



IN MEMORIAM

Caleb Foote
Professor of Law, Emeritus
UC Berkeley
1917 – 2006

Caleb Foote, whose deep moral convictions and unflinching sense of justice defined him and his career, as well as his lasting contributions to our legal system, died on March 4, 2006, in his 89th year. He came to the University of California, Berkeley, in 1965 as professor of law and (for a time) criminology, was a founding member of the School of Law's jurisprudence and social policy (JSP) faculty, and mentored and taught JSP and law students until his retirement in 1987.

Caleb was nationally recognized as a criminal law reformer who mobilized constitutional history and empirical social science evidence to advocate the elimination of economic discrimination at the heart of the criminal process, by eliminating the requirement of excessive bail. He advocated against excessive police discretion, especially the power to wield misdemeanor offenses against "vagrants" whose real crime was being poor and friendless, and for statutory limits to judicial discretion over criminal sentencing. Significant changes in all of these areas since the early 1960s can in some measure be credited to him (although he was himself ambivalent about the results, especially in regard to sentencing reform).

Even earlier, Caleb achieved national attention as a pacifist organizer and as an early critic of Japanese internment. After graduating from Harvard College in 1939, where he was managing editor of *The Harvard Crimson*, he completed a master's degree in economics and became familiar with empirical methods and policy analysis. As the United States became involved in World War II, he took a strong stance for pacifism. He was hired by the Fellowship of Reconciliation, a Quaker organization advocating peace and nonviolent social change, to open a northern California office to advise draftees seeking conscientious objector status. Caleb's own request was rejected by his draft board because of his refusal to offer the standard religious grounds for exemption; he insisted instead that humanist principles were his standard and should be accorded just as much legal effect. He refused the offer of alternative service in a work camp and in 1943 served six months in federal prison. In a contemporaneous interview with the Associated Press, he said:

Only by my refusal to obey this order can I uphold my belief that evil must be opposed not by violence but by the creation of goodwill throughout the world.

After prison, Caleb returned to northern California, organizing opposition to the internment of the Japanese and collaborating with the progressive photographer Dorothea Lange to produce a pamphlet, titled "Outcasts," attacking the internment. He was again arrested for draft law violations in 1945 and was returned to a federal prison. It was a general pardon for draft violators from President Harry S. Truman that achieved his release. He afterwards served as executive director of the Central Committee for Conscientious Objectors.

Caleb always credited his prison experience, and his perception of the gross inequality of treatment received there by minorities and the poor, with leading him to return to school for a law degree at the University of Pennsylvania, from which he graduated in 1953. His strong performance caught the eye of faculty members,

and after graduation he became law professor at the University of Nebraska. Characteristically seeking to bridge the gap between classroom debate and real world injustice, he and a colleague represented a Native American sentenced to death for killing a state trooper. They were able to win a new trial based on the incompetence of the original lawyer.

Caleb returned to Penn as a law professor in 1956 and threw himself into empirical studies of lower courts that resulted in his widely cited articles on vagrancy law and on bail. Convinced that far too many defendants pled guilty under the pressure of pre-trial confinement in jail, he argued that the Sixth Amendment ban on excessive bail meant that each defendant had to be released without regard to whether he could afford financial warranties. He backed up this constitutional argument with empirical studies of both New York and Pennsylvania bail practices. Although the Supreme Court never endorsed his constitutional theory (indeed, the Court rejected it in upholding preventive detention in *Salerno v. United States* in 1987), bail policy in the 1960s did seek to address inequality through such innovations as the Vera Institute's pre-trial release survey instrument and rules permitting a ten percent refundable deposit.

Soon after coming to Berkeley, Caleb chose to locate his office in the new Center for the Study of Law and Society, alongside the empirical social scientists Philip Selznick, Sheldon Messinger, and Jerome Skolnick. Drawing on the work of the young criminologists around Berkeley in the late 1960s, he led a Quaker-inspired effort to review the justness of current penal policy, including California's ultra-modern system of penal rehabilitation, with its indeterminate sentences permitting the administrative parole board called the Adult Authority to control the actual imprisonment time of virtually all felons. Their report, *Struggle for Justice: A Report on Crime and Punishment in America*, was put out by the American Friends Service Committee and published in 1971 by Farrar, Straus, and Giroux. By the 1980s Caleb was troubled by the direction of American penal policy, especially the high levels of incarceration. Even after his retirement, he continued to do research on the burgeoning California prison system, producing a study for the Center on Juvenile and Criminal Justice in 1993.

Caleb was a dedicated, empathetic, and engaged teacher. He received Berkeley's Distinguished Teaching Award in 1983. He coauthored casebooks for two law school courses. From 1966 to 1968, he was cochair of the campuswide Study Commission on University Governance, a faculty-student committee appointed in the aftermath of the Free Speech Movement and during troubled times of student protest against the Vietnam war, racial inequality, and University policies. The Commission wrote a lengthy report proposing a range of reforms in governance, student participation, and education, which was widely noticed and influential.

Caleb was a sparkling and stimulating colleague. He relished a productive argument. He was deadly serious and debated with collegial merriment. He admired quality and scorned pretension. He was a seeker after the good and a skeptic. He was enormously accomplished and entirely unassuming. He loved poetry, the outdoors and, above all, of course, his family. He is survived by his wife, Hope, their five children, Robert, Heather, Andrew, Ethan, and David — and by all of us, his colleagues and students, who will cherish his memory and be forever grateful for his gifts.

Jonathan Simon
Sanford Kadish
Robert Cole