

# DAVID F. CAVERS

ERWIN N. GRISWOLD\*

David F. Cavers was a child of the twentieth century, born in its second year, in Buffalo, New York. He became one of the leading law professors of his generation, widely known, greatly respected, and much admired. Among his many contributions, particular reference may be made to his influence on law teaching and on the development of thought in the field of conflict of laws.

I first heard of David Cavers when I came to Cambridge as a first-year student in the fall of 1925. He was, that year, president of the *Harvard Law Review*, and thus only dimly seen by a first-year student. He received his law degree in 1926, and then went off to practice law in New York for three years. In 1929-30, he returned to Harvard as a graduate student, holding appointment as the Ezra Ripley Thayer Teaching Fellow in 1930. He then taught for a year at West Virginia Law School and went on from there to the Duke University Law School, where he was a member of the faculty for fourteen years. In 1945 he returned to Harvard, where he was Professor of Law for twenty-four years, until his retirement in 1969. He also served as Associate Dean of the Law School for seven years, from 1951 to 1958.

These are the formal records of his career, but they do not begin to tell the story.\*\* He had an inquiring, penetrating, and innovative mind. He was also something of an iconoclast,<sup>1</sup> and he could be quite persistent.<sup>2</sup> Nothing in the law, or in the practices of a law school, could be so firmly settled that justification was not required.

This process began very early in his career. For a long generation, Professor Joseph Henry Beale was the embodiment of conflict of laws at the Harvard Law School, following intellectually down the path so brilliantly outlined by Joseph Story and advanced by Albert V. Dicey in England. Professor Beale's "vested rights" theory, sometimes irreverently called the "checker board" theory, was the orthodoxy of our law school days. It had

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\* Professor Emeritus, Harvard Law School. This text comes from remarks made by former Dean Griswold at the Cambridge Memorial Service for Cavers in April of 1988. Professor Cavers died March 5, 1988.

\*\* The citations that follow were added after the delivery of these memorial remarks. Unless otherwise indicated, all of the articles cited are by David F. Cavers. The citations given do not purport to be comprehensive. A complete list of Cavers' writings (to 1977) can be found in *Appendix I: Principal Publications of David F. Cavers*. LAW & CONTEMP. PROBS., Spring 1977, at 164.

1. See Cavers, *A Proposal: Legal Education in Two Calendar Years*, 49 A.B.A. J. 475 (1963).
2. See Cavers, *A Proposal Renewed: Legal Education in Two Calendar Years*, 66 A.B.A. J. 973 (1980).

already been severely criticized by Professors Walter Wheeler Cook<sup>3</sup> and Ernst Lorenzen<sup>4</sup> at Yale. These authors were devastating in their attacks on the inevitability of the vested rights theory, but they were largely destructive. They did not come up with any very good bases for resolving the conflicts questions which arise so frequently in a federal nation. Often, the best that they could propose was that courts should seek the “just” result, which really left the field wide open, with little that could be called “law.” David Cavers moved slowly into the field. His first article was conventionally entitled “Trusts *Inter Vivos* and the Conflict of Laws.”<sup>5</sup>

Soon thereafter David Cavers was appointed to the Duke University Law School faculty, where he quickly showed his capacity as an innovator. Only two years later, he published one of the seminal articles in the conflicts field. It was called “A Critique of the Choice-of-Law Problem.”<sup>6</sup> I can remember that Professor Beale was pained by this article, but it did clearly evidence David Cavers’ desire to make constructive contributions in the field.

At about this time, he made another careful and thoughtful suggestion at Duke, which brought about the establishment of “a New Type of legal Periodical.”<sup>7</sup> This new type of publication was *Law and Contemporary Problems*, now in its fifty-fifth year. David Cavers was its vigorous editor for ten years, from 1933 to 1943.

When World War II engulfed the country, David Cavers became Assistant and then Associate General Counsel of the Office of Price Administration in Washington. During this period, he became famous for the skill with which he made the regulations of the Price Administration intelligible to the average businessman. He simplified them and put them into the second person rather than into legislative language: “If you want to do so and so, you must obtain permission from the local Price Administration Office. The addresses of these offices are on the last page of this notice. You go there, and obtain a copy of Form XYZ. You provide the information requested . . . .”—and so on. This was known as “Caverizing” the language, and it received widespread approval, even from such an august authority as the *Wall Street Journal*.

In 1945, David Cavers returned to Harvard, where he made his home and extraordinary contribution for the next forty-three years. He was a quiet gentleman, but he could be very tenacious. He was widely liked by students and by faculty members. He was universally respected. During his period in Cambridge, he made important contributions in at least three areas.

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3. See Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924); Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 YALE L.J. 333 (1933); Cook, *The Jurisdiction of Sovereign States and the Conflict of Laws*, 31 COLUM. L. REV. 368 (1931).

4. Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L.J. 565 (1921); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924).

5. 44 HARV. L. REV. 161 (1930). By a happy piece of serendipity, this article immediately preceded one which I wrote that was published in the same issue of the *Review*.

6. 47 HARV. L. REV. 173 (1933).

7. Memorandum written by David F. Cavers to Dean Justin Miller (1932), reprinted in LAW & CONTEMP. PROBS., Spring 1977, at 167-68.

The first of these areas was legal education. He played a leading role in the immediate post-War period in developing the program of teaching fellows, and the group work program which they conducted. He undertook the task of supervising the teaching fellows, which meant that he provided constant leadership for them, as well as an outstanding role model. Out of this grew a seminar in legal education, which he conducted primarily for the teaching fellows and for graduate students who were thinking of entering law teaching.<sup>8</sup>

His second contribution was in the field of research. I had long sought to advance the idea that the function of a great university law school is not merely to pass on the knowledge and the techniques and the thinking which has accumulated, but is also to develop new knowledge, new materials, new ideas which will help to resolve both new and old problems. With this idea in mind, I participated in bringing Harold J. Berman to the Law School faculty to develop knowledge in the field of Soviet law. But I quickly saw that developing research required a more innovative mind than mine and required much time which I did not have available if I were to meet my other responsibilities. Indeed, it is not easy to know what research in law consists of. Some faculty members may feel that it is accomplished by reading and pondering, without production; but I wanted more. So I talked with Dave, and finally persuaded him to undertake the task of fostering, encouraging, and developing research at the Harvard Law School. He was appointed Associate Dean of the School with this objective in mind. He entered on these duties energetically and imaginatively.<sup>9</sup> He encouraged International Legal Studies<sup>10</sup> and the Foreign Tax Program, which was started by the initiative of Stanley Surrey. He developed some of the early research in the field of nuclear energy, and its regulation,<sup>11</sup> and the work of Robert Keeton and Jeffrey O'Connell on no-fault insurance was begun with his encouragement. In the process, he made contact with the Walter E. Meyer Research Institute of Law from 1958 to 1969, thus encouraging research at Harvard and at several other law schools.

Finally, and perhaps most important, David Cavers continued his work in the conflict of laws. He wrote a Comment called "The Two 'Local Law'

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8. See Cavers, *The Seminar in Legal Education*, 7 HARV. L. S. BULL., Apr. 1956, at 3; Cavers, *How to Become a Law Teacher*, 8 HARV. L. S. BULL., Feb. 1957, at 9; Cavers, *The Model Trial at Harvard: A Teaching Tool Adaptable for Use at Other Law Schools*, 9 J. LEGAL EDUC. 345 (1957). Cavers' final article, published when he was eighty, showed his persistent spirit. It was *Signs of Progress—Legal Education*, 1982, 33 J. LEGAL EDUC. 33 (1983).

9. See Cavers, *Manpower for Research*, 8 J. LEGAL EDUC. 267 (1956); Cavers, *Science, Research and the Law: Beutel's "Experimental Jurisprudence."* 10 J. LEGAL EDUC. 162 (1957); Cavers, *The Evolution of Research Proposals*, 23 J. LEGAL EDUC. 212 (1971); Cavers, "Non Traditional" Research by Law Teachers: Returns from the Questionnaire of the Council on Law Related Studies, 24 J. LEGAL EDUC. 534 (1972).

10. See Cavers, *The Developing Field of International Legal Studies*, 47 AM. POL. SCI. REV. 1058 (1953).

11. See Cavers, *Atomic Power Versus World Security*, 3 BULL. ATOM. SCIENTISTS 283 (1947); Cavers, *The Atomic Energy Act of 1954*, 191 SCIENTIFIC AM. NO. 5, at 31 (1954); Cavers, *Legislative Readjustments in Federal and State Regulatory Powers over Atomic Energy*, 46 CAL. L. REV. 22 (1958); Cavers, *Improving Financial Protection of the Public Against the Hazards of Nuclear Power*, 77 HARV. L. REV. 644 (1964).

Theories,"<sup>12</sup> and other articles.<sup>13</sup> This ultimately led to his great work entitled *The Choice of Law Process*, published in 1965, based upon the Cooley Lectures which he gave at the University of Michigan Law School.

During this period, the coherence of the field of conflict of laws was being rapidly demolished by the effect on the courts of the negative approaches begun by Professors Cook and Lorenzen, and carried on by Professor Brainerd Currie, David's successor at the Duke Law School. These writers had shown well enough that the orthodox approach of the nineteenth century was not inevitable, but they had not provided a workable substitute which would guide conflict of laws decisions by some sort of a rational approach. It was suggested, for example, that courts having conflict of laws cases should seek to reach the "just" result—which left everything wide open. Or, it was suggested that courts should apply the "better" law, or should always apply the law of the forum, which is, of course, a complete denial of any role for the conflict of laws. Much was written about "interest analysis," without ever providing a workable or even rational way to evaluate states' "interest" in any particular event which happened to occur within its borders. Among other things, predictability was almost completely lost, except for the fact that the plaintiff nearly always won.

The net result has been, in my view, a kind of chaos in much of the conflict of laws field, but David Cavers sought to develop a more rational approach. He developed "principles of preference," which he explained at length in his book and in subsequent articles, particularly in one called "The Value of Principled Preferences," published in the *Texas Law Review* in 1971.<sup>14</sup>

Some day, some sort of rationality will be restored to the conflict of laws field. When that day comes, we should be aware of our great indebtedness to David Cavers.

He was a fine teacher, a wise and thoughtful scholar, a good and steady colleague, and a rewarding companion. His contributions to the Harvard Law School, and to the law, are of the first order. His support and help and friendship were of great satisfaction to me during my years as Dean.

Our colleague, Dave, had a long and productive life. As Thomas Mann wrote in *The Magic Mountain*, "death is as part and parcel of life. . . ."<sup>15</sup> We do not meet here today to mourn, but rather to celebrate, and to salute a long-time friend. We are all better for having had the privilege of working with him here.

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12. 63 HARV. L. REV. 822 (1950).

13. Some of these articles are: *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROBS. 732 (1963); *Legislative Choice of Law: Some European Examples*, 44 S. CAL. L. REV. 340 (1971); *The Common Market's Draft Conflicts Convention on Obligations: Some Preventive Law Aspects*, 48 S. CAL. L. REV. 603 (1975); *The Proper Law of Producers' Liability*, 26 INT'L & COMP. L. Q. 703 (1977).

14. 49 TEX. L. REV. 211 (1971). Cavers was supported by Professor Maurice Rosenberg in 49 TEX. L. REV. 229 (1971). Both articles were contributions to a symposium entitled *Conflict of Laws Round Table*, held at the annual meeting of the Association of American Law Schools (Dec. 1969).

15. T. MANN, *THE MAGIC MOUNTAIN* ch. 5 (H. T. Lowe-Porter trans. 1924).