

**Promoting Criminal Justice Reform Through Legal Scholarship:
Toward a Taxonomy**

Carol S. Steiker
Caleb Foote Symposium, Boalt Hall, March 23, 2007

It is a pleasure and an honor to be here today to commemorate the life and career of Professor Caleb Foote, pre-eminent criminal justice scholar and reformer, by reflecting on what his life and work might teach us about how the next generation of criminal justice scholars can contribute to the reform of our institutions of criminal justice. My own experiences of working within the criminal justice system as a public defender, studying it as a scholar, and litigating and otherwise advocating for its reform as a law professor, have persuaded me that our administration of criminal justice strays far indeed from the ideals inscribed above many courthouse entrances. Instead of “Equal Justice Under Law” as the Supreme Court’s marble inscription promises, perhaps it might be fairer to declare, as one New Yorker cartoon lampoons, “Truth Justice Equality Public Relations,” or on occasion even “Abandon Hope All Ye Who Enter Here,” as Dante described the inscription to the entrance to hell.

While I can easily identify many pathologies in our administration of criminal justice, my gimlet-eyed students over the years have identified many more – though not necessarily the same ones, of course. As these students study their casebooks, write their own research papers, participate in clinical opportunities offered by the law school, and work at summer jobs on issues related to criminal justice, they often come to me for career advice, fired up – as students are delightfully wont to be – about the need for change. What should they do, they want to know, if they want to work toward criminal justice reform? Those who are drawn by talent or inclination (or hopefully both) to the

legal academy tend to be especially conflicted. Shouldn't they be "real" lawyers?, they want to know. Will the academy prove to be too much of an ivory tower that will isolate them from either understanding or confronting the pressing problems of the day? And even if they get the problems right and feel they have something to contribute, will the specialization of the academy allow them to address an audience wider than the small club of legal scholars and to speak in meaningful ways to a broader array of legal actors – lawyers, legislators, judges, policymakers, and so forth? My remarks today are undertaken as a way of answering these questions, informed both by the aspirations and achievements of Caleb Foote and by the transformation of the legal academy during his lifetime.

For better or worse, the anxieties expressed by my students are both deeper and better founded now than they were in the heyday of Caleb Foote's career in legal academia. In the 1950's and 1960's – when Caleb Foote joined the legal academy and made his seminal contributions with his widely cited work on the bail system – two related conceptions of law and legal scholarship combined to allay substantially any concerns about the irrelevance of legal scholarship to law reform. First, law was far more widely regarded then than now as an autonomous scholarly discipline, distinct from other methodologies such as economics, history, sociology, political science, or philosophy. Leading legal scholars almost never possessed substantial training in one of these other disciplines, and they felt no need to apologize for such a lack. Understanding legal doctrine and institutions, it was thought, required its own distinctive training, and future legal scholars were culled from those who excelled in law school and then perhaps briefly honed their skills as law clerks and/or lawyers in top government or private sector jobs.

Second, and relatedly, what counted as success in the legal academy reflected this view of the nature of legal scholarship. Much leading legal scholarship directly addressed doctrinal and institutional reform, and such work definitely “counted” for tenure and more generally for standing in the legal academy, whether or not it took the form of traditional scholarly articles or books. Indeed, law review articles or scholarly books published by university presses were not the only or even the primary avenues of success in the academy, as they clearly are today. Rather, the production of casebooks and legal treatises, work for such law “improvement” organizations as the American Law Institute, and participation on government-sponsored law reform commissions heavily marked the careers of the most successful and influential scholars of the era. Think of Sandy Kadish’s Criminal Law casebook or the work of Yale Kamisar, Wayne LaFave, and Jerry Israel on their joint casebook and on treatises and hornbooks on Criminal Procedure. Or consider Herbert Wechsler’s and others’ work on the Model Penal Code. Or remember Kamisar, LaFave, and Israel’s work as Reporters on the Project of the National Conference of Commissioners on Uniform State Laws to draft Uniform Rules of Criminal Procedure, or my former colleague and dean Jim Vorenberg’s work as Director of the Katzenbach Commission, President Johnson’s Commission on Law Enforcement and Administration of Justice. Caleb Foote’s own casebooks – on both Criminal Law and Family law – and his work for the Center on Juvenile and Criminal Justice in San Francisco reflect this tradition.

It’s not that these kinds of projects and achievements have disappeared or are irrelevant today. Casebooks and treatises continue to be written, the ALI is still busy with Restatements and model legislation, law professors still serve on law reform

commissions, and so on. However, it cannot seriously be doubted that there has been a profound shift in the conception of legal scholarship and the expectations for aspiring legal scholars. The shift in the conception of legal scholarship has entailed the interment – or at the very least the substantial undermining – of the vision of legal scholarship as an autonomous scholarly discipline.¹ Anyone who has served on a law school’s entry-level appointments committee in the past decade or so (or anyone who has undertaken to advise recent graduates seeking to enter the legal academy) knows that applicants to legal academy are invariably asked what “methodology” they are using or plan to use to pursue their “scholarly agenda.” This question, I have no doubt, would have engendered some head scratching in the earlier era I reference: not the “agenda” question so much as the “methodology” inquiry. What methodology *aside* from law could there be for legal scholars to employ? Today, top-tier law schools increasingly are hiring entry-level faculty with advanced training in a related scholarly discipline, and even those who lack such training often identify themselves – and their work – by its connection to another discipline, whether it be economics, history, sociology or some other field or combination of fields.

This conception of what legal scholarship *is* has had a profound impact on what legal scholars are expected to do. The publication of scholarly articles, and to a lesser extent of scholarly books, is the central requirement first for obtaining an entry-level academic appointment and then for promotion to tenure. Casebooks, treatises, and work on law reform commissions simply don’t count (or at least they don’t count nearly as

¹ Although it is not my purpose here to consider the “why” of this transformation, the triumph of legal realism, in particular the flowering of the critical legal studies movement, and the concomitant rise of law and economics no doubt played a role in undermining the autonomy of legal scholarship, as perhaps did changes in the demographics of those seeking positions in the legal academy, as opportunities declined for those with PhD’s in the humanities and social sciences.

much as they used to) either for these quite concrete assessments or more abstractly for garnering scholarly standing in the wider scholarly community. Moreover, legal scholarship tends to be judged by the standards of – and often by scholars whose training is primarily in – related scholarly fields. That is, law and economics scholarship will be judged to some extent against the metrics used to judge “pure” economics scholarship and often by economists as well as law professors; the same is true for legal history, sociology, philosophy, and so on. Thus, much more legal scholarship tends to use (or at least liberally borrow from) the specialized tools and discourses of these disciplines – tools and discourses not available to most practicing lawyers, judges, legislators, and policymakers. In addition, some of the same forces that have undermined the autonomy of legal scholarship as a scholarly discipline have undermined the expert, technocratic authority of organizations like the ALI or other law reform commissions. Hence, the work of such organizations, though it continues and continues to be important, is both less likely to be viewed as coextensive with the work of legal scholars and also less likely to have the special authoritative weight that it had in an earlier era.

So you can see why my students might feel anxious about pursuing a career in academia if they also aspire to promote law reform. Will the work that they will be expected to produce as legal scholars allow them to address issues that they think are key to law reform? If so, can their work be addressed to those outside the academy? Can it influence those in positions of power to bring about law reform? What, if anything, can they add through legal scholarship that is distinctive – different from the contributions that lawyers make, or that non-legal scholars make? My students aren’t the only ones who are anxious. The transformation of the legal academy has generated a number of

calls to action by those who want to set the academy on a new (or perhaps back on its old) course. The most well-known of these critiques is that of former law professor Harry Edwards who received his law degree in 1965 and wrote in the early 1990's from his position as judge on the D.C. Circuit Court of Appeals about "The Growing Disjunction Between Legal Education and the Legal Profession,"² in which he lamented that "many law schools – especially the so-called "elite" ones – have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship."³ Others have echoed and elaborated this critique, as the trends that Judge Edwards identified have become only more pronounced in the past decade.⁴

My goal here is not to assess the merits of this critique, because that is no answer to my anxious students. Whether the transformation of the legal academy has been salutary or pernicious (and I'm of the view that it's been some of both, but mostly salutary), the academy and its norms and expectations, ever evolving though they may be, are what they are. Nor can I hope to answer the question whether current legal scholarship actually succeeds in reforming the law and legal institutions. To be sure, law review articles are cited by (some) judges, and law professors are sometimes asked to testify in legislatures on the basis of their published work, but who is to say whether these are window dressing for whatever would have happened anyway, or whether the scholarship indeed plays some or even a determinative role in promoting helpful social change (or derailing wrong-headed initiatives)? Rather, I will try to answer my anxious

² 91 Mich. L. Rev. 34 (1992).

³ Id. at 34.

⁴ See, e.g., Douglas Colbert, *Broadening Scholarship: Embracing Law Reform and Justice*, 52 J. Legal Educ. 540 (2002); John S. Elson, *Why and How the Practicing Bar Must Rescue American Legal Education from the Misguided Priorities of American Legal Academia*, 64 Tenn. L. Rev. 1135 (1997); see generally Symposium on the Trends in Legal Citation and Scholarship Chi.-Kent L. Rev. (1996); Symposium on Law, Knowledge, and the Academy: Legal Scholarship Today, Harv. L. Rev. (2002).

students in way that I think Caleb Foote – though I never got a chance to meet him – might approve. He wrote about bail reform only after spending many hours sitting in courtrooms and collecting data. Similarly, I will canvass some recent scholarship of successful legal scholars and try to catalog what I believe, no doubt self-servingly, to be true: that legal scholarship, even in this world of burgeoning inter-disciplinarity and disconnection between the academy and bar, has something at least potentially useful to offer law reform efforts, something distinct from what engaged lawyers (on the one hand) or non-legal scholars (on the other) can offer those efforts. I by no means intend what follows to be comprehensive – I’ve neither the time nor the omniscience to make any such claim. Hence, my title “*Toward a Taxonomy.*” I hope it is enough to calm, a least a little, my anxious students, and to spark further discussion.

I. The Inter-Disciplinary Scholar and Law Reform

Contra some of the critics who have taken up Judge Edwards’ clarion call, I do not believe that the growing inter-disciplinarity or specialization of the legal academy necessarily diminishes the relevance of legal scholarship to law reform efforts. Rather, the actual *tools* of other disciplines can be tremendously helpful in answering questions central to law reform projects. Moreover, distinct from the tools of other disciplines are the *insights* that developing research in those fields produces. Legal scholars trained in or otherwise familiar with other academic fields play an invaluable role as both translators of those insights for the legal profession and proponents of reform based on those insights.

A. Tools

Perhaps the best counter-example of a helpful tool from another discipline is one that derives from the nature of Caleb Foote's own contributions. His contributions to bail reform were built on a firm empirical foundation of careful study of the bail systems in Philadelphia and New York. The analysis of empirical data, however, has undergone a revolution, too, since the 1950's and 1960's, as computers have engendered new techniques of organizing and analyzing.

Examples include:

1. Affirmative claims, such as David Baldus' landmark study of the effects of race on capital sentencing decisions,⁵ and J.J. Prescott's study of how the Supreme Court's new constitutional rule requiring jury determination of certain sentencing facts affected the sentencing of defendants under the Federal Sentencing Guidelines;⁶ and
2. Debunking claims, such as John Donohue and Justin Wolfers' rebutting of studies purporting to demonstrate that the death penalty deters homicides,⁷ and Bernard Harcourt's reconsideration of the empirical foundation of the "Broken Windows" theory of policing.⁸

[One might ask what is distinctively "legal" about economists or statisticians analyzing data. Here, the legal backgrounds of the scholars involved make them uniquely situated to choose the right questions and to consider what data is necessary to answer them. Note the debate among legal theorists about, for example, the death penalty and deterrence debate, or the post-*Apprendi* sentencing effect: only quantitative

⁵ David C. Baldus et al., **Equal Justice and the Death Penalty: A Legal and Empirical Analysis** (1990).

⁶ J.J. Prescott, *Measuring the Consequences of Criminal Jury Trial Protections* (PhD dissertation, 2005).

⁷ John J. Donohue & Justin Wolfers, *The Ethics and Empirics of Capital Punishment: Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 Stan. L. Rev. 791 (2005).

⁸ Bernard E. Harcourt, **Illusion of Order: The False Promise of Broken Windows Policing** (2001).

analysis could settle the question. Legal scholars also will know in a way that economists or statisticians cannot *which* data is crucial to the analysis. Note the example of the Hoffman, Rubin & Shepherd study on the effect of retained counsel on sentencing outcomes, in which the two quantitative analysts were not lawyers and failed to control for either pre-trial incarceration or prior record.]

[Note: Tools of quantitative analysis are not the only methodologies that can yield insight into criminal justice reform, though quantitative analysis does so in an unusually direct manner, which may account for why empirical analysis is sometimes exempted from critiques of inter-disciplinarity or even offered as a solution. But other methodologies that have been employed in ways clearly relevant to current law reform efforts, such as history (Jim Whitman comparative work) or sociology (works of Jonathan Simon, Bernard Harcourt)].

B. Insights

Even when legal scholars are not applying the tools of other disciplines, their training in another field can allow them to translate emerging insights of that field for lawyers and legal scholars, and to consider how legal doctrine and institutions should respond to these insights.

Examples include:

1. Stephen Morse's⁹ work on psychological insights into issues of criminal responsibility; and
2. Orin Kerr's¹⁰ work on cybercrime

⁹ See, e.g., Stephen J. Morse, *The Impact of Behavioral Genetics on the Criminal Law: Addiction, Genetics, and Criminal Responsibility*, 69 L. & Contemp. Probs. 165 (2006); Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. Crim. L. & Criminology 15 (1997) (for Symposium on the Future of the Juvenile Court).

[Here, it is not necessary to be trained in the applying the tools of another discipline, but simply to have some greater knowledge of non-legal information, often but not necessarily derived from another scholarly discipline, that affects law or legal institutions.]

II. The Former Practitioner and Law Reform

Is the mastery of some other discipline the only way to make substantial scholarly contributions? Many law students interested in academic careers want to work in the criminal justice system before entering the academy, and this still proves to be a more common route than Ph.D. programs for emerging law professors in the fields of criminal law and procedure. Is the only lesson such professors should take from what has been said thus far is that they must play catch up, and fast? No, there is much in recent scholarship that suggests that formerly embedded practitioners can make unique contributions when they bring their grounded knowledge of institutions and institutional actors to their engagement with current scholarly debates.

A. Questioning Reform Priorities

It is often difficult, when embedded in a particular institutional role, to question certain orthodoxies or priorities of the institution. Difficult not only because of fears of being perceived disloyal or other adverse consequences, but also because those beliefs are reinforced by supervisors and peers, and because those beliefs may help institutional actors to rationalize and perform their roles. Once freed from the constraints of role, however, the inside experiences can yield insights unavailable to most of those who remain embedded.

¹⁰ Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531 (2005); Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 Geo. L. J. 357 (2003).

Examples include:

1. My own work with my brother, Jordan Steiker,¹¹ questioning whether capital punishment “reform” should necessarily be embraced by abolitionists, and questioning whether the focus on innocence within the abolitionist movement is misguided; and
2. Dan Richman’s¹² work on the balance of powers between prosecutors and law enforcement agents and between federal and state law enforcement agencies, arguing that questions of institutional design can be more key in preserving civil liberties than substantive or constitutional law

B. Critiquing Institutions from the Inside

The claim to institutional competence can be a powerful force for scholars to use when they critique institutions of which they have first-hand knowledge, offering new ways of thinking about problems, and proposing doctrinal or institutional changes based on those new paradigms.

The best examples are all drawn from the work of former federal prosecutors who have offered law reform proposals of quite divergent sorts:

1. David Sklansky’s¹³ much cited work on the crack/cocaine distinction’s racial impact and equal protection work;
2. Debra Livingston’s¹⁴ work on community policing;

¹¹ Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative “Reform” of Capital Punishment?* 63 Ohio St. L. J. 417 (2002); Carol S. Steiker & Jordan M. Steiker, *Seduction of Innocence: The Attractions and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. Crim. L. & Criminology 587 (2005).

¹² Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 Colum. L. Rev. 749 (2003); Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 Crime & Justice 377 (2006).

¹³ David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 Stan. L. Rev. 1283 (1995).

¹⁴ Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551 (1997).

3. Sam Buell¹⁵ and Lisa Griffin's¹⁶ reassessment's of corporate criminal liability;
and

4. Paul Butler's¹⁷ call for race-based nullification

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So, to my anxious students I conclude:

The transformation of the legal academy since Caleb Foote's youth has made certain kinds of participation in law reform more peripheral to your career than in prior days. Perhaps you'll be glad to learn that casebooks, treatises, and work on Restatements are less commonly the route to scholarly pre-eminence than before. Perhaps you'll be disappointed to find that it is probably less likely that, by virtue of your being a legal scholar, the President or Governor or Mayor will knock on your door asking you to head an important law reform commission, and certainly less likely that you'll be able to proffer that work as the basis for tenure (rather than a leave of absence), and similarly less likely that the report of such a commission will be regarded by the legal world as the product of distinctive expertise that you possess above all others. But it is more likely that you will read and engage in intellectual exchange with a wider and more diverse group of scholars. And it is no disqualification, but rather an asset, that you may bring with you insights from the practice of criminal law. The catalog of the works of recent scholars demonstrates that the work that you can do through these exchanges and with these insights offers important contributions to legal reform that "real" lawyers will or

¹⁵ Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. Rev. 1971 (2006).

¹⁶ [forthcoming article on excessive prosecutorial use of deferred prosecution agreements in corporate criminal investigations]

¹⁷ Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L. J. 677 (1995).

should use – thus allowing you to keep faith with rather than depart from the tradition in which Caleb Foote did his most important work.