

# The battles of Clara Shortridge Foltz —

California's first woman law student, first woman attorney, first woman Los Angeles deputy district attorney, creator of state's prisoner parole and public defender systems and founder of the San Diego Bee.

By Mortimer D. Schwartz, Susan L. Brandt and Patience Milrod

**CLARA SHORTRIDGE FOLTZ** watched the district attorney as he presented his closing argument to the San Francisco jury. He concluded with an attempt to discredit her as attorney for the defendant:

"She is a WOMAN, she cannot be expected to reason; God Almighty decreed her limitations . . . this young woman will lead you by her sympathetic presentation of this case to violate your oaths and let a guilty man go free."

Foltz was angry, but having listened to similar accusations in other courtrooms, she was not surprised. Rising to address the court, she demolished both the legal and *ad hominem* arguments of the prosecutor and won her case.

She was California's first woman attorney. Facing opposition from both sexes, she fought for entrance to the state bar and, later, for fair treatment within it. She opened the profession to future generations of California women, and throughout her long and successful practice she used a lawyer's expertise to work for legal reform and women's rights.

## Early Years

Foltz was a fighter by nature. Reared in the midwest, she boasted, "I am descended from the heroic stock of Daniel Boone and never shrank from contest nor knew a fear. I inherit no drop of craven

blood." She had come to San Jose, California, with her husband and five small children in 1874. Two years later, she divorced Jeremiah Foltz and faced the responsibility of supporting her young family. She was 27 years old and already well known within her community. She had been the impetus behind the paid city fire department, and she was an active suffragist and a "brilliant and logical" speaker on sexual equality. While her work experience had been along traditional lines, she had developed a fascination with the law in her childhood, and she decided to try a legal career. She later observed, "I had no thought of the hardships to be encountered, the humiliation, and the thousand torments to be suffered!"

Bolstered by her parents' and brothers' encouragement,<sup>1</sup> she asked a prominent local attorney whether she could read law with him. The response was discouraging:

My dear young friend:

Excuse my delay in answering your letter asking permission to enter my law office as a student. My high regard for your parents, and for you, who seem to have no right understanding of what you say you want to undertake, forbid encouraging you in so foolish a pursuit, — wherein you would invite nothing but ridicule if not contempt.

A woman's place is at home, unless it is as a teacher. If you would like a position in our public schools I will be glad to recommend you, for I think you are well-qualified.

Very respectfully,  
Francis Spencer

Disappointed, she "silently went about preparing to do battle against all comers who would deny to women any right or privilege that men enjoyed." She finally secured a place to study in a neighborhood law office<sup>2</sup> and began preparing for her career. She continued to lecture to maintain a source of income.

## The Woman Lawyer's Bill

Foltz realized, however, that her years spent reading law would serve no purpose as long as women were excluded from the California bar. To remedy the situation she wrote an amendment to section 275 of the Code of Civil Procedure, which set out qualifications for lawyers in California. The proposed amendment deleted the words "any white male citizen" and substituted "any citizen or person," so that the new section read:

Any citizen or person resident of this state who has bona fide declared his or her intention to become a citizen in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the

necessary qualifications of learning and ability, is entitled to admission as attorney and counselor in all the Courts of this state.

In February of 1876, she persuaded a state senator to present it to the Legislature.

proponent thereafter changed his eye to no and moved to reconsider the vote the following day; his motion passed 39-33. She lobbied that evening for the reconsideration vote, coaxing and entreating on behalf of her amendment. She later stated, "I would have reasoned

### Another opponent lamented the embarrassing situations which might arise in court, when a woman attorney would have to listen to or elicit indelicate evidence.

The amendment, Senate Bill 66, became popularly known as the Woman Lawyer's Bill. There was little public concern over the deletion of the racial restriction; the debate focused on the elimination of the code's sex qualification. As Foltz reported:

"The bill met with a storm of opposition such as had never been witnessed upon the floor of a California Senate. Narrow-gauge statesmen grew as red as turkey gobblers mouthing their ignorance against the bill, and staid old grangers who had never seen the inside of a courthouse seemed to have been given the gift of tongues and they delivered themselves of maiden speeches pregnant with eloquent nonsense."

Yet Senate Bill 66 passed the Senate handily by a vote of 22-11 and moved to the assembly a few days later. One opponent of the bill spoke of the omnipotent power which had defined the walks of life from which women should not be drawn. Another kindly allowed that "the sphere of women was infinitely more important than that of men, and that sphere was home." Still another lamented the embarrassing situations which might arise in court, when a woman attorney would have to listen to or elicit indelicate evidence. In her later years, Foltz would echo a suffragist comment: "Men are the sentimentalists . . . they become so tearfully emotional that it all spills out over 'home and mother' every time you offer a suffrage argument."

The amendment also had some supporters among the assemblymen. One spoke twice in its favor, stating that he saw no reason to deny a woman the right to earn her living in this manner. He pointed out that the eastern states allowed the practice, and that certainly no woman would have to take advantage of the bill. Another assemblyman cited the contributions of women in the medical profession.<sup>3</sup>

A vote was called and the bill was defeated 33-30. A quick-thinking

had they been reasonable men." The bill was passed in the morning by a majority of two.

Foltz returned to San Jose to complete her course of reading for the bar, and subsequently took the examination for admission to the 20th District Court Bar.<sup>4</sup> She passed it with "highly colored compliments" and took her professional oaths in early September 1878, the first woman admitted to the California bar pursuant to the code amendment which she had drafted and promoted.

#### The Hastings Lawsuit

Recalling her feelings upon entering into the practice of law, Foltz remarked: "I had many secret misgivings as to my ability to cope with men who had a thousand years advantage over me." Nevertheless, within a few months she had a growing practice in San Jose and was a successful advocate in even her earliest cases. Never one to be guilty of false modesty, she remembered one of her first triumphs:

"I kept my wits fairly well, though I trembled, and certainly was dreadfully scared lest I should fail to serve my trusting client as capably as a man lawyer might have done. No one, not even the astute experienced Registrar himself — as he told me later — regarded me as a novice in his department — so intelligently and effectively did I guard the interests of my client by the skillful manner in which I handled the contestant and his witnesses."

Foltz believed, however, that a formal legal education would enable her to serve her clients with greater skill and confidence. She applied for admission to Hastings College of the Law in San Francisco in October 1878.

The Hastings law school had been established as a department of the University of California, pursuant to a generous grant from Judge S. Clinton Hastings, who was also the college's first dean. A board of directors and Dean

Hastings determined the law college's policies, including admissions standards. Those standards, however, did not include any reference to the candidate's sex, perhaps because the board of directors had never considered the possibility that a woman would be so audacious as to try to enroll in a law school. The admissions qualifications simply required that an applicant be over the age of 21 years, of good moral character, and a citizen and resident of California. Foltz met all these requirements.

She paid the \$10 tuition fee and started classes on January 9, 1879. When she returned to school the following day, she was met at the door by a janitor: "Miss, this is a law school. I'm ordered not to let you come in here." Undaunted, she obtained from founder Judge Hastings a note directing the janitor to admit her. The judge advised her that his was a conditional admission only, subject to approval by the board of directors of the college.

Armed with this ticket, Foltz returned to school to find that resistance to a woman law student was not confined to the school administrators:

"The first day I had a bad cold and was forced to cough. To my astonishment every young man in the class was seized with a violent fit of coughing. You would have thought the whooping cough was a raging epidemic among the little fellows. If I turned over a leaf in my note book every student in the class did likewise. If I moved my chair — hitch went every chair in the room. I don't know what ever became of the members of that class. They must have been an inferior lot, for certain it is, I have never seen nor heard tell of one of them from that day to this."

Her tenure as a law student was short-lived. On Jan. 11, two days after she had started classes, Foltz was notified that the Board of Directors of Hastings College of the Law had decided to deny her application for admission.

Foltz applied to the 4th District Court in San Francisco for a writ of mandamus to compel the board of directors to admit her and journalist Laura de Force Gordon.

In her petition, Foltz maintained that she had been wrongfully excluded from Hastings College of the Law, since she met all University of California requirements for admission. Judge Morrison granted the alternative writ, requiring that the board admit her "upon the same terms and conditions as other citizens of the State of California" or show cause why not.

The respondents claimed in their

answer that the board of directors reserved to itself complete discretion to exclude from the college any and all persons whose presence there it believed would be "useless to such persons themselves, or detrimental to said college, or likely to impair or interfere with the proper discipline and instruction of the students . . ."<sup>5</sup>

The board averred that it acquired this discretion in its role as sole manager and executor of a trust created by Judge Hastings upon the passage of the act establishing Hastings College of the Law and the founder's payment of \$100,000 into the state treasury. The board maintained that the law college was therefore administered independently of the University of California and was in fact associated with it only for the purpose of dispensing degrees.

Judge Morrison heard the oral arguments on Feb. 24, 1879. By all accounts, the case had aroused much interest: the courtroom was full, "the younger and more gallant members of the profession being present in large numbers."

Judge Morrison instructed the attorneys, "Proceed, gentlemen." Upon noting Foltz's look of astonishment and confusion, he immediately corrected his slip. She did proceed, presenting her case "with both force and polish," as the *Daily Alta California* reported it the next day.

She cited the 1868 act which created the University of California to show that the Legislature had contemplated affiliation of medical and law colleges with the university and had intended that those departments be governed by the same admission standards as the rest of the university. She then cited the act of 1878 creating the Hastings law college and pointed out that it required no special qualifications for admission to law study. Nor did it indicate that the board of directors had any discretion to make rules governing the law college which were inconsistent with the rules governing the university as a whole.

She concluded that the law college was a department of the University of California, bound by its rules and without authority to exclude her on the basis of her sex. By Foltz's own account, "I closed my argument conscious that I had won my case. I could not then nor at any time since understand how [the counsel for respondents] could take up the time of the court in urging their foolish objections to my petition for a peremptory writ."

Opposing counsel first urged that the law school was not subject to the laws

governing the university as a whole because it was created and managed as a special trust. Furthermore, they maintained that no court could review the decisions of the board of directors and that therefore no writ could issue. Attorney Delos Lake then left legal argument behind. According to the *Chronicle*, "He repeated the usual objections to the enlargement of woman's sphere. He complimented the grace and beauty of the applicant, and said that lady lawyers were dangerous to justice inasmuch as an impartial jury would be impossible when a lovely woman pleaded the case of the criminal." The respondents also quoted at length from a Wisconsin decision denying a woman admission to that state's bar. In that decision, Judge Ryan had declared his fervent opposition to the idea of women practicing law:

The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it. . . . Reverence for all womanhood would suffer in the public spectacle of woman so instructed and so engaged.

Foltz replied to these assertions "commiserating them if they thought a broader education would make a woman less womanly." She objected to the arguments regarding "woman's sphere" and remarked that she had expected counsel to focus on the legal aspects of the case.

On March 5, 1879, Judge Morrison delivered a judgment in favor of Foltz and Gordon.

The board of directors pursued an appeal of Judge Morrison's decision, perhaps in the hope that if Foltz's determination would not give out, her money would. During the months that the Supreme Court appeal was pending, she studied for and passed the exam for admission to the State Supreme Court bar, though she was not formally admitted until December of 1879. She represented herself before the court, facing substantially the same arguments advanced by the directors in the district court, and won her case. In later years, Foltz recalled the case as "the greatest in my more than half century before the bar."

Soon after the Supreme Court's decision in November 1879, she took her place

among the law students at Hastings, where she remained for two years, "until my increasing practice and increasing family made further attendance difficult."

### **Before she created the public defender system, a defendant's conviction, in many cases, became almost a matter of course.**

#### **Creation of Public Defender System**

Foltz had begun her career as a lawyer specializing in probate and divorce cases.<sup>6</sup> She soon found, however, that her reputation as a humane and sympathetic counselor brought many indigent clients into her office: "I kept myself continually impoverished by what my friends declared was unwise generosity." She slowly acquired a criminal practice, which exposed her to the inequities of criminal justice administration in California. She became an energetic advocate of penal reform, responsible for several major pieces of legislation still in effect today.

Probably the most significant of Foltz's legislative achievements was the creation of the public defender system. She began to promote this concept while in her early 30s, soon after her admission to the bar. At that time, any impoverished criminal defendant had to rely on court-appointed counsel for his defense, and this practice imposed a hardship on both defendant and attorney. The attorney had no guarantee of payment and received no compensation from the state.

Furthermore, the court-appointed attorneys were not usually those with thriving practices who could afford to support a few *pro bono* cases with their other earnings. Rather, they were generally young lawyers "from the kindergartens of the profession . . . anxious to learn the practice" or lawyers too unsuccessful to maintain practices of their own. Because these attorneys had few financial resources, investigations on behalf of the defendants were often perfunctory. In many cases, a defendant's conviction became almost a matter of course. Moreover, the defendant, though indigent, had a legal obligation to pay for the attorney's services and was liable to have his property seized in payment.

On the other hand, public prosecutors were usually skilled and experienced and were well paid. In many jurisdictions the prosecutors were offered a bonus for each

conviction. In addition, they had access to the manpower and investigative skills of law enforcement organizations.

Foltz believed that unless an accused had comparable representation, which could be furnished by a public defender, his constitutional presumption of innocence was worthless.

In the 1890s she began working in earnest for adoption of the public defender concept. She wrote a model bill, which set out the qualifications, salary, duties, and term of office of a county officer who would "defend, without expense to them, all persons who are not financially able to employ counsel and who are charged with the commission of any contempt, misdemeanor, felony or other offense." She wrote articles in legal periodicals explaining and advocating the idea.

When she was 44, she represented the California bar at the 1893 Congress of Jurisprudence and Law Reform, held in conjunction with the Chicago World Columbian Exposition, and there worked to convert others to her position. She personally introduced her model bill, which became known as the "Foltz Defender Bill," in 32 states, where it "caused a great sensation." The California Legislature finally adopted Foltz's public defender plan in 1921, after much legislative wrangling.

One of the chief factors which spurred her interest in the public defender idea was the extensive abuse of justice she saw in most district attorneys' offices. In an article published in the *Criminal Law Magazine and Reporter* she cataloged the prosecutors' prejudicial methods, which, she claimed, spawned "an evil brood of appeals that choke the courts, irritate the public mind and waste the public funds." Foltz wrote that as a rule, district attorneys were overzealous in their pursuit of convictions, often sacrificing truth and objectivity to win a case. She attributed this excessive zeal to a system which rewarded successful prosecutions with public acclaim and, often, money bonuses, but which subjected the losing prosecutor to public criticism. Furthermore, the district attorneys themselves held attitudes which interfered with the proper execution of their duties. Some came to believe that the accused was always guilty, even though the statistics disproved this notion. Others looked upon every conviction as a personal triumph rather than a public service. Many were anxious to "uphold a friendly police in its frequent blunders."

In 1910, at the age of 61, Foltz was offered an opportunity to improve the

situation which she had criticized: she was appointed deputy district attorney in Los Angeles and served as the first woman to hold that post.

Foltz was also responsible for numerous penal reforms on both state<sup>7</sup> and local levels. In San Francisco, she agitated to abolish the iron cages in which prisoners were confined in the courtrooms during their trials. She argued that such confinement before judge and jury violated the constitutional presumption of a defendant's innocence, and she succeeded in convincing the San Francisco Board of Supervisors that the cages should be removed. She also worked for better treatment for prisoners in San Francisco jails, obtaining segregation of the juvenile inmates from the adult prisoners and appointment of a matron in the county jail.

### **Foltz agitated to abolish the iron cages in which prisoners were confined in courtrooms during trials. She also worked for better treatment for prisoners in San Francisco jails.**

At the state level, Foltz drafted and procured passage of the act creating a parole system for California prisoners. This law, adopted in 1893, provided that any prisoner, other than one convicted of first or second degree murder, might be paroled after serving at least one year of his or her term.<sup>8</sup> Like many other penal reformers of her time, she also advocated adoption of the indeterminate sentence as a tool to rehabilitate the convicted criminal.

#### **Feminist Activities**

Foltz's interests as attorney and feminist often overlapped: "I was bent on correcting things generally where women were concerned." She became particularly involved in the suffrage movement, maintaining that women had a constitutional right to vote.

In 1880, not long after her admission to the bar, she wrote and lobbied energetically for a bill to give women the vote in state school elections. The bill failed, but her efforts to have it enacted established her as a "leader of woman suffrage on the Pacific Coast."

The following year, at the age of 31, she was elected president of the California Woman Suffrage Association. Her activism, at a time when women were expected to be retiring and demure, made her an easy target for the satirist press. The San Francisco Saturday magazine *Wasp* ran the following "report" on a Suffrage Association meeting in 1881. Entitled "The

Sexless Impracticables," it began:

On Tuesday last the antique hens of the Incorporate California State Woman's Suffrage Association gathered one another together at Charter Oak Hall for business. Mrs. Clara Foltz presided like a little man. She has a fine baritone voice and a pleasant pug nose, and wore a single red rose in the hip pocket of her trousers. The first business of importance was the election of officers for the ensuing week — seventeen in number.

Over the next 30 years, Foltz continued to work for suffrage in California, making slow progress. She found herself in demand throughout the state as a speaker on the issue, but her flourishing law practice, now in Los Angeles, prevented her from accepting most invitations.

Finally, in 1909 or 1910, she became

president of the Los Angeles Votes For Women Club, one of the largest and most vocal groups of its kind.

In 1911, when she was 62, she drafted a suffrage amendment which stated simply, "Women citizens of this state who comply with elections laws and are 21 years old shall be entitled to vote at all elections."

Foltz also worked for passage of the 19th Amendment, which guaranteed all American women the right to vote in federal elections.

She was enthusiastically involved in politics throughout her life.<sup>9</sup> She ran for governor of California in 1930, when she was 81 years old, and polled 3,570 votes in the Republican primary. Running on a women's rights platform, she wrote a friend during the campaign, "This being a candidate for governor is no small job . . . Of course, I have no illusions as to the outcome of this last courageous effort of mine — I simply must go right on demonstrating our great cause."

Foltz encouraged the entrance of more women into the legal profession. She taught law to women students in her offices and established women lawyers' clubs in San Francisco and Los Angeles. In the *New American Woman* she published a monthly autobiographical serial called "The Struggles and Triumphs of a Woman Lawyer," in which she described some of her successful battles with the (male) legal establishment. Committed to expanding women's legal rights, she was responsible

for California laws allowing qualified women to act as administrators, executors, and notaries public.

Yet Foltz's progressive legal and feminist activities subjected her to much ostracism, and often ridicule, from the very women who benefited from her labors. Remembering the slights she had received, Foltz wrote, "I hesitate to lift from oblivion the memory of the hurts and wounds which women inflicted upon me . . . women who could not understand why a woman lawyer, why bills for the enlargement of their privileges . . . who even refused friendly recognition of my efforts."

Much of the general public also criticized Foltz for attempting to expand woman's domestic role. The popular attitude was expressed by the Wisconsin Supreme Court in an opinion denying women admission to that state's bar:

This is the first application for admission of a female to the bar of this court. And it is just a matter for congratulation that it is made in favor of a lady whose character raises no personal objection: something perhaps not always to be looked for in women who forsake the ways of their sex for the ways of ours.

The press occasionally echoed this disapproval of Foltz and women lawyers

in general, especially in the earliest days of her legal career. During the Hastings lawsuit, a *Chronicle* journalist decried the impropriety of men and women sharing the legal classroom:

The friction of studious silk with contemplative broadcloth was not to be thought of. It was a wild imagining . . . The legal carpenter might be instructed to erect a gilt-edged and golden-railed balcony, a gallery with gilt and pearl-inlaid lattice in the style of Turkish harems, a pagoda with minarets, or a simple Oregon pine platform in one corner with plush furniture, sheet-iron door, and the legend "All hope (of marriage) abandon ye who enter here."

Despite her reputation as a vocal feminist, many of Foltz's views on woman's role were quite traditional. While she insisted on equality for the sexes in the professional sphere, she believed that there were many jobs for which women were unsuited, especially those calling for physical labor. During World War I, when to further the war effort many women took over jobs requiring heavy work, Foltz wrote that "the tasks that are now performed by women in war-stricken Europe are not naturally theirs and when the war is over they will gladly surrender them to men." She believed that woman was of such value as a moral teacher and

homemaker that it was man's duty to support and protect her.<sup>10</sup>

Editorializing in the *San Diego Bee*, a daily newspaper which she founded, edited, and published from 1887 to 1890, Foltz revealed clearly her view of woman as teacher: "Men cannot succeed without the aid of women, nor can women be more truly working for the advancement of their own sex than when seeking to uplift, dignify, and purify men. Women compel men to think. Their mission is to ennoble the race . . ."

She encouraged women not to overlook their natural domestic role. Extolling the duties of motherhood, she bitterly regretted that her busy career had kept her away from her children so much of the time in their early years. She felt that in practicing law and lobbying for women's rights she had sacrificed "all of the pleasure of my young motherhood . . . having lost more for myself than I have gained for all women." **D**

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Excerpted from "Clara Shortridge Foltz: Pioneer in the Law," *Hastings Law Journal*, January 1976. Further reading: "A History of the Bench and Bar of California, 1901."

<sup>1</sup> The Shortridge family had also moved to San Jose, where Foltz's brother Charles later published and edited the *San Jose Mercury* newspaper.

<sup>2</sup> She obtained a place in the offices of C.C. Stephens of San Jose. 1 THE BAY OF SAN FRANCISCO 670 (1892). Law schools were not to become major training grounds for lawyers until almost two decades later. At this time, would-be attorneys studied in the offices of those already admitted to practice until they themselves could pass the bar examinations.

<sup>3</sup> At this time women had been practicing medicine in California for over twenty years; the California Board of Medical Examiners began issuing licenses to physicians under the Medical Practice of 1867.

<sup>4</sup> *Id.*, Oct. 1916, at 11. According to the California Code of Civil Procedure in effect at that time, an attorney could be admitted to practice in all courts of the state by showing proof of good moral character and passing an oral examination in open court before the justices of the Supreme Court. An attorney could gain admission to practice before a particular district or county court by showing proof of good moral character and passing an oral exam in that court. Cal. Stat. 1861, ch. 1, §§ 275-77 at 64 (repealed 1931).

<sup>5</sup> *Id.* at 10. Foltz later wrote that the reason given her to justify excluding women from the college was that "The rustle of the ladies' garments would distract the attention of the young gentlemen." Foltz "was hardly able to appreciate their argument as a legal proposition."

<sup>6</sup> See *Woman's Herald of Industry*, Oct. 1882, at 4, col. 4. In this advertisement, Foltz described herself as "Clara S. Foltz, Attorney and Counselor at Law . . . Probate and Divorce Matters a Specialty." The Rules of Professional Conduct, which forbid advertising by attorneys, were not adopted by the California Supreme Court until May 24, 1928, 46 years after this advertisement.

<sup>7</sup> In recognition of her activity and expertise in the area of penal reform, Foltz was appointed to the California State Board of Charities and Corrections at the age of 60. She was the first woman to serve on the board, where she was active for two years. NOTABLE AMERICAN WOMEN, *supra* note 4, at 643.

<sup>8</sup> Cal. Stat. 1893, ch. 153, § 1, at 183. The statute restricted parole to defendants who had had no prior felony convictions and who had not otherwise served time in a penal institution.

<sup>9</sup> She campaigned across California for the Republican party in 1880, 1882, and 1884. In 1886, she supported a Democrat, Washington Bartlett, when his Republican opponent for governor, John F. Swift, expressed the opinion that a woman had no right to be a lawyer. Bartlett won, and he appointed Foltz to a State Normal School trusteeship, the only state office then open to women. With her active support, her brother Samuel M. Shortridge ran for the United States Senate, winning a seat which he occupied from 1921 to 1932.

<sup>10</sup> Yet Foltz supported herself very well. Along with her legal practice, she developed extensive business interests. In 1905 she organized a women's department for the United Bank and Trust Company in San Francisco and began to publish a monthly magazine, *Oil Fields and Furnaces*, in the same city. She headed Foltz Oil Producers Syndicate from 1921 to 1922. This venture came to an end in August of 1922 when State Corporations Commissioner E.M. Daugherty suspended sales of shares in the corporation, for reasons he did not disclose. The *San Francisco Examiner* speculated that Foltz's venture may not have complied with the corporations commission regulation that 80 percent of money invested in oil drilling companies must be spent on development. S.F. Examiner, Aug. 12, 1922. Foltz also apparently operated a Los Angeles real estate agency, the American Woman's Little Farms Company. See *NEW AM. WOMAN*, June 1916, at back cover (advertisement).

## ***In her own words***

*Foltz explains the major objections to her public defender bill in this excerpt from her article, "Public Defenders," published in the American Law Review in 1897.*

The objections to the bill are two: The first one is as to the cost. In any broad view of the question the cost will be seen to be really less than it is now. Money is not cost; it is only a measure of it. Cost is the draft of time and force and energy made upon a people. War would be a fearful cost though every soldier served free and every garment, cartridge and ration was a compulsory contribution. Time, energy and effort,—these are the elements of cost because they are the prime factors of wealth. The defense of the accused under a public defender law would require no more time nor effort than is now consumed. Indeed, quite the contrary, for, orderly arrangement of causes for trial could be far better effected between opposing officers than between a district attorney and a dozen lawyers with conflicting civil business. Besides, an officer devoted to that business could actually accomplish more work with less effort and in less time. Viewed from the broad plane of a statesman who would conserve the energies of the people and

direct them to the best results, there would be an actual saving in cost,—that is in the factors of wealth.

The other objection to the bill is: that it would prevent young lawyers having any one to practice on. This objection has actually been seriously made. Is it the State's business to furnish victims to young lawyers who lack the wit to rise in the ordinary way? Are we so in need of more lawyers that the State should sacrifice its duty, to encourage them? The worthy young practitioner should be quite content to learn as he learns in civil cases, as junior or associate counsel; and he is.

The unthinking suggestion is made, that a criminal deserves no consideration. But it must be remembered that as a fact one-half of those arrested and charged with crime are actually innocent, and in the eyes of the law all of them are so. Every person is presumed to be innocent and that presumption goes with him through every step of the trial until the verdict is rendered. The law ought to treat him as it presumes him.

Free counsel in criminal cases is in line with free juries, free witnesses and free courts; and we are approaching it by slow but certain steps. We long since took the gag out of the prisoner's mouth; we have let him meet the witnesses face to face; we have brought in his own; we have read him the charge in open court; we have permitted him to pay for a representative of his stammering tongue; in some cases we have paid for counsel; and in foreign ports our consuls act for American citizens and no bill is ever presented to them. The State has no desire to wrong its people. Its citizens are not its enemies. It is not interested in convicting the innocent. It is not interested in the impoverishment or disgrace of its people. Their full protection is its legitimate care, and in giving it, the State will not only perform its duty but will promote exact and equal justice, protect the poor, save the innocent and remove an unjust burden from a generous profession.

CLARA FOLTZ.

TEMPLE COURT, NEW YORK

*Clara Foltz pleads for indigent defense in this excerpt from "Public Defenders — Rights of Persons Accused of Crime — Abuses Now Existing," an article she wrote for The Albany Law Journal in 1893.*

It would naturally seem that an act so important as the defense of the innocent, and at the same time so consonant with the noblest impulses of the heart, would find a prominent and exalted place in our law and practice. The innocent are, and of right ought to be, the special care of the law, and let it be remembered that in the eyes of the law every man is innocent until proven guilty, and the presumption of innocence goes with him and follows him through every step of the trial till the verdict is rendered. Every man brought to trial in a criminal court being presumed to be innocent, is entitled to be treated as an innocent man, and becomes of necessity the special object of the court's care. On the court rests a double duty in every criminal cause, to punish the guilty and protect the innocent. But up to the finding of the verdict the court is bound to regard the accused as innocent. And this is not only consistent with a legal maxim, but it is a legitimate inference from established facts; for in over one-half the criminal cases the accused is actually found not guilty. With a deeper motive and a higher duty to protect than to convict, we would expect to find in the criminal court a machinery for defense quite equal to that of the prosecution. But how is it in fact? Connected with the court is a public prosecutor, selected for his skill in securing convictions, strong of physique, alert of mind, learned in the law,

experienced in practice and ready of speech. Around and behind him is an army of police officers and detectives ready to do his bidding, and before him sits a plastic judge with a large discretion often affected by newspapers and police officers to the injury of the prisoner. Not only is machinery for prosecution provided, but it is most effectively operated. The prosecuting attorney is usually imbued with the idea that he must convict at all hazards, and this idea takes deeper root because, in many instances, the State pays him a money bonus for each conviction. He misrepresents the facts he expects to prove, attempts to get improper testimony before the jury, garbles and misstates what is allowed, slanders the prisoner and browbeats the witnesses, all from the mistaken notion that it is the duty of the State to convict whoever is arrested.

A police, impelled by vanity to justify its arrests, and inoculated with the error that it is the State's desire and duty to convict in any event, aids in the prosecution by colored testimony and overawing presence. To the manifest prejudice of the prisoner in some States he has been manacled in court, and a few years ago in California the officers constructed cages in court-rooms and confined the accused in them like wild beasts, till an outraged public sentiment demanded and secured their removal. Frequently hired counsel are joined in the prosecution,

counsel in no sense representing the majesty of a great State, but rather the malice of a great prosecuting witness whose pride and vanity urge him to pay for a conviction to which he may point as a justification of his charge, and over which he may gloat in the unholy pleasure of his revenge. When this mesalliance of the justice of the State and the revenge of little minds is made, then no pack of bloodhounds ever pursued a fleeing fugitive with more relentless vigor than do these officers and allied prosecute their victims. Trials which should be calm and solemn, investigations unmarked by prejudice and untainted by rancor, degenerate into a legal battle in which the highest personal rights are subordinated and trampled under foot in the reckless desire to win. For the conviction of the accused every weapon is provided and used, even those poisoned by wrong and injustice. But what machinery is provided for the defense of the innocent? None. Absolutely none. For its lesser duty of convicting the guilty it has equipped and maintains an array and gives access to the public funds; for the higher one of defense of the innocent there is neither counsel nor officer nor money. It was not always so. A hundred and fifty years ago, when the death penalty for one hundred offenses disgraced the Penal Code, when the Circuit judge in his rigorous enforcement of a cruel law was the herald of a hundred hangings, even then the accused was not without a defender, at least in name, for the law made it the duty of the State's attorney to produce all the facts both for and against him, and of the judge to see that his rights were preserved to the uttermost; so that the judge announced himself as the counsel for the prisoner. But times have changed. The State's attorney, once equally interested in the State and the accused, has so become a prosecutor that his very name is changed in common legal parlance to that of public prosecutor. The judge declines in every instance to interfere on behalf of the prisoner unless specially requested and urged to do so. The old defensive machinery is gone. There has been none supplied to take its place and the accused is thrown back on his original, natural right — the great right of self-defense . . .

. . . The chief and highest function of government is to secure the lives and liberties of its people. For this purpose taxes are levied, imposts laid and internal revenues collected. To this end the police is organized, courts are established, armies mustered and navies manned. To support them each citizen surrenders his natural right to defend himself and pays his share for the support of the State, under the implied contract that for such surrender of right and such contribution, the government will defend his life and liberty from unlawful invasion.

When therefore the rights of a person are assailed it is the duty of the government under its implied contract to provide him defense. This is not merely a privilege or latent function of government. It is a duty inseparably connected with its very existence — a duty it could not shirk if it were sufficiently ignoble to attempt it; an obligation it could not evade if it were base enough to wish it. And that duty exists at all times and in all cases, whether the invasion be under the form of law or under the more savage form of personal outrage.

Let the criminal courts be reorganized upon a basis of exact, equal and free justice; let our country be broad and generous enough to make the law a shield as well as a word; let the citizen understand that his flag is his protection in his own home as well as when his foot is on foreign soil, and there will come to the State, as a natural sequence, all those blessings which flow from constitutional obligations conscientiously kept and government duties sacredly performed.

CLARA FOLTZ.

SAN FRANCISCO, August, 1893.

Several entities are honoring Clara Shortridge Foltz and declaring 1985 the centennial of her founding of the public defender movement. Among them are the National Legal Aid and Defender Association, Los Angeles County Criminal Courts Bar Association, Santa Clara County Bar Association, Los Angeles Commission on the Status of Women and California Public Defenders' Association.

All have passed resolutions recognizing her struggle to institute a defender system in the state; Some have established annual awards in her name for outstanding achievers in the public defense.

In addition, similar resolutions are being considered by the State Bar and the American Bar Association, and members of the California Legislature and United States Congress are working on bills commemorating her significant contributions to the advancement of justice for the poor.

Santa Clara County Public Defender Sheldon Portman is behind this drive to gain national recognition for Foltz as well as his office, which is celebrating its 20th anniversary in April. He dug up this Hastings article after reading a reference to it in a column on Foltz by Sunnyvale-Cupertino Superior Court Judge Mark Thomas.

Thomas, a self-proclaimed "amateur legal historian," writes regularly on early local attorneys and court justices for the "Independent Advocate Journal," a San Jose legal publication. He discovered Foltz seven years ago while researching for his column.

"She's just one of many outstanding people who have been forgotten — haven't been written about," Thomas says. "I think that holds true for many in legal history particularly if they're in an area that's not colorful, not sexy. So, they go unrecognized.

"For example, workers' compensation. I'm working on something in that area now, and I wasn't even aware of some of the people involved in that in 1911 — people doing monumental things."

"Very little history is taught in law school," Portman says. "And this is a narrow, highly specialized area of the law — a specific agency or method. It's not surprising that lawyers and law schools don't know much about her.

"The fact that virtually no one in the public defender movement has been aware of Clara Foltz makes it particularly interesting and appealing to try to bring national attention to this forgotten heroine of the law," he says. "Especially now, at a time when so many women are getting into the legal profession . . . She's someone we can take a great deal of pride in."