor was calling us to order.

"I'm Chris Henley," he said. He was short and had a full beard. He looked to be in his early thirties. "I'd like to welcome you to Harvard Law School.

This'll be a brief session. I just want to give you a few ideas about what we'll be doing for the next few days and then in the rest of the course."

Before he went on, Henley told us a little about himself. He had been a lawyer with OEO in Washington for seven years. Now he was here, working on a graduate law degree; next year he would probably move on to another school to become a law professor. Then he introduced the three members of the Board of Student Advisors who would be working with each of the Methods groups. . . . After that, Henley described the course.

"In the Legal Methods program," he said, "you'll be learning skills by practicing them. Each of you will act as attorney on the same case. You'll assume the role of a law firm associate who's been asked to deal with the firing of an employee by a corporation."

It would all be highly fictionalized, but we'd follow the matter through each of its stages, gaining some taste of many aspects of a lawyer's work. Among other things, Henley said we would be involved with a client interview, the filing of suit, preparing and arguing a brief for summary judgment. At the very end we would see how two experienced attorneys would handle the suit in a mock trial. I had only the vaguest idea of what many of the words Henley used meant—*depositions* and *interrogatories* and *summary judgment*—and perhaps for that reason alone, the program sounded exciting.

Henley said our first assignment would be handed out at the end of class. It consisted of a memo from our mythical law-firm boss and a "case" the boss had asked the associate to consult. "Case" here means the published report of a judge's resolution of a dispute which has come before him [or her]. Typically, a case report contains a summary of the facts leading up to the lawsuit, the legal issues raised, and what the judge has to say in resolving the matter. That portion of the case report in which the judge sets forth his views is called an "opinion." Cases and opinions form the very center of a law student's world. Virtually every American law school adheres to the "case-study method," which requires students to learn the law by reading and discussing in class a steady diet of case reports. Most of those are the decisions of appellate courts, designated higher courts to which lawyers carry their objections to some point of law ruled on by a trial judge. Because they deal with closely defined legal questions, appellate opinions are considered especially apt tools for teaching students the kind of precise reasoning considered instrumental to a lawyer's work.

The case Henley assigned us was from the Supreme Court of New Hampshire. He asked us to read it and to be ready to discuss it the next time the Methods group met. That did not sound like much. . . .

In [other] law school classes there would be no "introductory day" like the ones I'd experienced in college and graduate school, none of that business of the professor's displaying himself to prove he does not have to mumble and hoping that students won't drop. "Lectures begin on the opening day of the year," the catalog sternly announced. Assignments would be posted in advance so that we would be fully prepared when we entered class on Monday.

In Criminal Law, Professor Mann had simply assigned the first chapter of the casebook. But Professor Perini's announcement was longer:

For Monday's class, please read pages 1–43 in the casebook, Baldridge and Perini, *Selected Cases in the Law of Contracts*. Also read, at page 46, the case of *Hurley v. Eddingsfield* and the case of *Poughkeepsie Buying Service, Inc. v. Poughkeepsie Newspaper Co.* at p. 50.

Do not forget to bring your casebook and supplement to class.
Be certain to read all material CAREFULLY.

It was not a good sign. As I copied the announcement, one man beside me said he had looked at the casebook and that the assignment would take hours. And as I finished writing I also noticed that Professor Perini had underlined the last word, *carefully*, twice. . . .

9/3/75

(near midnight)

Tried tonight to read a case for the first time. It is harder than hell.

When I started, I thought the Legal Methods assignment would be easy. The memo from the boss was straightforward. A man named Jack Katz is "our firm's" client. Katz, who had worked for years as the comptroller of a company that makes raincoats, was fired a few months ago by the president of the corporation. His name is Elliot Grueman, and he is the son of the man, now dead, who hired Katz ages ago. Grueman and Katz differed about expansion plans for the company; when Katz carried his objections to a member of the board of directors, Grueman showed Katz the door.

The memo from the boss indicates that Katz probably doesn't have a leg to stand on. It looks like Grueman had every right to fire him, since Katz did not have an employment contract. But still, the boss says, read this New Hampshire case, *Monge v. Beege Rubber Company*, which may indicate some limitations in an employer's right to discharge a worker.

OK. It was nine o'clock when I started reading. The case is four pages long and at 10:35 I finally finished. It was something like stirring concrete with my eyelashes. I had no idea what half the words meant. I must have opened *Black's Law Dictionary* twenty-five times and I still can't understand many of the definitions. There are notations and numbers throughout the case whose purpose baffles me. And even now I'm not crystal-clear on what the court finally decided to do.

Even worse, Henley asked us to try our hand at briefing the case—that is, preparing a short digest of the facts, issues, and reasoning essential to the court in making its decision. Briefing, I'm told, is important. All first-year students do it so they can organize the information in a case, and the various student guide books make it sound easy. But I have no idea of what a good brief looks like or even where to start. What in the hell are "the facts," for instance? The case goes on for a solid page giving all the details about how this woman, Olga Monge, was fired primarily because she would not go out on a date with her foreman. Obviously, I'm not supposed to include all of that, but I'm not sure what to pick, how abstract I'm supposed to be, and whether I should include items like her hourly wage. Is a brief supposed to sound casual or formal? Does it make any difference how a brief sounds? Should I include the reasoning of the judge who dissented, as well? Is this why students hate the case-study method?

Twenty minutes ago, I threw up my hands and quit.

I feel overheated and a little bit nervous. I wouldn't be quite so upset if I weren't going to be reading cases every day and if understanding them weren't so important. Cases are the law, in large part. That fact came as news to me when David explained it this summer. I had always thought that the legislature makes all the rules and that judges merely interpret what has been said. I'm not sure where I got that idea, either in high-school civics or, more likely, from TV.

Anyway, that is not right. When the legislature speaks, the judge obeys. But most of the time, nobody has spoken to the point, and the judge decides the law on his own, looking to what other judges have done in similar circumstances. Following precedent, that's called. Much of what lawyers do in court, apparently, is to try to convince judges that the present situation is more like one precedent than another.

This system of judges making law case by case is called the "common law." I am a little embarrassed that I did not understand what that meant when I applied to law school, particularly since the first page of the HLS catalog says that the law school prepares lawyers to practice "wherever the common law prevails."

Well, tonight the common law has prevailed over me, beaten me back. I suppose it will not be the last time, but I feel frustrated and disturbed.

I am going to sleep.

9/8/75

(Monday)

Today is the start of regular classes. We will now commence "normal" law-school life. The 2Ls and 3Ls will be present, and the section will begin the schedule we'll be on for much of the year. This semester we'll have Contracts, Civil Procedure, Criminal Law, and Torts. The latter two courses last only one term, and they'll be the subjects on which we'll take our first exams in January. Second semester, Contracts and Civil Pro continue, Property will be added, and we'll each be allowed to choose an elective.

We've been warned that today's classes—Criminal and Contracts—will not seem much like Legal Methods. The courses we begin now are considered the traditional stuff of law school, analytical matter, rather than mere how-to. Unlike Methods, these courses will be graded, and they'll be taught by professors, not teaching fellows. The classes will be made up of the whole 140-person section instead of a small group. And, most ominous to me, the instruction will be by the noted "Socratic method."

In a way I'm looking forward to Socratic instruction. I've heard so much about it since I applied to law school it will at least be interesting to see what it's like.

The general run of student reaction is most succinctly expressed in a comment I heard from [a friend] David this summer, the day he showed me around the law school. He was kind of mimicking a tour guide, whining out facts and names as he took me from building to building. When we reached Langdell, he stood on the steps and lifted his hand toward the columns and the famous names of the law cut into the granite border beneath the roof.

"This is Langdell Hall," he said, "the biggest building on the law-school campus. It contains four large classrooms and, on the upper floors, the Harvard Law School library, the largest law-school library in the world.

"The building is named for the late Christopher Columbus Langdell, who was dean of Harvard Law School in the late nineteenth century. Dean Langdell is best known as the inventor of the Socratic method."

David lowered his hand and looked sincerely at the building.

"May he rot in hell," David said.

The Socratic method is without question one of the things which makes legal education—particularly the first year, when Socraticism is most extensively used—distinct from what students are accustomed to elsewhere. While I was teaching, it was always assumed that there was no hope of holding a class discussion with a group larger than thirty. When numbers got that high, the only means of communication was lecture. But Socraticism is, in a way, an attempt to lead a discussion with the entire class of 140.

Generally, Socratic discussion begins when a student—I'll call him Jones—is selected without warning by the professor and asked a question. Traditionally, Jones will be asked to "state the case," that is, to provide an oral rendition of the information normally contained in a case brief. Once Jones has responded, the professor—as Socrates did with his students—will question Jones about what he has said, pressing him to make his answers clearer. If Jones says that the judge found that the contract had been breached, the professor will ask what specific provision of the contract had been violated and in what manner. The discussion will proceed that way, with the issues narrowing. At some point, Jones may be unable to answer. The professor can either select another student at random, or—more commonly—call on those who've raised their hands. The substitutes may continue the discussion of the case with the professor, or simply answer what Jones could not, the professor then resuming his interrogation of Jones. . . .

Despite student pain and protest, most law professors, including those who are liberal—even radical—on other issues in legal education, defend the Socratic method. They feel that Socratic instruction offers the best means of training students to speak in the law's unfamiliar language and also of acquainting them with the layered, inquiring style of analysis which is a prominent part of thinking like a lawyer.

For me, the primary feeling at the start was one of incredible exposure. Whatever its faults or virtues, the Socratic method depends on a tacit license to violate a subtle rule of public behavior. When grounds are too large for any semblance of intimacy, we usually think of them as being divided by role. The speaker speaks and, in the name of order, the audience listens—passive, anonymous, remote. In using the Socratic method, professors are informing students what would normally be a safe personal space is likely at any moment to be invaded.

In Austin [Hall] the rooms were ancient and enormous. The seats and desks were in rows of yellowed oak, tiered steeply toward the rear. At its highest, the classroom was nearly forty feet, with long, heavy curtains on the windows and

dark portraits of English judges, dressed in their wigs and robes, hanging in gilt frames high on the wall. It was an awesome setting, especially when its effect was combined with the stories we had all heard about Perini. There was a tone of tense humor in the conversations around me, most voices somewhat hushed. As I headed for my seat, I overheard a number of people say, "I don't want it to be me," referring to whom Perini would call on.

It was already a few minutes after ten, the hour when we were supposed to start. The class was assembled and almost everyone was in his seat.

Perini moved slowly down the tiers toward the lectern. He held his head up and he was without expression. My first thought was that he looked softer than I'd expected. He was around six feet, but pudgy and a little awkward. Although the day was warm, he wore a black three-piece suit. He held the book and the seating chart under his arm.

The room was totally silent by the time he reached the lectern. He slapped the book down on the desk beneath. He still had not smiled.

"This is Contracts," he said, "Section Two, in case any of you are a little uncertain about where you are." He smiled then, stiffly. "I have a few introductory comments and then we'll be going on to the cases I asked you to look at for today. First, however, I want to lay out the ground rules on which this class will run, so that there will be *no* confusion in the future."

He spoke with elaborate slowness, emphasis on each word. His accent was distinctly southern.

Perini picked up the casebook in one hand.

"The text for this class is *Selected Cases in the Law of Contracts*. The editors are Baldridge and"—Perini lifted a hand to weight the silence—"et cetera." He smiled again, without parting his lips. Around the room a few people snickered. Then he said, "Needless to mention, I hope you bought it new," and got his first outright laugh.

"We will proceed through the book case by case," Perini told us. "Now and then we may skip a case or two. In that event, I'll inform you in advance, or you will find a notice on the bulletin boards. You should stay three cases ahead, each day."

Between the desk on which the lectern sat and the students in the front row, there was a narrow area, a kind of small proscenium. Perini began to pace there slowly, his hands behind his back. I watched him as he came toward our side of the room, staring up harshly at the faces around him. He looked past fifty, coarse-skinned and dark. He was half-bald, but his black hair was styled carefully. There was a grim set to his mouth and eyes.

"This class will deal with the law of obligations, of bargains, commercial dealings, the law of promises," Perini said. "It is the hardest course you will take all year. Contracts has traditionally been the field of law of the most renowned intellectual complexity. Most of the greatest legal commentators of the past century have been Contracts scholars: Williston, Corbin, Fuller, Llewellyn, Baldridge—" He lifted his hand as he had done before. "Et cetera," he said again and smiled broadly for the first time. Most people laughed. One or two applauded. Perini waited before he began pacing again.

"Some of your classmates may find the Property course in the spring the hardest course they take. But you will not feel that way, because you will be taking Contracts with me. I am not"—he looked up—"an easy person.

"I expect you to be here *every* day. And I expect you to sit where the registrar has assigned you. On the so-called back benches, I should see only those persons who are visiting us seeking a momentary glimpse of something morbid." Laughter again from a few places.

"I expect you to be very well prepared, *every* day. I want to be absolutely clear on that. I have *never* heard the word 'pass.' I do not *know* what 'unprepared' means. Now and then, of course, there are personal problems—we all have them at times—which make full preparation impossible. If that is the case, then I want a written note to be handed to my secretary at least two hours before class. You can find her on the second floor of the Faculty Office Building in room two eighty-one."

I wrote it all down in my notebook: "No absence. No pass. No unprepared. Note to sec'y 2 hrs. b-4 class, FOB 281."

Holy Christ, I thought.

As expected, Perini told us to read nothing aside from class assignments for the first few months—not even "a certain hornbook" we might have heard of. For the present, he assured us, we would have our hands full. Then he described the course in some detail. In that discussion, too, Perini maintained that tone of barely veiled menace. We may have been Phi Beta Kappas and valedictorians, but this was Harvard Law School now—things would not be easy.

There were moments when I was certain that Perini was only half serious. There was such obvious showmanship in all of this, the deliberateness of the gestures, the archness of his smile. It was almost a parody of the legendary tough professor, of the Perini of rumor. But if it was an act, it was one which he was determined would be compelling. He revealed no more than a trace of irony, and there were often moments, as when he had looked up at us, that he seemed full of steel.

As he went on describing the subjects with which we would soon be dealing—offer, acceptance, interpretation; the list was extensive—I began to think that, like Mann, he would let the hour slip away. No one would be called and we'd all be safe for one more day. But at six or seven minutes to twelve he returned to the lectern and looked down at the seating chart.

"Let's see if we can cover a *little* ground today." Perini took a pencil from his pocket and pointed it at the chart. It might as well have been a pistol. Please, no, I thought.

"Mr. Karlin!" Perini cried sharply.

Nearby, I heard a tremendous thud. Five or six seats from me a man was scrambling to grab hold of the books that had been piled before him, two or three of which had now hit the floor. That, I was sure, was Karlin who had jolted when he heard his name called. He was a heavyset man, pale, with black eyeglasses. He was wearing a yarmulke. His eyes, as he struggled with his books, were quick with fright, and at once I felt terribly sorry for him and guilty at my own relief.

"Mr. Karlin," Perini said, ambling toward my side of the room, "why don't you tell us about the case of *Hurley v. Eddingfield*?"

Karlin already had his notebook open. His voice was quavering.

"Plaintiffs intestate," he began. He got no further.

"What does *that* mean?" Perini cried from across the room. He began marching fiercely up the aisle toward Karlin. "In-tes-tate," he said, "'in-tes-tate. What is that? Something to do with the *stomach*? Is this an anatomy class, Mr. Karlin?" Perini's voice had become shrill with a note of open mockery and at the last word people burst out laughing. Louder than at anything Perini had said before.

He was only five or six feet from Karlin now. Karlin stared up at him and blinked and finally said, "No."

"No, I didn't think so," Perini said. "What if the word was 'testate'? What would that be? Would we have moved from the stomach"—Perini waved a hand and there was more loud laughter when he leeringly asked his question—"elsewhere?"

"I think," Karlin said weakly, "that if the word was 'testate' it would mean he had a will."

"And 'intestate' that he didn't have a will. I see." Perini wagged his head.

"And who is this 'he,' Mr. Karlin?"

Karlin was silent. He shifted in his seat as Perini stared at him. Hands had shot up across the room. Perini called rapidly on two or three people who gave various names—Hurley, Eddingfield, the plaintiff. Finally someone said that the case didn't say.

"The case doesn't *say*!" Perini cried, marching down the aisle. "The case does not say. Read the case. *Read* the case! *Carefully*!" He bent with each word, pointing a finger at the class. He stared fiercely into the crowd of students in the center of the room, then looked back at Karlin. "Do we really care who 'he' is, Mr. Karlin?"

"Care?"

"Does it make any *difference* to the outcome of the case?"

"I don't think so."

"Why not?"

"Because he's dead."

"He's *dead*!" Perini shouted. "Well, that's a load off of our minds. But there's one problem then, Mr. Karlin. If he's dead, how did he file a *lawsuit*?"

Karlin's face was still tight with fear, but he seemed to be gathering himself.

"I thought it was the administrator who brought the suit."

"Ah!" said Perini, "the *administrator*. And what's an administrator? One of those types over in the Faculty Building?"

It went on that way for a few more minutes, Perini striding through the room, shouting and pointing as he battered Karlin with questions, Karlin doing his best to provide answers. A little after noon Perini suddenly announced that we would continue tomorrow. Then he strode from the classroom with the seating chart beneath his arm. In his wake the class exploded into chatter.

I sat stunned. Men and women crowded around Karlin to congratulate him. He had done well—better, it seemed, than even Perini had expected. At one

point the professor had asked where Karlin was getting all the definitions he was methodically reciting. I knew Karlin had done far better than I could have, a realization which upset me, given all the work I had done preparing for the class. I hadn't asked myself who was suing. I knew what "intestate" meant, but not "testate," and was hardly confident I could have made the jump while under that kind of pressure. I didn't even want to think about the time it would be my turn to face Perini.

And as much as all of that, I was bothered by the mood which had taken hold of the room. The exorbitance of Perini's manner had seemed to release a sort of twisted energy. Why had people laughed like that? I wondered. It wasn't all good-natured. It wasn't really laughter with Karlin. I had felt it too, a sort of giddiness, when Perini made his mocking inquiries. And why had people raised their hands so eagerly, stretching out of their seats as they sought to be called on? When Socratic instruction had been described for me, I had been somewhat incredulous that students would dash in so boldly to correct each other's errors. But if I hadn't been quite as scared I might have raised my hand myself. What the hell went on here? I was thoroughly confused, the more so because despite my reservations the truth was that I had been gripped, even thrilled, by the class. Perini, for all the melodrama and intimidation, had been magnificent, electric, in full possession of himself and the students. The points he'd made had had a wonderful clarity and directness. He was, as claimed, an exceptional teacher. . . .

"While many clients think of the legal process as an arena for a full adversarial contest, most divorce disputes are not resolved in this manner."

5.2 LAW AND STRATEGY IN THE DIVORCE LAWYER'S OFFICE

Austin Sarat and William L. F. Felstiner

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In the research from which this paper is derived, we developed an account of lawyer-client interaction in divorce cases. We chose to examine divorce because it is a serious and growing social problem in which the involvement of lawyers