

## Reflections on Foote on Vagrancy--Type Laws

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(This is a talk for the March 23, 2007 conference honoring Caleb Foote. Will be revised, with footnotes, for publication.)

Caleb Foote's 1956 article reporting on vagrancy-type laws and their administration in Philadelphia<sup>1</sup> foreshadowed a lifetime of commitment to understanding how the practices of police, prosecutors and the courts affected ordinary people; especially those who were poor, homeless, mentally impaired, or otherwise disadvantaged by race, ethnicity or poverty.

Despite noteworthy changes in American vagrancy law and procedure, the policing of persons stigmatized with "spoiled identity"—a concept introduced into sociology by Erving Goffman--remains a significant, and possibly the most contentious, issue in policing and contemporary criminal justice today. It resonates especially in the term "broken windows" policing, the theory that crime flourishes in places where the appearance of disorder is permitted to dominate neighborhoods. I plan to say little today, about the pros and cons of "broken windows" policing.

I want instead to talk about how the law of vagrancy mirrored social norms; how the social norms that infused vagrancy law likely remain with us, and how that may undermine Constitutional policing. I'm going to do this by focusing on and celebrating Caleb Foote's classic, 1956, University of Pennsylvania Law Review article, "Vagrancy-Type Law and Its Administration."

One part of Caleb's article is a brilliantly told history. We learn that whether called vagrants, tramps, bums, hobos, beggars or more recently, the homeless, displaced wanderers have long been part of western society; and especially so

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<sup>1</sup> Caleb Foote, "Vagrancy-Type Law and its Administration," Penn. L. Rev. March, 1956

since the beginning of the industrial revolution and migration to work in factories and mines. Vagrancy laws were initially a failed attempt to tie workers to their industrial jobs, as serfdom had tied workers to the land. Workers moved because work was unavailable or because working conditions were wretched. Those who had taken to a vagrant life, however, began to threaten stable communities. “The ban upon migration,” Caleb writes in a sentence that has contemporary resonance, “became a preventive to keep a parish, which had the responsibility of providing relief for local needy residents, from being burdened with the annoyance and economic liability of foreign paupers and idlers.” (616)

Early vagrancy statutes, which distinguished between laborers, on the one hand, and foreign paupers and idlers, on the other, may also be said to distinguish between a respectable working class and a disreputable underclass. Karl Marx, writing in the 19<sup>th</sup> century, famously called those who worked in factories and mines, the proletariat. This class was to produce the future revolutionaries and leaders who would overthrow the capitalists and their government. But in *The Communist Manifesto* Marx distinguishes between the proletariat, the class of hard working laborers, on the one hand, and tramps and hobos, and criminals, on the other. He derides the latter as the *Lumpenproletariat*, as “social scum” who will not only fail to participate in revolutionary activities with their “rightful brethren,” the proletariat; but may even undermine the proletariat by acting as turncoats and spies for the police.

The expressions “social scum” and “lumpenproletariat” express extraordinary disdain and social distancing, but they aptly describe the vision Philadelphia’s respectable classes—and quite possibly its working class as well-- had of those described in Caleb’s classic and significant 1956 article.

Caleb’s article is in the tradition of the “legal realists” who thought it important to describe and critique the “law in action.” But it’s worth stressing that Caleb’s observations of the Philadelphia courthouses took place years before the

existence of a law and society movement encouraging empirical research on legal processes—in this, Caleb was a pioneer. Caleb’s sparkling analytical history of the vagrancy law is powerful, but his description of how this law was actually enforced is what makes his article unique.

We learn that the Philadelphia police regularly rounded up “undesirables” in periodic drives. Caleb describes a drive against those so-called undesirables who were occupying Philadelphia’s newly completed Independence Hall. The drive was—not surprisingly-- popular with the general public, and surely with the editorial staff of *The Philadelphia Inquirer*, which titled an editorial, “Get Bums off the Street and Into Prison Cells.”

Caleb’s article—and his life—showed that he placed a value in the lives of these despised persons, and was outraged by the unfairness of the legal system in responding to them. Caleb posted himself in Philadelphia’s police Magistrate’s Court to observe the summary justice meted out to sweep up the human trash.

From our perspective today, the proceedings are so outrageous as to be almost hilarious if—that is—you can envision another Marx—this time Chico or Groucho— as the magistrate.

A man claims he has a bus ticket to New York. He produces it “after considerable fumbling.” “You better get on that bus quick,” says the magistrate, “because if you’re picked up between here and the bus station, you’re a dead duck.”

To another he says, “What are you doing in this part of town? You stay where you belong; we’ve got enough bums down here without you.”

A vagrant named George is luckier in his judge who says “George, I feel sorry for you; go on home and quit drinking.’ To another he says, “You’re too clean to be here, you’re discharged.”

But Caleb also describes summary convictions, where, as soon as a defendant's name was called, and he was moving forward, the judge sentenced him to three months in the house of correction.

It is hard to know how representative were the proceedings in the Court Caleb observed. But we do know there were many such arrests across the United States. According to a study of the "chronic police case inebriate" sponsored by the Yale Center of Alcohol Studies, (and published in 1958) arrests for public intoxication or disorderly conduct, which Caleb labels the most common of the "vagrancy-type" laws, were routine in major American cities.<sup>2</sup> 1955 produced roughly 100,000 such arrests in Los Angeles, more than 50,000 in Chicago, and around 40,000 in the District of Columbia. "Where conviction can be obtained by sight and smell alone," Caleb writes, "it makes little practical difference what charge is listed in the records." The charges of drunk or disorderly were interchangeable. "The definition of vagrancy and the fact of drunkenness are regarded as merely illustrative," he writes, "of a mode of life which is to be suppressed." (p.612)

We can tease four themes out of Caleb's argument. The first is humanistic, evoking Rawls—if we didn't know where our life chances would bring us, and if, perchance, we ended up as one of the homeless drunkards, how would we wish to be treated? To Caleb, no matter how disheveled, poor, and offensive to the social norms of most of the city's residents, every human being should be treated with elementary respect, regardless of his or her attachment to a disfavored mode of life. But as we have seen, this was not the opinion of Philadelphia's established authorities; and likely, it was not the opinion of the overwhelming majority of Philadelphia's citizens, possibly including the working class who, at

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<sup>2</sup> David J. Pittman and C. Wayne Gordon, *Revolving Door: A Study of the Chronic Police Case Inebriate*, (Glencoe: The Free Press and Yale Center of Alcohol Studies) 1958, 2.

least in this instance of acceptable social norms, would probably support Karl Marx.

Caleb surely understood how unappreciated the behaviors and appearance of the vagrant underclass would be to Philadelphia's shopkeepers, bankers and possibly, unionized workers. Nevertheless, his second prong is—by today's standards--a modest appeal for elementary due process. Appalled by the lack of rudimentary procedural protections before sanctions of jail or expulsion were imposed, Caleb recommended a "Voluntary Defender system" to raise the level of legal fairness.

I found it myself puzzling as to why Caleb did not recommend a *publicly* funded Defender system. Los Angeles County had established a public defender's office in 1914; Earl Warren had helped establish a public defender office in Alameda County, CA in 1927, which, by the time Caleb wrote in the 1950's, was a substantial and well regarded law office. Was Philadelphia, which prided itself as a temple of American independence from the British crown so backward and primitive that a public defender system was inconceivable as late as the 1950's?

Quite possibly, as we see from Caleb's description of his third focus, the courts. The "vagrants" were sentenced by Philadelphia police court judges innocent of, or uncaring about, legal knowledge or competence, who ruled by whim, caprice, and minor self aggrandizement. Defendants were asked to contribute to the magistrates "favorite charity." Those who dropped a dollar into the collection box were freed. Those who didn't were assigned to a "goon squad" to mop and clean the building. Perhaps even more than a public defender system, Philadelphia needed modestly capable and honest judges.

Caleb describes the administration of vagrancy-type law in Philadelphia as the "garbage pail" of the criminal law, where magistrates could "clean up" a district by incarcerating "loafers" in the city center, "drunkards in the skid row," and the

mentally ill who disturbed the community or their relatives. Caleb recommends that the cases be transferred to a Magistrates court before judges trained in law, and prefers a court with appropriate social, medical and psychiatric services.

I found Caleb's brief, therapeutic recommendation interesting for three reasons. First, Caleb is not portraying those arrested for vagrancy as itinerant laborers, or romantic wanderers. Caleb sees the arrestees, on the whole, as sick, rather than criminal. They need help, not punishment—which is a kindly sentiment, but not necessarily a realistic one.

The authors who reviewed the records of nearly 4,000 "Chronic Police Case Inebriates" in the 1950's found them to be older, middle-aged men, with a steady decline into arrests for public intoxication. They mostly grew up in poverty, and 80 percent had spent time in institutions. Even Alcoholics Anonymous doesn't work with such men. They mostly cannot be rehabilitated, since they grew up in poverty, and were not habilitated into jobs and professions, as many of those in AA were. They are described as "undersocialized."

Caleb's critique is most assured and assertive, when he is writing about legal history or the practices he has witnessed. He is at his most compelling and influential when he juxtaposes legal history and legal practice. By giving the background and history of vagrancy law, Caleb challenges the crime of vagrancy as the "catch-all of the criminal law" criminalizing people on vague and disparate charges addressed to a sad population of persons who manifest a despised social identity by loitering, being drunk or disorderly, homeless, poor or mentally ill.

Among the many appreciative readers of Caleb's article was Justice William O. Douglas, who in a 1960 Yale Law Journal article, quotes at length from that part of Caleb's article portraying "a small but significant minority" as impoverished wanderers seeking employment. Like Caleb, Douglas traces the vagrancy laws

to the poor laws, which confined workers to specific places, and to work at specified wage rates. “The vagrant was the runaway serf,” Douglas writes. Rather than seeing vagrants in the hardened vision of Karl Marx as “social scum,” the lumpenproletariat, Douglas portrays vagrants appreciatively. He freshens their spoiled identity by portraying them as migratory members of the working class, casual laborers who ride the rods, share meals under railroad bridges, and, as he concludes “destitute wanderers of no prestige of class or family.”

Douglas also cites a lesser known 1960 article by Arthur Sherry, a U.C. Berkeley Professor of Law and Criminology, who was later to become Caleb, and my, colleague in the School of Law and the School of Criminology.

Arthur’s article (published in the *California Law Review*<sup>3</sup>) is clearly addressed to the California state legislature, and doesn’t cite to Caleb’s, who in 1960 was yet to be his colleague. Perhaps Caleb’s article was not material, or perhaps it seemed too radical, of perhaps Arthur was unaware of it.

In any case, Caleb and Arthur present two visions similar in their understanding of the history of vagrancy law and its unfairness, but quite different in their interpretation of how to deal with that unfairness. Here is the similar. “[T]he vagrancy law,” Arthur writes in 1960, “is archaic in concept, quaint in phraseology, a symbol of injustice to many and very largely at variance with prevailing standards of constitutionality.” (569)

Arthur, an Earl Warren protégé, was a practical man (unlike Caleb, who rarely, if ever, suffered the charge of being unduly practical). Caleb empathizes with the downtrodden. He says vagrancy laws are “ineffective” in reforming or treating alcoholics. “Nor” he writes, “is there any legal or policy justification for

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<sup>3</sup> Arthur Sherry, “Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision, 48 Calif. L. Rev. 557.

imprisoning people because their poverty or characterization as ‘bums’ makes them vaguely undesirable.” (648)

Arthur, by contrast, reflects the norms and interests of the broader community. To him, addressing the California legislature, vagrants are “bums.” He asserts that the community need not, and cannot, tolerate “the beggar or “moocher”; the drunk, the pimp and the prostitute, the lewd and dissolute, “the loiterer in dark places, the Peeping Tom and the prowling trespasser.” (566)

Anticipating the specificity feature of Justice Douglas’s opinion in *Papichristou v. City of Jacksonville*, Arthur proposes a statute that criminalizes the behavior persons, for example, who “Accost other persons in any public place (or any place open to the public) for the purpose of begging or soliciting alms (as a business). The proposed statute does not forbid begging. It is drafted not against those who beg sitting or standing “by the wayside,” but “against the *conduct* (my italics) of the individual who goes about the streets accosting others for handouts.” It embraces what Arthur—I think correctly--reads as the dominant social norms of the community, that is, begging may be permissible, but aggressive panhandling is not. (This is currently the law in New York City and is enforced under the philosophy of “broken windows” policing.) And he also anticipates, as Caleb does earlier, the constitutional requirement of specificity that finds its promise in Douglas’s opinion in the 1972 case, *Papichristou v. City of Jacksonville*.

Twenty years later, Harvard Law Professor William Stuntz writes in 1992 that “[Most] people probably would approve of greater police authority to keep an eye on “undesirables” (and to keep them out of “nice” neighborhoods.) That is why old-style loitering and vagrancy laws were politically tolerable, not withstanding their stunning breadth.” He writes this to make what he calls (and is) a “vital and largely ignored” point about the relation between the breadth of criminal law and procedural restraints on police. When the criminal law is vague and expansive,



as in the classic vagrancy statutes, the police are given the right to stop, arrest, and to make lawful searches incident to arrest, on almost anyone they care to.

That's exactly what happened in *Papichristou v. City of Jacksonville*, the 1972 opinion declaring vagrancy statutes unconstitutional. *Papichristou* shows how easy it was for police to use vagrancy-type statutes not only to arrest the homeless and downtrodden, search them, and confine them, but also to enforce racist norms. Margaret Papichristou and Betty Calloway were white women who were arrested, along with Eugene Melton and Leonard Johnson, black men, for driving together through town in an automobile, and charged with “vagrancy-prowling by auto.” Of course, their real offense in Jacksonville, Florida was the crime of interracial dating.

How much police were restrained after *Papichristou* is a topic for another paper, but it's worth recalling that studies of police have revealed that police can, and still do, exercise enormous discretion. Nevertheless, *Papichristou* was a landmark decision, removing from police the “stunning breadth” of discretion they previously enjoyed under vagrancy-type statutes.

Justice Douglas's decision essentially recaps the argument against vagrancy-type laws he had made in his 1960 *Yale Law Journal* article. Here he also cites and quotes from Charles Reich's 1966 *Yale Law Journal* article eloquently defending the rights of wandering nightwalkers.

Douglas footnotes Arthur's article for its research on the history of vagrancy law; Caleb's article is quoted, in a footnote, in language resonant with Caleb's humanistic values and which I will read—but you have to imagine a tall man, not yet 40 years old, handsome and eloquent, with a New England accent cultured at Harvard college, saying:

“The common ground which brings such a motley assortment of human troubles before the magistrates in vagrancy-type proceedings is the procedural laxity which permits 'conviction' for almost any kind of conduct and the existence of the House of Correction as an easy and convenient dumping-ground for problems that appear to have no other immediate solution.”

And so—vagrancy-type laws were struck down in 1972---without dissent---by a very different United States Supreme Court.

Footnote, Vagrancy-Type

Law and Its Administration, 104 U.Pa.L.Rev. 603, 631. ^FN11