

BOOK REVIEW

ERWIN N. GRISWOLD, *OULD FIELDS, NEW CORNE: THE PERSONAL MEMOIRS OF A TWENTIETH CENTURY LAWYER*, West Publishing Co., St. Paul, Minnesota (1992) (444 pages).

*Reviewed by the Honorable James E. Quinn**

In a recent conversation with a young friend who happens to be a third year law student, the name of Erwin N. Griswold surfaced. Since I have attained a fairly advanced age, this gave me the opening to tell my friend that Mr. Griswold was the dean of the law school that I attended and that I had taken his course in federal taxation in the long ago term of 1948-49.

Erwin N. Griswold is undeniably one of the giants among American jurists of all time—a great advocate, scholar, and teacher. In 1992, he published his autobiography under the title of *Ould Fields, New Corne: The Personal Memoirs of a Twentieth Century Lawyer*.¹ Always a self-effacing man and always a stickler for accuracy, one suspects that he would not have trusted another author to tell his story.

Because of his long association with the Harvard Law School and with Washington D.C., many perceive Griswold as a WASP member of the eastern establishment. As a matter of fact, his father, who became a lawyer in Cleveland, was born in a small town in Ohio. Erwin himself was born in East Cleveland on July 14, 1904. Of this date, Griswold notes, "I have no personal recollection of the event, but I feel confident about the time and the place. Indeed, one's date of birth is the oldest and most firmly fixed of the exceptions to the hearsay rule."² Erwin attended the public schools in Cleveland through high school and then attended Oberlin College, graduating in 1925. His family had a long history at Oberlin; both of his parents were graduated from there. Even before his own enrollment, Erwin attended reunions of his father's

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¹ The title of the book was borrowed from Sir Edward Coke: "Out of ould fields must spring and grow the new Corne." SIR EDWARD COKE, COMMENTARIES, Vol. 1, Preface (1600).

² ERWIN N. GRISWOLD, *OULD FIELDS, NEW CORNE: THE MEMOIRS OF A TWENTIETH CENTURY LAWYER* 8 (1992).

class. At one of these, he met and spoke with Orville Wright, who stated that he and his brother had made only two lasting contributions to the world of aviation. The first contribution, Wright said, was the warping of the wings essential for lateral stability. The warping of the wings was the precursor to the "flaps" on modern aircraft. The second contribution, Wright stated, was the understanding that at a certain angle, an airplane would lose lift and begin a precipitate fall. The rest, Wright modestly averred, could have been discovered by anyone in the field.

Erwin had more reason to attend Oberlin than just its famous alumni. Oberlin had a long liberal tradition which appealed to this future supporter of the civil rights movement. In 1837, it became the first college to admit women. Two years earlier, Oberlin, a station on the underground railroad, began offering enrollment to African-Americans. Perhaps more important to this admittedly shy young man, however, was Oberlin's proximity to home. As a youth, his diffidence was of such concern to his mother that she would often organize parties in order to expose him to new people. Slow to embrace the novel and the unknown and quick to underestimate himself, this young man nonetheless went on to achieve great things.

Griswold speaks fondly of his years at Oberlin, recalling numerous experiences that shaped his philosophies as a person and as a lawyer. Two of these experiences, in particular, stand out. Erwin observes that he lost whatever commitment he may have had to doctrinal religion while at Oberlin. Although he still calls himself a Christian, he believes "humanist" or "agnostic" to be a more telling label. Erwin admits to finding much guidance in the teachings of Christ but accepts Him as merely an important historical figure. To this day, Erwin remains mystified by religion, particularly the concepts of the Trinity and the Holy Spirit. Perhaps so great an analytical mind can be an obstacle to faith.

Erwin speaks also of the oral examination taken in connection with the Masters degree which he obtained concurrently with his Bachelor of Arts. One of the professors grading his performance, Anna Marie Klingenhagen, supported the theory that the constitutional Framers were wealthy individuals who structured the Constitution primarily to protect the rich and oppress the poor. Erwin vigorously disagreed, an act for which Professor Klingenhagen marked him down heavily. The young Griswold staunchly maintained that the Founding Fathers were stirred by patriotic motives and that they had constructed a remarkable document for gov-

erning an economically diverse nation. His strong argument on behalf of the Framers was indicative of the great respect which Erwin has long felt for the principles and institutions created by the Constitution.

After a summer of extensive travel with Oberlin's Bureau of University Travel, Erwin entered Harvard Law School, having dismissed a brief notion of becoming an astrophysicist. Feeling somewhat concerned that his Oberlin education would not enable him to match wits with graduates of Harvard, Yale, and Princeton, Erwin worked assiduously and conscientiously. After completing his first year exams, Erwin again travelled to Europe with Oberlin's Bureau of University Travel, feeling certain that he had failed out of Harvard Law School. Later that summer, his father wired his grades to him in Rome—an A in every course and second in his class behind Nathan M. Jacobs, future justice of the New Jersey Supreme Court.

Based on his academic performance, Griswold earned membership on the Law Review, eventually becoming its editor-in-chief. It may amuse students editing this book review to know that it was during Erwin's time on the Law Review that he first felt uncomfortable in his practice of not drinking. Although his resolve never wavered, Erwin believed that his constant if gracious declining of drinks made him appear stiff and odd, an image compounded by his shy nature. To this day, Erwin has not taken a drink and has never served one in his home. He learned in later years that whenever he and his wife invited colleagues to dinner, they would stop for cocktails at another's home before coming to his house. Erwin admits that this practice bothered him just as it had bothered him during law school that his classmates could so blithely disregard the laws of prohibition. Erwin wished only that his views could have been respected even as he respected views different from his own.

Erwin has remained an interested observer of the changes in law reviews throughout the decades and, in his book, offers a perspective on the evolution of law review articles since his time as editor-in-chief. Dean Griswold finds the scholarly articles long and esoteric, written by professors for professors rather than by and for judges and practitioners. He bemoans the fact that there are not more book reviews and that those written spend more time expressing the opinions of the reviewer than those of the author—a mistake which I shall strive to avoid. Finally, Erwin notes that student

articles have dramatically improved in quality and usefulness from his own four-page Note.

After graduation, Griswold was invited to serve as a junior assistant in the office of the Solicitor General of the United States. Erwin was at that time the only lawyer whom the Justice Department had hired directly out of law school. Within a matter of time, Erwin realized that he was being assigned all of the tax cases. He thought of going to the Solicitor General and explaining that "I knew nothing about taxes, that I had never taken a course in taxation, and that there was no course on federal taxation at the Harvard Law School at that time." He realized quickly, however, that he was receiving the tax cases because the senior lawyers knew nothing about tax law either. Erwin, therefore, immersed himself in the federal tax codes and soon emerged as an expert in the field. As a member of the Harvard faculty, he eventually remedied the fact that the law school had no course in federal taxation.

After five years of arguing cases before the Supreme Court on behalf of the Solicitor General's office, Griswold was approached to join the teaching staff at Harvard. By then married, Erwin moved to Cambridge in 1934. He was to remain there for thirty-four years, first as an assistant professor, soon as a full professor, and from 1946 until 1968 as dean.

Griswold's years as a professor at Harvard were marked by political and personal conflicts. He writes of his opposition to President Roosevelt's Court packing plan. Although he disagreed with many of the Supreme Court's decisions striking down New Deal programs, he felt that the Court was an institution deserving of greater respect. As Erwin himself puts it,

In my view, the Supreme Court was sort of an ultimate bulwark which provided essential stability for our political system. If an attack of this sort could be successfully made against the Supreme Court, then further attacks could be made on the Court by later Presidents, or by Congress, and a crucial balance in the operation and stability of the government under the Constitution would be lost forever.³

Griswold therefore testified before the Senate Judiciary Committee, voicing his opposition to the plan.

In August of 1939, Erwin and his wife suffered, in his words, a "disaster."⁴ She was diagnosed with Polio and became permanently paralyzed. Erwin states thoughtfully that if she had to suffer so severe

³ *Id.* at 122.

⁴ *Id.* at 132.

a disability, he was grateful that it was no one's fault. Some may say that his wife's paralysis was the will of God. Erwin, however, admonishes that "a God who would inflict such a burden on a person without fault would not be worth having."⁵

The post war years were explosive ones for the dean, what with a flood of returning veterans and, in 1950, the admission of the first women students. In later years, Erwin pointed with pride to this event. Whenever he interviewed a female graduate of the Harvard Law School for a position in his Washington law firm, he proudly mentioned that he was the dean to bring about the admission of women to the school. He notes that the frequent reply in firm but friendly voice was, "Well, why didn't you do it sooner."⁶ He thereafter decided to stop, as he put it, patting himself on the back.

For some years after the admission of women to the law school, Erwin and his wife made a practice of inviting the new female students to their home for a buffet supper. Because the number of women students in a class equalled only about fifteen for the first several years, Erwin felt that the evening would give them an opportunity to achieve some comradery and solidarity. At these annual dinners, Griswold expressed his hope that these young women would use their law degrees to the benefit of their communities and that they were not simply occupying positions in the class which could be occupied by male students who would, in fact, use their legal training. He now realizes that some women graduates found those comments to be evidence of his sexism. Apologetically, Erwin explains that his intention was to encourage those women to take full advantage of their legal educations.

As dean, Erwin made many attempts to overcome his shyness and get along with the people on his faculty. In the book, Griswold describes himself as a reserved person who nonetheless tends to speak his mind, often using words that are perceived as stronger than intended. As dean, he therefore feared misunderstandings and went out of his way to forge a good working relationship with his colleagues. He never summoned a professor to his office. He always went to the faculty member's office. For similar reasons, he never posted office hours. He would receive people in his office at any time. Moreover, he made every effort to recognize the achievements of his faculty. If a professor published an article or gave a speech, he sent that professor a personalized note, not only congratulating him or her but also reacting to the substantive content of the piece.

⁵ *Id.* at 134.

⁶ *Id.* at 173.

In addition to his duties as dean and carrying a full teaching load, he continued to be active in many other fields of the law. A long-recognized expert in federal taxation matters, he was often consulted by private clients. During his years as dean, he argued seven cases before the United States Supreme Court.

Griswold was active also in civil rights matters. He appeared several times as an expert witness for Thurgood Marshall, then the Legal Director of the National Association for the Advancement of Colored People (NAACP). The cases were all concerned with racially segregated legal education at a time when "separate but equal" was the law of the land. The gist of his testimony was that segregated legal education could never be equal. He testified that legal education relies in large part on self-education, that student participation is an essential element of that education, and that learning is reinforced by student exchanges both in and out of the classroom. Griswold argued that the efficacy of the learning process depends in large part on the quality and diversity of the students participating. Erwin maintained that only by representing a cross-section of the community could a law school prepare the students for the environment in which they would be practicing. These cases were the precursors of *Brown v. Board of Education*.⁷

Griswold writes also of a phenomenon occurring simultaneously with the advent of the national civil rights movement—McCarthyism. As a result of his support of former Harvard Law School classmate Alger Hiss, Griswold earned the disfavor of the FBI and the anti-communists. Moreover, as dean, Griswold refused to disband Harvard's chapter of the National Lawyer's Guild (NLG), a student organization which was preparing an article on FBI wiretapping. As a result, the president of the Massachusetts Bar Association publicly rebuked Harvard for "playing host to the Communist Party."⁸ Shortly thereafter, the law school, on Erwin's recommendation, refused to expel two members of the NLG who had asserted their Fifth Amendment privilege when asked whether they were members of the Communist Party. Erwin consequently became a vocal opponent of the notion of "Fifth Amendment Communists," people who were deemed communists and therefore guilty because they relied on their Fifth Amendment privilege against self-incrimination.

In 1961, Griswold was appointed to the Civil Rights Committee by President Kennedy. After Kennedy's election in 1960, a half dozen of Griswold's professors left on short notice for appointments in Wash-

⁷ 347 U.S. 483 (1954).

⁸ GRISWOLD, *supra* note 2, at 190 (citation omitted).

ington, giving rise to the witticism, "Old deans never die, they just lose their faculties."⁹

In 1968, Griswold returned to the Washington office where he began his public career, this time as its Chief. President Johnson had appointed him Solicitor General of the United States, the only federal office to which Erwin ever truly aspired. When the Attorney General telephoned to ask Erwin if he would consent to having his name placed on a list of candidates for the office, Griswold recalls that he "took fifteen agonizing seconds, and said yes."¹⁰ Griswold explains that the office is by definition a political one; the Solicitor General is nominated by the President, confirmed by the Senate, and serves only during the pleasure of the President. Nonetheless, Griswold considers the position "the best legal office in the executive branch of the government."¹¹ The Solicitor General is responsible for representing the United States, its officers, and its agencies in all litigation before the United States Supreme Court. Because of sheer volume, the Solicitor General's office cannot handle each case in its entirety. Briefs, therefore, are written by other lawyers in the various divisions of the Department of Justice. The drafts are then reviewed and, if necessary, revised by a member of the Solicitor General's staff. Oral argument in any government case is handled only by the attorneys in the Solicitor General's office. On a very rare occasion, the Attorney General may appear for oral argument.

Griswold remained in the office of Solicitor General until 1973, and his book gives lively recountings of cases of special interest. He believes that his most famous case was the one involving the Pentagon Papers. With the passage of time, Erwin has arrived at two conclusions about that intense national conflict. First, he agrees that the Second Circuit, Chief Justice Burger, and Justices Harlan and Blackmun were correct in favoring an interim injunction because (a) it would have provided the circuit court and the Supreme Court with an opportunity to examine the Pentagon Papers and assess the risks involved in their publication, and (b) it would have enabled the parties to compare the differences between the papers held by the Pentagon and those in the possession of the newspapers. According to Griswold, the government's case might have been withdrawn had the parties realized that the version of the papers provided to the newspapers contained no sensitive information.

Second, Erwin disagrees with the conduct of the newspapers and

⁹ *Id.* at 245.

¹⁰ *Id.* at 255.

¹¹ *Id.* at 259-60.

their complete unwillingness to admit that they were participants in a breach of fiduciary duty. Daniel Ellsberg, who turned the Pentagon Papers over to the New York Times, was a government employee. As such, he had a legal duty to maintain confidence. His failure to do so was a breach of trust. In Griswold's view:

[I]t would be satisfying if the press recognized that there is a serious problem here, and that, whatever the justification may be, they were willing to act in concert with, and to facilitate the purposes of, a person who was clearly violating his fiduciary obligation. Instead, newspaper people continue to praise the Pentagon Papers case as the greatest decision since *Marbury v. Madison*. I can only say that I continue to hope that they will recognize their serious responsibility in appropriate cases, and that they will not feel that they are privileged to print anything which comes to hand, even though they know that they are encouraging a breach of trust. In my view, the Pentagon Papers decision is not a wide open gate. On the contrary, it still allows a barrier, though in a rather narrow class of cases.¹²

In Erwin's opinion, the historical significance of the Pentagon Papers controversy was not its effect on the press but rather its effect on the Nixon Administration. President Nixon became obsessed with preventing the release of classified information and soon thereafter authorized the creation of a team of investigators now known as "the plumbers," so named because it was their job to stop leaks. If the concern over leaks had not reached such a fevered pitch in the Administration, Griswold believes that Watergate and its subsequent cover-up might never have occurred.

Upon leaving the office of Solicitor General in 1973, Griswold accepted an invitation to become a partner in a large Washington law firm. In addition to routine matters, he argued eleven more cases before the Supreme Court, winning his last one in 1991, at the age of eighty-seven.

Erwin's association with the legal profession has been almost lifelong. Overall, it is an association and a profession of which he is proud. He concludes that lawyers face two fundamental problems when practicing their craft. First, they must constantly balance the notion of public service with the need to make a living. Second, lawyers, unlike all other professionals, operate in an atmosphere that is by nature contentious. Tensions and emotions run high. Attorneys thus become the objects of scorn when events do not turn out as the client had hoped.

¹² *Id.* at 312.

Griswold's single greatest criticism of the legal profession is its tendency to succumb to commercialism. For example, Erwin is uncomfortable with the concept of billable hours. All tasks, he maintains, are not deserving of the same hourly rate; some require more effort, some require less. Griswold is more receptive of a *quantum meruit* system in which payment is based on the value of services performed and the results achieved. Erwin thus seems to suggest that attorneys approach their craft as a profession, not as a business.

During his illustrious career, Griswold served on many commissions, both public and private. His duties on these took him to five continents. Although he spent almost all of his career in Ivy League surroundings and in high places in Washington, he never lost the down-to-earth touch of the midwesterner. His recollections in crisp unvarnished prose provide a good read for lawyer or layman.