

Caleb Foote: A Personal and Loving Remembrance†

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Caleb was craggy.¹ Physically, if not in most other respects, he had hard edges. Watching him as he paced the room when we argued about legal and other issues, he often reminded me, oddly, of the Maine coastline he loved so dearly. He was tough, difficult to control, beautiful, proud, self-sufficient, and easy to approach and enjoy. He was slim but moved heavily, as if his shoes were too big or too heavy (forecasting, I suspect, the back troubles that would make his last decades so painful). I don't know for sure whether he was ever satisfied that he had been as academically "productive" as his incredibly demanding personal moral code required. But I do know that he was always a great joy to his large family, and that colleagues and students at three law schools considered him a mentor, even a champion. Once his student, I co-authored with him several editions of a family law casebook and a criminal law casebook, endeavors which were far and away the most rewarding intellectual experiences of my academic career. And I was an admiring and loving friend.

The faults and foibles, such as they were, can be placed on the table first, because of their scarcity. Caleb was awfully stubborn. True, my fleeting observations of his fathering of the twins, Ethan and David, when they were young, suggest that he was a relaxed and flexible—as well as a doting, supporting and protective—father for all five of the kids.² But as to casebook

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1. Reviewing my notes, I noticed that one of Caleb's colleagues at Boalt Hall, Robert H. Cole, used the same word to describe Caleb in a recent memorandum to the faculty. The word is apt and our sentiments about Caleb are clearly similar. I do not know whether Professor Cole and I simply think alike or if I am guilty of the misdemeanor version of plagiarism.

2. Perhaps such an inference can be drawn from my children's fond memories of Caleb's occasional visits to our home and their sadness at news of his death, despite the fact that their only concentrated contact with him was as children in our home and our vacation cottage some thirty years ago. There is also the evidence provided by Caleb's energetic effort to persuade his son Andrew *not* to refuse to register for the draft, because Caleb wanted to protect him from the rigors of prosecution and criminal punishment that Caleb himself had been willing to undertake when he made his decision not to register. Nor will I soon forget Caleb's anguished voice on the telephone the morning he told me of his and Hope's fears for their daughter Heather the day Chile's

construction, as to family law and criminal law doctrinal issues, he was a bear. Of course, an argumentative style fit our personalities and our work habits. This style greatly benefited both the academic product and our grumpy happiness when we met to write and edit.

And his stubbornness certainly facilitated Caleb's ability and courage to publicly address some of the day's great legal and social issues, and to help influence over time, without much publicity, their solution or at least amelioration. While imprisoned for being a conscientious objector to World War II, Caleb refused to cooperate with the racially discriminatory practices of the administrators of the prison farm to which he was assigned, which reserved indoor jobs during hot summers for white prisoners. As a new law professor at Nebraska, he participated as counsel in a federal habeas corpus proceeding that freed from death row a Native American who was convicted under questionable circumstances of murdering a policeman, despite the fact that the sentence had been affirmed by the Nebraska Supreme Court.³ He worked long and hard in the San Francisco area and in Wyoming to help Japanese Americans imprisoned at the beginning of World War II—work uncelebrated and unappreciated by the general population but never forgotten by the victims of the shameful government decision that led to their imprisonment.⁴ My

President Allende and his family were killed in the presidential palace, where Heather was employed to teach English to the president's children. It was a few days until Caleb and Hope were able to determine that Heather had been sick and did not go to work on the day of the coup.

Caleb's values were clearly personal and not necessarily those of his wife Hope. To cite only one example: he ate meat throughout their marriage, meat she prepared for him despite her never-faltering vegetarianism. Yet no one who spent any time with Hope and Caleb would doubt for an instant that his views and his strength were in some part the product of an incredibly strong marriage and of a powerful and powerfully effective marital partner.

3. With chambers directly across the street from the law school at the time, the state's chief justice responded to the federal court's habeas order by trying unsuccessfully to have Caleb fired by the Nebraska Law School, because, as a convicted felon, Caleb could not have been admitted to the Nebraska Bar and therefore should not have been allowed to teach at the state law school. The Chief Justice either ignored the fact or was unaware that Caleb had been pardoned.

4. The story of the much criticized government internment of American citizens of Japanese ancestry immediately after the attack on Pearl Harbor has been told a number of times. See generally BRIAN M. HAYASHI, *DEMOCRATIZING THE ENEMY: THE JAPANESE AMERICAN INTERNMENT* (Princeton Univ. Press 2004); ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS, AND REPARATIONS: LAW AND THE JAPANESE AMERICAN INTERNMENT* (Aspen Publishing Inc. 2001); WENDY NG, *JAPANESE AMERICAN INTERNMENT DURING WORLD WAR II: A HISTORY AND REFERENCE GUIDE* (Greenwood Press 2002). Two federal statutes provide recompense to those who were interned: American-Japanese Evacuation Claims Act 50 U.S.C. §§ 1981-87 (1948); Restitution for World War II Internment of Japanese-Americans and Aleuts 50 U.S.C. §§ 1989(a)-(d) (1988).

On one occasion in the 1980s, when Caleb gave a public speech in Minneapolis, an elderly couple identified themselves to me as post-Pearl Harbor detainees in Wyoming. They told me that they had come to thank Caleb for his efforts to help their families and all Japanese-Americans who had been "relocated." Caleb's "Additional Biographical Note" attached to his curriculum vitae, explaining his decision to enter law school after World War II, read:

Much of his work in California dealt with his opposition to the evacuation of Japanese-

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sadness at the occasion for this essay has in no way modified my memory and judgment that he was always more stubborn and argumentative than I.

It will appear strange only to those who did not know Caleb well that I begin with memories of what might be called his eccentricities. A great many of Caleb's colleagues and friends know how much he needed coffee during the work day and of the two small thermos bottles he always carried in his briefcase. His daily morning preparation revealed important personal traits, and for early rising guests in the Foote household, Caleb's coffee preparation left an indelible memory. It began before 6:00 a.m. when Caleb appeared in the kitchen dressed in what looked to be a very old bath robe, barely covering an undershirt and underwear. A very small (six-cup, I remember), old percolator coffee pot was placed on the stove and a separate pot filled with water to boil while the pot basket was filled with very precisely measured grounds. A precisely measured amount of boiling water was poured into the coffee pot, which was then placed on the stove to percolate for a specific, timer-measured period (seven minutes comes to mind). The stove was then turned off; one cup was poured for current enjoyment while the rest was carefully poured into two small thermoses (pre-heated, of course, with boiling water left after the percolator was filled). The presence of a coffee-drinking visitor required repetition of the routine. Caleb was certainly aware of the apparently compulsive qualities of the routine, but always replied gently and without rancor whenever he noticed my amused observation of the ritual.

Caleb's adventures preparing and smoking his pipe were a frequent diversion from serious discussions about how criminal and family law should be presented to students. Caleb seemed to want to avoid being separated from his pipe, but when he became captured intellectually by an issue or began to argue with me, he would lose his "smoking concentration" and put the pipe down on any convenient surface, often as a prelude to pacing the floor. Later, noticing that he was no longer smoking, he would begin to look for the pipe, almost always surreptitiously whenever he became aware that I knew he was looking for it, that I knew its location, and that I was amused by his search. The only time I ever saw Caleb sheepish was when he felt compelled to ask for help retrieving the pipe.

But Caleb's idiosyncratic habits (and I would bet there were many of which I never became aware) were minor attributes of a gracious, kind, sensitive, and humble human being. I should begin with his teaching. Many of us who took his family law class at Penn labeled him "uninteresting." Former law students of my generation who read this essay will remember the student

Americans from the West Coast and their subsequent detention in concentration camps. He studied the evacuation on the spot, wrote numerous short articles, and published two pamphlets, *American Refugees* (1942) and *Outcasts* (1943), which exposed the constitutional violations and absurd policy premises of this shamefully racist episode in American history.

drill as “boring” or as letting “the dumb students run on and on.” Years later, after visits to Caleb’s classes and many discussions with him about teaching (not to mention my own conversion from an uncompromising “Socratic” teacher to a more sedate, less challenging, and almost certainly less “interesting” one), I understood Caleb’s teaching methods much better. He deliberately chose, at the risk of boring some students, to avoid at all costs embarrassing those students who failed to understand issues or who offered silly or unresponsive replies to questions. The style was not simply a matter of maximizing the legal skills of his students: it was the product of his belief (and his astonishing ability to lead his life consistently with the belief) that everyone, whatever his or her intellectual weaknesses, is entitled to respect and kindness. Anger and scorn should be reserved for governments or government officials who abuse their authority or democratic ideals. I don’t know all the details, but Caleb’s continuing concern for and willingness to spend his academic capital liberally devising and working to improve Penn’s legal writing program (when such programs were almost non-existent, primitive, and hated by students) amply evidenced Caleb’s devotion to law students and their intellectual development.

Caleb’s life experiences fairly shouted the man’s care for others (especially the disadvantaged, the poor, and victims of discrimination) and his quite unusual lack of concern for “climbing the academic ladder.” Although he was a first year law teacher in Nebraska and a convicted felon, he agreed to help represent in a federal habeas corpus petition a Native American whose death sentence had already been affirmed by the state supreme court and been denied review by the United States Supreme Court.⁵ As his work for Japanese-

5. See *Grandsinger v. State*, 73 N.W.2d 632 (Neb. 1955), *cert. denied*, 352 U.S. 880 (1956). For the federal court decision on the habeas petition, see *Grandsinger v. Bovey*, 153 F. Supp. 201 (D. Neb. 1957), *aff’d*, *Bovey v. Grandsinger*, 253 F.2d 917 (1958). Caleb’s name does not appear as co-counsel for the defendant in the Federal Supplement. Caleb told me that he vividly remembered his concern when he was interviewed by the county prosecutor after the federal court decision as to how funds had been raised for Grandsinger’s defense, because the defendant’s supporters might have been chargeable with raising money (at a cocktail party) without the license required by municipal regulations. Grandsinger was charged with first degree murder for killing a deputy sheriff while escaping from a roadside arrest. The deputy was shot in the stomach through his police belt and the hole in the belt, according to medical testimony, had been made by a .22 caliber bullet fired from a .22 caliber firearm; a .22 caliber firearm had been traced to Grandsinger at the time of his original arrest, but it could not be found when Grandsinger was captured. The policemen involved in the arrest, including the deceased, possessed .38 caliber weapons (whose slug would make a larger hole). After the record was closed and while the jury was out of the court room, the county attorney observed the lead defense counsel using a wooden dowel to expand the hole in the decedent’s belt. After a lengthy conference in chambers, the jury was called, and the prosecutor announced that defense counsel had been discovered pushing a dowel through the belt “hard enough so that it materially enlarged the size of the hole to an extent which cannot now be determined . . . and that the hole is now materially larger” Defense counsel acknowledged the behavior and the judge admonished the jury “when they go to deliberate upon this matter to not probe these exhibits.” *Grandsinger*, 153 F. Supp. 201 at 231-32. Although there were other issues presented in the habeas corpus petition, concerning among other matters the

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Americans after Pearl Harbor showed, Caleb's volunteering and personal efforts to aid victims of discrimination and hatred, and to transform the criminal justice system, were not the product of his legal education: they were part of his wiring. As a former inmate himself, of two federal prisons, Caleb had clashed with prison authorities as he consistently fought for humane and equal treatment for all prisoners. As Caleb himself put it:

The weeks spent in the San Francisco County jail, the sentence to a Federal Prison Camp, and the months in administrative segregation in the McNeil Island Penitentiary as a protester against what prison did to prisoners, generated life-long concern about injustice in the justice system.⁶

The focus of Caleb's scholarship and his academic accomplishments was also the product of his personal background. His interest in criminal law and his concern for those subjected to its methods and consequences, his rage at the blind rigidities of administrators, his fears about possible abuses of discretionary authority, his awareness of the dilemma produced by replacing dangerous judicial discretion with harsh and unbending rules⁷: all can be traced

voluntariness of Grandsinger's confessions, the federal court held the defendant was entitled to habeas corpus because he had been unconstitutionally denied effective assistance of counsel: "an orderly trial was perverted into a virtual legal lynching. From [the time when defense counsel admitted to the jury tampering with evidence, defense counsel] stood discredited before the jury in respect of petitioner's case. The [closing] argument he was shortly to make was stripped of its persuasiveness and effectively damned in the jury's estimation; for his acknowledged trickery would rise at every turn to plague him and to nullify his contentions." *Id.* at 235-36.

Grandsinger was apparently acquitted when he was retried (see what Caleb's notes identify as an article to appear in the Ridge Reporter, a newsletter of the Inverness, California Ridge Association, the local organization of Caleb and Hope's retirement home community, in the Fall of 1995). Still later, Grandsinger was convicted of transporting a stolen motor vehicle in interstate commerce. *See Grandsinger v. United States*, 332 F.2d 80 (10th Cir. 1964).

6. Caleb Foote, *Biographical Note* (written originally in 1991 for the American Society of Criminology). *See also infra* text accompanying notes 8 & 9.

7. Caleb railed against the abuses of the sentencing discretion he frequently observed exercised by state and federal trial judges. Caleb expressed his ambivalence about the possible consequences of the adoption of "sentencing guidelines" when he spoke about sentencing at the University of Minnesota in the early 1980s. Later, in 1991, in his personal biographical notes Caleb put on paper his hesitation to join the determinate sentencing "movement:"

Prison experiences also fed concerns about sentencing disparity, the failure of prediction about rehabilitation [when used as] a factor in sentence severity, and America's over-reliance on harsh punishment as a cure-all for the problems of crime in our society. My contribution to the report for the American Friends Service Committee, *Struggle for Justice* (1971), included a preliminary proposal for determinate sentencing, but one which linked any possible benefits of such a sentencing reform to the necessity for concurrent basic changes in the law of crimes and sharp limitations in the use of imprisonment. The subsequent imposition in many states and in federal law of inconsistent, inequitable and inhumane determinate sentencing legislation without addressing the underlying defects in substantive law and policy has, unfortunately but predictably, only worsened rather than alleviated our problems.

See supra note 6. Caleb was not only very smart; he was often prescient about the problems of crimes and sentencing. *Cf., e.g.*, Albert W. Alschuler, *Disparity: The Normative and Empirical*

in part to Caleb's prosecutions, sentences, and personal knowledge of prison administration.⁸ It is only a minor irony that Caleb, as an individual who made a lifelong effort to control and ameliorate the consequences of the exercise of discretion by government officials, was one of a select group of World War II conscientious objectors later pardoned by President Truman.⁹

Unlike the experience of many academics, Caleb's writing and other more direct efforts to make the world better did not go unrecognized. How many of us are asked to be the featured speaker at our school's commencement?¹⁰ How many former prisoners are awarded the August Vollmer Award of the American Society of Criminology for "outstanding contributions to criminal justice,"¹¹ and told by the retired warden of the first prison in which they were incarcerated that their objections to prison administration were right, after all? How many criminal law teachers have had a student tell us that the student's father, a now-retired Assistant United States Attorney who had prosecuted us

Failure of the Federal Guidelines, 58 STAN. L. REV. 85 (2005).

8. Caleb's curriculum vitae includes among his early articles: Caleb Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 1125 (1965); Caleb Foote, *Vagrancy-Type Law and its Administration*, 104 U. PA. L. REV. 603 (1956); Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954) (with student law review editors). All Caleb's writing was graceful (even when full of rage at administrative and judicial discrimination), and contained meticulous historical research and frequent use of significant classic as well as modern poetry. Caleb's interest in history can certainly be ascribed in part to his Harvard degree in American History and to his family's lengthy and distinguished American educational and professional pedigree. (Not all his ancestors were celebrated for such reasons: Caleb once showed me a hand-carved wooden spoon, dated in the eighteenth century, created by his name-sake while a prisoner for piracy on a British frigate.) One of my own favorite examples of Caleb's creative writing skills is *An Anatomy of Divorce*, a lengthy *New Yorker*-style report on the doctrines and practices of no-fault divorce, written by Caleb for CALEB FOOTE, ROBERT J. LEVY AND FRANK E.A. SANDER, *CASES AND MATERIALS ON FAMILY LAW* 943-1010 (2d ed. 1976).

9. Douglas Martin, *Caleb Foote, Law Professor and Pacifist Organizer*, 88, *Dies*, N.Y. TIMES, April 3, 2006, at B6.

10. See Caleb Foote, Faculty Address at the University of California, Berkeley Commencement (May 20, 1978). Caleb not only warned students against "the transmogrification of intellectual legal sharpness into the insensitivity of toughness;" he also reminded them of the evil of slavery and asked:

[Will] our descendants rank us any less harshly for our tolerance of our contemporary analogues to slavery, for the ways in which our law, and we as lawyers, legitimate and thereby perpetuate war and inequality and sexism and racism? How are we going to be judged for the recurrent breakdown of judicial administration; for our law's pervasive discrimination against indigents; for its grossly inadequate provision of legal services to lower and middle income persons; for a criminal law administration that should be a disgrace to any society and a substantive criminal law that is permeated with class bias; for our failure to take effective measures to eliminate racism, sexism or anti-semitism; and for a system of legal education whose narrowness and lack of diversification is a contributing cause of these continuing deficiencies?

Id.

11. Caleb received the award some forty-five years after his release from his second prison term.

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many years before, had looked over our criminal law casebook and wanted to compliment us on a careful and thoughtful effort to examine the criminal justice system? How many academics get to read, twenty years after publication of a “tenure article,” a Ph.D. thesis devoted to measuring and praising the quality as well as the social and political impact of our scholarship?¹²

It’s so easy to use stereotypes when trying accurately and justly to describe a person not well known to one’s audience. I have done my best to provide an impressionistic, and certainly very personal, vision of the man while avoiding the temptation to be trite. I would like readers to feel, as I do and always will, Caleb’s powerful intellect and the astonishing passion he brought to issues of discrimination, his incredibly unusual willingness to put himself on the line to accomplish social change, and, with it all, his enormous kindness, decency, and modesty. Not all who met Caleb casually were able to discover the whole man, because he never seemed to need to show off. Modesty, not ego, was a constant in his life.¹³ But those who were privileged to know him well will never forget him; I know I never will. The country and the world will miss this good man of great conviction and courage, and so will I.

12. See John S. Goldkamp, *Philadelphia Revisited: An Examination of Bail and Detention Two Decades After Foote*, 26 CRIME & DELINQ. 179 (1980). Goldkamp commented:

It is difficult to discover an issue that was addressed by the bail reform movement of the 1960s that was not first discussed by Foote in his 1954 study. . . . Apparently, the assessment of bail practices in Philadelphia published by Professor Foote in 1954 has served as a blueprint of issues and change for the years of reform that succeeded his study. . . . [M]any of the issues raised by Foote have been addressed with fairer and more efficient procedures. Many of his recommendations have been either prophetic or have contributed directly to changes that were later institutionalized.

Id. at 180, 191-92.

13. How could it have taken me so long, while writing this essay, to remember a dinner party in Minneapolis to which my wife and I brought Caleb when he was in town for a week? The affair was given by good friends whose politics (and whose friends’ politics) I regularly described to them (and reported to Caleb in advance) as “trogodyte” or “to the right of Genghis Khan.” Apprised by me of some of Caleb’s history and his politics, he drew a curious crowd throughout the evening. Later, our hostess told me how surprised she was to find him “just an ordinary person, and so nice and polite.” Yes, indeed—and he found the crowd fascinating.

