

## Reflections on Caleb Foote on Vagrancy-Type Laws

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Caleb Foote's classic 1956 article *Vagrancy-Type Law and Its Administration*,<sup>1</sup> which appeared in the *University of Pennsylvania Law Review* and reported on vagrancy-type laws and their administration in Philadelphia, 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<sup>2</sup>—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.<sup>3</sup> I plan to say little about the pros and cons of "broken windows" policing.

I want instead to discuss 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 am going to do this by focusing on and celebrating Caleb Foote's classic 1956 article.<sup>4</sup>

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

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1. Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956).

2. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (Prentice-Hall 1963).

3. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29.

4. Foote, *supra* note 1.

homeless, displaced wanderers have long been part of western society, especially so since the beginning of the industrial revolution and migration to work in factories and mines.<sup>5</sup> Vagrancy laws were initially a failed attempt to tie workers to their industrial jobs, as serfdom had tied workers to the land.<sup>6</sup> Workers moved because work was unavailable or because working conditions were wretched.<sup>7</sup> 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.”<sup>8</sup>

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.<sup>9</sup> Karl Marx, writing in the nineteenth century, famously called those who worked in factories and mines the proletariat.<sup>10</sup> This class was to produce the future revolutionaries and leaders who would overthrow the capitalists and their government.<sup>11</sup> But in *The Communist Manifesto*, Marx distinguishes between the proletariat, or the class of hard working laborers, on the one hand, and tramps, hobos and criminals on the other.<sup>12</sup> He derides the latter as the *lumpenproletariat*: “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.<sup>13</sup>

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—had of the people described in Caleb’s classic article.<sup>14</sup>

Caleb’s article is in the tradition of legal realists who thought it important

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5. *Id.* at 615-17.

6. *Id.* at 615.

7. *Id.*

8. *Id.* at 616.

9. *See, e.g.*, VAGABONDS AND BEGGARS ACT, 11 Henry VII c.2 (1494), available at <http://www.workhouses.org.uk/index.html?poorlaws/poorlaws.shtml> (“Vagabonds, idle and suspected persons shall be set in the stocks for three days and three nights and have none other sustenance but bread and water and then shall be put out of Town. Every beggar suitable to work shall resort to the Hundred where he last dwelled, is best known, or was born and there remain upon the pain aforesaid.”).

10. *See generally* KARL MARX, *THE GERMAN IDEOLOGY* (Lawrence & Wishart 1970) (1845).

11. *Id.*

12. *See generally* KARL MARX, *Communist Manifesto* in *POLITICAL WRITINGS, VOL. 1: THE REVOLUTIONS OF 1848* (David Fernbach trans., Random House 1974) (1848).

13. *Id.*

14. *See* Foote, *supra* note 1.

to describe and critique “law in action.”<sup>15</sup> However, it is 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;<sup>16</sup> in this, Caleb was certainly 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.<sup>17</sup> Caleb describes a drive against those so-called undesirables who were occupying Philadelphia’s newly completed Independence Hall.<sup>18</sup> The drive was, not surprisingly, popular with the general public and surely with the editorial staff of the *Philadelphia Inquirer*, who titled an editorial *Get Bums off the Street and into Prison Cells*.<sup>19</sup>

Caleb’s article—and his life—showed that he placed a value on the lives of these despised persons, and that he was outraged by the unfairness of the legal system in responding to them. Caleb posted himself in Philadelphia’s Police Magistrates Court to observe the summary justice meted out to sweep up the “human trash.”<sup>20</sup> 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. For example, a man claims he has a bus ticket to New York.<sup>21</sup> He produces it “after considerable fumbling.”<sup>22</sup> “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.”<sup>23</sup> 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.”<sup>24</sup> A vagrant named George is luckier in pulling a judge who says, “George, I feel sorry for you; go on home and quit drinking.”<sup>25</sup> To another he says, “You’re too clean to be here, you’re discharged.”<sup>26</sup> 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.<sup>27</sup>

It is hard to know how representative the proceedings in the court Caleb

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15. See generally, Michael Steven Green, *Legal Realism as a Theory of Law*, 46 WM. & MARY L. REV. 1915 (2005).

16. See generally, Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986).

17. See Foote, *supra* note 1, at 604.

18. *Id.*

19. *Id.* at 606 (citing *Get Bums off the Street and into Prison Cells*, Editorial, PHILA. INQUIRER, Feb. 3, 1954, at 30).

20. *Id.* at 604.

21. *Id.* at 605.

22. See Foote, *supra* note 1, at 605.

23. *Id.*

24. *Id.*

25. *Id.* at 608.

26. *Id.* at 606.

27. *Id.*

observed were, but we do know that there were many such arrests made across the United States. According to a 1958 study of the “chronic police case inebriate,” sponsored by the Yale Center of Alcohol Studies, 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>28</sup> The year 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.<sup>29</sup> “Where conviction can be obtained by sight and smell alone,” Caleb writes, “it makes little practical difference what charge is listed in the records.”<sup>30</sup> 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.”<sup>31</sup>

We can tease four themes out of Caleb’s argument. The first, evoking Rawls,<sup>32</sup> is humanistic: if we did not know where our life chances would bring us, and if, perchance, we ended up as one of these 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. However, 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, probably including the working class who, at least in this instance of acceptable social norms, would support Karl Marx.<sup>33</sup>

Caleb surely understood how unappreciated the behaviors and appearance of the vagrant underclass would be to Philadelphia’s shopkeepers, bankers and even 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.<sup>34</sup>

It is puzzling why Caleb did not recommend a *publicly* funded defender system, especially since the nation was not without precedent. Los Angeles County had established a public defender’s office in 1913;<sup>35</sup> and Earl Warren

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28. DAVID J. PITTMAN & C. WAYNE GORDON, *REVOLVING DOOR: A STUDY OF THE CHRONIC POLICE CASE INEBRIATE 2* (Free Press 1958).

29. *Id.* at 2.

30. Foote, *supra* note 1, at 612.

31. *Id.*

32. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (Belknap Press of Harvard University Press 1971).

33. See Foote, *supra* note 19.

34. Foote, *supra* note 1, at 647.

35. See Barbara Babcock, *Inventing the Public Defender*, 43 AM. CRIM. L. REV. 1267, 1274 (2006).

had helped establish a public defender office in Alameda County, California in 1927,<sup>36</sup> which, by the time Caleb wrote in the 1950s, 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 1950s?

Quite possibly it was, as we see from Caleb's description of his third focus: the courts. The Philadelphia police court judges who sentenced "vagrants" either lacked legal training or were indifferent to its lessons.<sup>37</sup> They ruled their courts by whim and caprice, always with an eye towards minor self-aggrandizement.<sup>38</sup> Defendants were asked to contribute to the magistrates "favorite charity."<sup>39</sup> Those who dropped a dollar into the collection box were freed.<sup>40</sup> Those who did not were assigned to a "goon squad" to mop and clean the building.<sup>41</sup> 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.<sup>42</sup> He 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.<sup>43</sup>

Caleb's brief, therapeutic recommendation is interesting for three reasons. First, he does not portray those arrested for vagrancy as itinerant laborers or romantic wanderers. Caleb sees the arrestees, on the whole, as sick rather than criminal.<sup>44</sup> They need help, not punishment—which is a kindly sentiment, but not necessarily a realistic one, given the paucity of such services and the difficulties of rehabilitating this population.

The authors who reviewed the records of nearly 4000 "chronic police case inebrates" in the 1950s found them to be older, middle-aged men, who had steadily declined into arrests for public intoxication.<sup>45</sup> They grew up mostly in poverty and eighty percent had spent time in institutions.<sup>46</sup> Alcoholics Anonymous (AA) did not appear to work with such men.<sup>47</sup> Having grown up in poverty and unaccustomed to work in the jobs or professions that many of

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36. Earl Warren, *THE MEMOIRS OF EARL WARREN* 121 (Doubleday 1977).

37. Foote, *supra* note 1, at 646-47.

38. *Id.* at 604-09.

39. *Id.*

40. *Id.* at 607.

41. *Id.*

42. *Id.* at 631-35.

43. Foote, *supra* note 1, at 631-35.

44. *Id.* at 648.

45. Pittman, *supra* note 29, at 2-4.

46. *Id.* at 65-66.

47. *Id.* at 71-74.

those in AA had, these men were considered incapable of rehabilitation.<sup>48</sup> They were described in the study as “undersocialized.”<sup>49</sup>

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 or being drunk, disorderly, homeless, poor or mentally ill.<sup>50</sup>

Among the 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.<sup>51</sup> Like Caleb, Douglas traces the vagrancy laws to the poor laws, which confined workers to specific places and to work at specified wage rates.<sup>52</sup> “The vagrant was the runaway serf,” Douglas writes.<sup>53</sup> Rather than seeing vagrants in the hardened vision of Karl Marx as “social scum,” Douglas considers and portrays vagrants appreciatively. He freshens their spoiled identity by portraying them as migratory members of the working class, casual laborers who ride the rods and share meals under railroad bridges, and who are, as he concludes, destitute “wanderers who have no prestige of class or family.”<sup>54</sup>

Douglas also cites a lesser known 1960 article by Arthur Sherry, a University of California, Berkeley Professor of Law and Criminology, who was later to become a colleague of Caleb’s and of mine, at the School of Law and the School of Criminology.<sup>55</sup> Arthur’s article is clearly addressed to the California State Legislature and does not cite to that of Caleb, who in 1960 was yet to be his colleague.<sup>56</sup> Perhaps Caleb’s article was not material, perhaps it seemed too radical, or perhaps Arthur was unaware of it.

Caleb and Arthur present two visions that are 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 similarity: “[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

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48. *Id.*

49. *Id.* at 78-108.

50. Foote, *supra* note 1, at 614, 631.

51. William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 *YALE L.J.* 1, 5 (1960).

52. *Id.*

53. *Id.* at 6.

54. *Id.* at 4.

55. Arthur Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 *CAL. L. REV.* 557 (1960).

56. *Id.*

variance with prevailing standards of constitutionality.”<sup>57</sup>

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 imprisoning people because their poverty or characterization as ‘bums’ makes them vaguely undesirable.”<sup>58</sup> Arthur, by contrast, reflects the norms and interests of the broader community. To him, as he says when addressing the California Legislature, vagrants are “bums.”<sup>59</sup> 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 [p]eeping [t]om and the prowling trespasser.”<sup>60</sup>

Anticipating the specificity feature of Justice Douglas’s opinion in *Papachristou v. Jacksonville*,<sup>61</sup> Arthur proposes a statute that criminalizes the behavior of persons, for example, who “[a]ccost other persons in any public place (or any place open to the public) for the purpose of begging or soliciting alms (as a business).”<sup>62</sup> The proposed statute does not forbid begging. It is drafted not against those who beg sitting or standing “by the wayside,” but “[a]gainst] the *conduct* of the individual who goes about the streets accosting others for handouts.”<sup>63</sup> It embraces what Arthur—I think correctly—reads as the dominant social norms of the community: begging may be permissible, but aggressive panhandling is not.<sup>64</sup> And he also anticipates, as Caleb did earlier, the constitutional requirement of specificity that finds its promise in Douglas’s opinion in *Papachristou*.<sup>65</sup>

Twenty years later, in 1992, Harvard Law Professor William Stuntz wrote, “[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.”<sup>66</sup> He writes this to make what he calls a “vital and largely ignored” point about the relation between the breadth of criminal law and procedural restraints on police.<sup>67</sup> When the criminal law is vague and expansive, as in the classic vagrancy statutes, the police are given

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57. *Id.* at 569.

58. Foote, *supra* note 1, at 648.

59. Sherry, *supra* note 55, at 566.

60. *Id.*

61. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

62. Sherry, *supra* note 55, at 567.

63. *Id.* at 570. (emphasis added)

64. This is currently the law in New York City and is enforced under the philosophy of “broken windows” policing. See Wilson, *supra* note 3; N.Y.C. ADMIN. CODE § 10-136 (2007).

65. See *Papachristou*, 405 U.S. at 156.

66. William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 560 (1992).

67. *Id.* at 561.

the right to stop, arrest and make lawful searches incident to arrest, on almost anyone they choose.<sup>68</sup>

That is exactly what happened in *Papachristou*,<sup>69</sup> which shows how easy it was for police to use vagrancy-type statutes not only to arrest, search and confine the homeless and downtrodden, but also to enforce racist norms. Margaret Papachristou 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.”<sup>70</sup> Of course, their real offense was the crime of interracial dating in Jacksonville, Florida. How much police were restrained after *Papachristou* is a topic for another paper, but it is worth recalling that studies of police have revealed that police can, and still do, exercise enormous discretion.<sup>71</sup> Nevertheless, *Papachristou* was a landmark decision, removing from police the “stunning breadth” of discretion they previously enjoyed under vagrancy-type statutes.<sup>72</sup>

Justice Douglas’s decision essentially recaps the argument against vagrancy-type laws he had made in his 1960 *Yale Law Journal* article.<sup>73</sup> Here he also cites and quotes from Charles Reich’s 1966 *Yale Law Journal* article eloquently defending the rights of wandering nightwalkers.<sup>74</sup> Douglas cites Arthur’s article for its research on the history of vagrancy law;<sup>75</sup> Caleb’s article is quoted in language resonant with Caleb’s humanistic values:

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.<sup>76</sup>

And so, vagrancy-type laws were struck down in 1972—without dissent—by a very different United States Supreme Court.<sup>77</sup>

Caleb would not have approved of concluding with this positive ending. He would have pointed out that while constitutional law may have changed, impoverished wanderers rarely find a welcome in cities across the country. For

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68. *Id.* at 560.

69. *See Papachristou*, 405 U.S. at 171.

70. *Id.* at 158-59.

71. The classic discussion is Joseph Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543 (1960).

72. *Papachristou*, 405 U.S. at 171 (finding Jacksonville’s vagrancy laws, although useful to police, plainly unconstitutional). *See also* Stuntz, *supra* note 66, at 560.

73. Douglas, *supra* note 51.

74. Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 *YALE L.J.* 1161 (1966).

75. *Papachristou*, 405 U.S. at 162, n.4.

76. *Id.* at 167, n.10.

77. *Id.* at 171.

example, after *Papachristou*, a city may pass an ordinance making it unlawful to store personal property on any city land, regardless of any criminal intent.<sup>78</sup> And a 2006 study by the National Coalition for the Homeless found that many cities have passed, and use, city ordinances to criminalize homelessness.<sup>79</sup> So the real conclusion is that social norms have scarcely changed, nor has the capacity of legislators to write statutes that respond to constitutional demands while achieving an effect similar—but by no means identical—to the classic vagrancy statutes.

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78. See *id.* at 156. See also N.Y.C. ADMIN. CODE § 16-122(b) (2007).

79. See NAT'L COALITION FOR THE HOMELESS & NAT'L LAW CTR. ON HOMELESSNESS AND POVERTY, *A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES* 9 (2006) (finding, (1) of the 224 cities surveyed, “28% prohibit ‘camping’ in particular public places in the city and 16% had city-wide prohibitions on ‘camping.’ 27% prohibit sitting or lying in public places, 39% prohibit loitering in particular public areas and 16% prohibit loitering city-wide, 43% prohibit begging in particular public places; 45% prohibit aggressive panhandling and 21% have city-wide prohibitions on begging;” and (2) that in sixty-seven cities over a five-year period there was “a 12% increase laws [sic] prohibiting begging in certain public places and an 18% increase in laws that prohibit aggressive panhandling... a 14% increase in laws prohibiting sitting or lying in certain public spaces... a 3% increase in laws prohibiting loitering, loafing, or vagrancy laws.”).

