ARTICLES

INVENTING THE PUBLIC DEFENDER

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ABSTRACT

Clara Foltz, one of the first women lawyers in the United States, was also the first person to propose a public defender and to launch a movement based on the radical idea that the state should provide a defense for those it accuses. The idea was formed from Foltz’s experiences as a jury lawyer facing unfair prosecutors and from her involvement with reform movements such as suffrage and populism. She marshaled creative constitutional arguments and a rights-based presumption of innocence in support of her conception.

Foltz’s public defender was a capable jury lawyer, the equal of the public prosecutor in resources and respect. As actually enacted in the Progressive Era twenty years after she first proposed it, the public defender was less concerned with individual advocacy than with generalized fair process. The history of the public defender reveals that this tension between the models of partisan advocate and responsible public official was present at the creation and probably inherent in the office itself.

INTRODUCTION

The great case of Gideon v. Wainwright1 in 1963 required every criminal court in the country to provide free counsel to the indigent accused.2 Though in some jurisdictions lawyers do this work pro bono by court appointment, in most places, the government pays for the representation. Generically, these state-paid attorneys who regularly represent poor people charged with crime are called public defenders.

* Judge John Crown Professor of Law, Emerita. Stanford Law School. Too many wonderful researchers have aided my biographical digging to list them all here. You know who you are, and I hope to thank you more fully soon. For special help on public defender topics, I must name these Stanford graduates: Michael Subit (J.D. 1990), Julie Loughran (J.D. 2001), and Michael Evans (J.D. 2004). In her own category is Angie Schwartz (J.D. 2004), the only helper I’ve ever had to hold back.

My seminar in Women’s Legal History (class of 2005) inspired me to nail down Foltz’s legal achievement in a law review article, and I am always indebted to the staff of the Robert Crown Law Library led by Paul Lomio and Erika Wayne.

Special thanks also for the extraordinary aid and support in producing this article to Rae Woods and Hilary Ley, both presently third-year students at Stanford. Finally, I am grateful for Tom Grey’s clear-eyed assessments, world-class editing, and delightful companionship.

2. Id. at 344-345.
Since Gideon, public defense has become an integral and essential part of the vast decentralized criminal justice bureaucracy. Yet the institution remains controversial, even as to its essential features. To many, it is anomalous, if not odious, that the government should pay for the defense of those it accuses. Certainly, it is not an idea many legislatures have been willing to fund adequately over the long run.

Every decade or so, often on the anniversary of Gideon, studies and articles lament the broken promise of that case. The most recent and elaborate of these reports, based on extensive hearings about an array of indigent defense delivery systems, concludes that many thousands of people are convicted every year “either with no lawyer at all, or with a lawyer who does not have the time, resources, or in some cases, the inclination to provide effective representation.” Following on earlier studies, the report warns of an unacceptable risk of wrongful conviction and erosion of the integrity of the criminal justice system.

In one respect, however, this latest report is hopeful. It shows that though the problems of public defense are deep and their solution costly, they are not ineradicable. Unlike, say, eliminating poverty or inequality, providing good lawyers for poor people accused of crime is something that we can do: if we have the political resolve.

Our collective failure of will arises at least partly from a profound disagreement over the nature and purposes of public defense. If mapped on a continuum, the disagreement would have at one end those equal rights advocates who would give the poor defendant the same level of capable defense he could obtain if he had means. At the other end are the due process proponents—those who would protect the factually innocent and assure generalized fairness to all. Along the continuum are positions placing varying weights on such factors as the defender’s duty to the community at large, and to the court as its officer.

The distance between the two ends of this continuum is observable in the disputes over funding and caseloads for defenders, but it emerges most clearly in court opinions on ineffective assistance of counsel. The case of Ronald Rompilla,7

5. Id. at 38.
6. Id. at 41–46 (making specific recommendations for organization and governance of public defender programs and urging increased oversight by courts and the Bar).
decided in 2005, is a good example. Rompilla’s lawyers—public defenders in an overworked office—failed to obtain readily available files containing leads to the defendant’s horrendous childhood, evidence of severe alcoholism and other mental illness.\(^8\) Nothing of this history was presented to the jury in mitigation of the death penalty.\(^9\) Five Justices found the representation inadequate.\(^10\)

To those dissenting, the situation appeared entirely different.\(^11\) First, Rompilla was clearly guilty and second the “committed criminal defense attorneys”\(^12\) had investigated the case, interviewed the family and the defendant at length, and employed three mental health experts who did not produce anything helpful to the accused. No more process was due in the view of the dissenting justices.\(^13\) Moreover, since obviously the decision would “not increase the resources committed to capital defense,” its requirement of further investigation would “divert resources from other tasks” and possibly “diminish the quality of [overall] representation.”\(^14\)

Rompilla is recent and revealingly stark in its oppositions, but the same divergence can be found in most cases dealing with ineffective assistance of counsel. Perhaps the tension between equal rights advocates and due process proponents is inherent in making individual defense of the poor a public function and in the nature of the public defender institution particularly. This is the issue I aim to explore through the little-known history of public defense.

Clara Foltz, lawyer and suffragist, inaugurated the public defender movement with a speech at the Chicago World’s Fair in 1893.\(^15\) In the course of researching her biography, I uncovered a great deal about the original intentions and founding aspirations of public defense. Presenting those ideas is my purpose here, rather than telling the heroic story of Foltz in her time and setting, though there will be some of that too.

Part I of this article is an overview of the history of public defense—from Foltz’s original conception through its first enactment as a Progressive Era

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8. Id. at 382, 391-93.
9. Id.
10. Id. at 392.
11. Id. at 396-97 (Kennedy, J., dissenting).
12. Id.
13. Id. at 398-99 (explaining the work done by the attorneys and referring to a letter from the defendant’s family thanking them for their hard work).
14. Id. at 2475.
15. Clara Foltz, Public Defenders, Address to the Congress on Jurisprudence and Law Reform during the Chicago World’s Fair (1893), in 25 CHI. LEGAL NEWS 431 (1893); 48 ALB. L.J. 248 (1893) [hereinafter Foltz, World’s Fair Speech]. There are only slight textual differences between the two reprints; I will cite to the Albany Law Journal version. Later, Foltz elaborated her argument and responded to criticism in two law review articles: Clara Foltz, Duties of District Attorneys in Prosecutions, 18 CRIM. L. MAGAZINE & REPORTER 415 (1896) [hereinafter Foltz, Duties]; Clara Foltz, Public Defenders, 31 AM. L. REV. 393 (1897) [hereinafter Foltz, Public Defenders].
reform.\textsuperscript{16} It examines the differences between Foltz's defender and the Progressive-era model and shows how the debate over public defense in the early part of the twentieth-century laid the groundwork for \textit{Gideon}, as well as commencing the continuum with its opposite extremes.

Part II depicts the main forces that shaped Foltz's original conception of the public defender. Most influential was her unique experience as a woman lawyer confronting overzealous prosecutors. Foltz's public defender was born as an oppositional figure to check and correct the district attorney. In a case she tried and appealed, Foltz established an important precedent regarding the prosecutor's duty of fairness and her experience on a shadow jury in another case led her to make an impressive study of the case law on trial misconduct.

Part III describes a second major influence on Foltz's formulation of the public defender: feminism and other associated reforms. Of special note in this section are the Nationalist movement and its proposed public defender model, as well as Foltz's first presentation of the idea on a nationwide platform at the Women's National Liberal Union in 1890.

Part IV analyzes the Constitutional arguments that Foltz devised to support the public defender campaign.

I conclude that both equal rights idealism and due process pragmatism inspired the conception and the enactment of the public defender, and that the conditions which fueled its invention still exist today. Foltz's vision, the Progressives' plans, and \textit{Gideon}'s promise all remain unfulfilled.

I. AN OVERVIEW OF THE ORIGINS OF PUBLIC DEFENSE

No one should have to "buy justice in a land that boasts that justice is free."

-- Clara Foltz, 1897\textsuperscript{17}

The first published proposal for a Public Defender was the text of Clara Foltz's


\textsuperscript{17} Foltz, \textit{Public Defenders}, supra note 15, at 397.
speech at the Congress of Jurisprudence and Law Reform in 1893.18 One of the
great public meetings held in conjunction with the Chicago World’s Fair,19 the
Law Reform Congress had many stars. James Bradley Thayer delivered perhaps
the most famous of all works of American Constitutional law scholarship,20 and
other presentations included such notable scholars as Judge Thomas Cooley, John
Henry Wigmore and David Dudley Field.21

Clara Shortridge Foltz was neither a judge nor an academic—no woman lawyer
was. But she had fifteen years of experience in the criminal courts of the West. In
phrases drawn from jury arguments, briefs and speeches, Foltz vividly pictured the
breakdown of the criminal justice system. First the desperate defendant, reduced
“to a savage state,” one of self-defense, must pay for counsel, though the cost “may
ruin his business, impoverish his family and make his wife and children objects of
charity.”22 On the other hand, if he “announces himself a pauper,” the court will
appoint counsel for him.23 But these are not capable lawyers: “they have no money
to spend in an investigation of the case, and come to trial wholly unequipped either
in ability, skill or preparation to cope with the man hired by the State . . . .”24

Foltz brought forth her solution. “For every public prosecutor there should be a
public defender chosen in the same way and paid out of the same fund.”25 She
described the public defender as a powerful, resourceful figure to counter and
correct the prosecutor, to balance the presentation of the evidence, and to make the
proceedings orderly and just.26 Her defender would engage the law’s presumption
of innocence on a deep level, making no distinction between the factually and

appears to be the first article on the subject of public defenders in any American legal journal. A search of
returned no others.

(describing the Congresses and claiming 700,000 in attendance); HUBERT HOWE BANCROFT, THE WORLD’S CONGRESS
various congresses and success of the idea, including the “sessions devoted to law reform and jurisprudence”).

129 n.1 (1893); see also Thomas C. Grey, Thayer’s Doctrine: Notes on Its Origin, Scope and Present Implication,
88 NW. L. REV. 28, 28-41 (1993); Symposium, One Hundred Years of Judicial Review: The Thayer Centennial

21. For contemporary accounts of the Congress of Jurisprudence and Law Reform, see, for example, Belva
Lockwood, The Congress of Law Reform, 3 AM. J. POLITICS 321 (July-Dec. 1893); How to Rule a City, CHI. DAILY
TRIB., Aug. 10, 1893 (discussing the attendance of Wigmore and Field); Politics and Law, DAILY INTER OCEAN,
Aug. 8, 1893 at 1 (discussing the attendance of Judge Cooley); The World’s Congress Auxiliary, The Dial: A
Semi-Monthly Journal of Literary Criticism, Discussion, and Information, Dec. 16, 1892 (Chi., Ill.), at 377;
Women in the Law Reform Congress, CHI. LEGAL NEWS, Aug. 12, 1893.

22. Foltz, World’s Fair Speech, supra note 15, at 248-249; see also Foltz, Public Defenders, supra note 15, at
398-99.


24. Id.

25. Id.

26. Id.
presumably innocent. He would investigate every case for favorable evidence, would summon witnesses, seek expert testimony, and prepare to cross-examine.

Public defense would not be a professional charity, or a training ground for inexperienced attorneys, or a low visibility plea mill run by shysters and incompetents. Instead, the public defender would hold an honored position, even more important than the prosecutor because he would be protecting the innocent. Just as the prosecutor made no distinctions based on wealth, so Foltz’s defender would speak for all who sought his services, including those who could afford to pay for a lawyer. She believed that justice should be free, and she knew that an advocate who represented only the friendless and destitute would not command the respect or resources necessary to do the job.

A few years after the Fair, Foltz put her proposal in statutory form. In the

27. Id. at 248-49 (“[A] large percentage of those arrested for crime are actually proven not guilty, and all are presumed to be during the trial, and are entitled to be treated as innocent men . . . . [E]very person accused of crime is rightfully regarded as innocent, and rightfully entitled to treatment as such.”).

28. Id. at 249. These ingredients of an adequate defense are drawn from Foltz’s attack on the failures of appointed counsel. For example, Foltz said that counselors appointed to represent the poor “have no money to spend in an investigation of the case” and “usually lack[] skill and experience in criminal law . . . or money [for] the discovery of evidence.” Id.

29. Id. at 248.

30. An Act to Create the Office of Public Defender, Provide for His Election, Define His Duties, and Fix His Compensation in the Several Counties, and Cities and Counties of New York, printed in Current Topics, 55 Alb. L.J. 65, 66-67 (1897) [hereinafter Foltz Defender Bill]. Its sections were as follows:

Section 1: There shall be elected by the qualified electors of each county or city and county, at the general election to be held in the year 1897, and at the general election every third year thereafter, a public defender, who shall hold office for three years from and including the first day of January next succeeding his election.

Section 2: Any person duly admitted to practice as an attorney and counselor-at-law in this State, and who has been a resident of the county or city and county for one year, shall be eligible to the office of public defender, and no person not possessing the said qualifications shall be eligible.

Section 3: The public defender, when authorized by the Board of Supervisors, Board of Aldermen, or other legislative body of any county or city and county in which he is public defender, may appoint one or more assistants. Every assistant public defender shall be an attorney and counselor-at-law in this State, shall be a resident of the county or city and county in which the service is to be performed, and shall take and file the constitutional oath of office before entering upon his duties. When similarly authorized, the public defender may appoint clerks or other employees. Every appointment made by the public defender shall be in writing and filed with the county clerk, and may by him be revoked by a writing similarly filed.

Section 4: It shall be the duty of the public defender to attend all criminal courts, and to appear for and defend all persons charged with violation of the law who are without counsel and who desire an attorney to appear from them; also, to attend the courts and boards of charities and appear for and in behalf of all persons charged with being insane or lunatic.

Section 5: The public defender of any county or city and county in which a capital or other important criminal action is to be tried, may, with the approval of a judge or justice of the court in which the action is to be tried, which approval shall be filed with the county clerk, employ counsel to assist him on such trial; and the costs and expenses thereof, duly certified by the judge presiding at the trial, shall be a charge upon the county or city and county in which the indictment was found or information filed.

Section 6: The Board of Supervisors, Board of Aldermen, or other legislative body of the county
winter of 1897, it was introduced in "more than a dozen states."31 She herself took the Foltz defender bill to the premiere New York state legislature. 32 The editor of the Albany Law Journal applauded it as a "new and original idea" of "great importance."33 By Foltz's count, 200 newspapers "mentioned and explained" the measure.34 Of those that commented editorially, she found that fifty percent liked it, and added generally that the public defender concept met with "a favorable reception among a large class of people."35

The Harvard Law Review said that the idea "certainly merits consideration," especially amidst the "hurry and bustle" of big-city courts, though the editors doubted the necessity for a public defender in smaller towns, where competent volunteer lawyers were available for appointment.36 The New York Times, on the other hand, derided Foltz's defender as "absurd" and as the "strange project" of "a female attorney."37 The New York Daily Tribune held it "a ridiculous thing for the State to prosecute with one hand and defend with the other the violation of its own statutes."38

Though it made a splash in the popular and professional press, the Foltz defender bill did not pass anywhere in 1897. Within a year, she left New York and by the end of the decade was back in San Francisco practicing oil and gas law.39 After the earthquake and fire in 1906, Foltz moved to Southern California for the rest of her life.40 Whatever else she was doing, and wherever she was, however, Foltz continued to lobby for the public defender. By 1912, she claimed to have

33. Editor's Note, 55 ALB. L. J. 66, 69 (1897); see also Public Defenders, 29 Chi. Legal News 23, 191 (1897) (describing why the statute is necessary).
34. Foltz, Public Defenders, supra note 15, at 393 & n.2.
35. Id. at 393 & nn.1-2.
40. AMERICAN NATIONAL BIOGRAPHY, supra note 39.
personally introduced the statute in sixteen states; her last count, a decade later, was thirty-two.

A. The Foltzian Public Defender and the Progressive Model

Foltz also took credit for the first public defender office established in Los Angeles in 1913, an outgrowth of the Progressive movement which had found root early in California. In 1919, when Reginald Heber Smith wrote the first history of public defense in Justice and the Poor, he described it as largely a Progressive reform, though he credited Foltz with “reviv[ing]” the idea in 1896 and used some of her arguments in its favor.

According to Smith, the public defender movement took off from the early success of the Los Angeles office. After 1914, he described “a flood of articles” committees, studies, and “a large number of bills” in the “state legislatures” that advocated for the public defender. An annotated bibliography published in 1924 had 110 entries on the public defender, almost all in the 1914-1924 decade.

From the articles in the bibliography and the Smith study, the Progressive public defender emerges, and shows himself different in important ways from the figure that Clara Foltz first imagined. Instead of an equal adversary representing everyone, the Progressive defender would focus on the indigent accused. He

41. “Sister of Men” Has Fought Battles of Women; Now Runs for Judge, FORT WAYNE SENTINEL, June 26, 1912 (crediting Foltz with the introduction of legislation to create a public defender in sixteen states).

42. BENCH AND BAR, supra note 16, at 109 (recording that Foltz authored bills introduced in the legislature of thirty-two states, and had the public defender included in the Los Angeles Charter and in statewide legislation in 1921).

43. Id.

44. SMITH, supra note 16, at 116 & n.1; see also id. at 109 n.6, 110 n.4, 110-111 & n.1. Smith suggested that the public defender originated in the late eighteenth century and cited Benjamin Austin, (Honestus, pseudonym) OBSERVATIONS ON THE PERNOCIOUS PRACTICE OF THE LAW 26 (1786). SMITH, supra note 16, at 115-116. Though Austin does call for an “Advocate General” for all defendants, this figure was part of a larger scheme to do away with adversary lawyering altogether. After Benjamin Austin proposed it, Smith says, the idea was “revived and by 1896 legislation pointing toward public defense had been introduced in a dozen states.” Id. at 116. For this proposition, he cites Foltz’s Article, The Public Defender, but spells her name “Fultz” and does not otherwise identify her.

45. SMITH, supra note 16, at 116.

46. Barrow, supra note 16, at 556. Barrow lists two bibliographic references, four books, nineteen general articles, seventy-one favorable articles, and fourteen opposition articles. All of them (with the exception of Foltz’s articles) were published after 1909. Id. Barrow fails to mention Smith, or other writings on the Legal Aid movement because she did not understand its connection with the public defender. See infra Part I.B.

47. See Reginald Heber Smith & John S. Bradway, Growth of Legal Aid Work in the United States, BULLETIN OF THE UNITED STATES BUREAU OF LABOR STATISTICS, No. 398, at 57 (1926) (explaining that “most states assign counsel without pay... or make no provision for the general run of cases”); see also ESTHER LUCILE BROWN, LAWYERS AND THE PROMOTION OF JUSTICE 253-59 (1938) (giving the same basic story of the public defender history as Smith and Bradway and treating it as a rare but promising innovation); SMITH, supra note 16, at 115-17 (arguing that the public defender provisions at that time still needed development); Mayer C. Goldman, Public Defenders for the Poor in Criminal Cases, 26 VA. L. REV. 275, 280 (1939-1940) [hereinafter Goldman, Public Defenders] (explaining that public defenders would encourage respect for justice and cooperation between both sides would be enhanced).
would be an officer of the court protecting the innocent and pleading the guilty. Even when he went to trial, the Progressive defender would present the evidence in a balanced and fair way—his interest not solely that of the client, but of truth and justice, which entitled him to the same respect accorded the prosecutor. As a leading Progressive proponent put it: the public defender would not “pervert justice by trying to acquit a guilty defendant . . . as is frequently done by private counsel . . .”.48

Foltz’s model, by contrast, was a capable jury lawyer more likely to go to trial with a client who had a good defense, even if he was factually guilty. The Progressive model reflected the view among many legal elites, especially Roscoe Pound, who thought juries and the lawyers who played upon them were part of the problem with the criminal justice system.49

To these Progressive thinkers, public defense was less a solution in itself to the need for indigent defense than a segment of a more generalized reform of the entire system. They would focus on the criminal rather than the crime, on treatment rather than punishment, on cooperation rather than on adversary presentation.50

The early reports of the Los Angeles office reveal its difference from Foltz’s original vision, as well as its successes that inspired imitation. Just as Foltz had predicted when she introduced her bill some twenty years earlier, the public defender almost immediately eradicated the “shyster and [the] swindling riffraff”51 of the legal profession from the courts.52 Other systemic evils Foltz had described in her speeches and writings were also decreased: conviction of the innocent, guilty pleas by the confused, neglect by court appointees, and unfair and vindictive prosecution.53

One example of progressive-type representation from Los Angeles was a


53. Foltz, World’s Fair Speech, supra note 15, at 248 (describing the evils that a public defender system could eradicate); see also Wood, supra note 52, at 592-597 (discussing the advantages of having a public defender, both for the defendants and for the rest of the public).
murder case in which insanity was the only possible defense. Instead of employing competing psychiatrists ("alienists" as they were called), the prosecutor and defender joined in requesting the court to choose three experts who would be equally available to both sides. Foltz’s defender would be at least troubled by the possibility that this arrangement could effectively destroy any jury defense (if all three found the client sane).

Another example comes from Connecticut, where the public defender represented a stranger to the town, accused of killing a popular local priest. There were eyewitnesses, a gun with one bullet missing, and a confession. Yet the public defender believed him innocent and proclaimed as much to the press, resulting in further investigation by the district attorney. It turned out that the confession was coerced and false, the bullet no match, and the eyewitnesses unreliable. "An innocent man... was saved by the lawyerlike work of the defender and also, let us remember, by the cordial and thorough cooperation of the prosecuting attorney," said a report describing this performance as a paradigm for public defense. Again, though a Foltzian defender would certainly negotiate with the district attorney, it is not clear she would completely forego the trial advantage of surprise should the prosecutor be unconvinced. And what does the defender’s public proclamation of innocence say about his client in the next case?

To Foltz’s arguments that the introduction of capable defense counsel would reform the system, the Progressives added a strong pitch that it would also save money. Cost-effectiveness was a talking point for the Progressive defender in a

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54. Letter from J.D. Fredericks, District Attorney, Los Angeles, to Thomas J. McManus, Esq., Secretary of the Committee on Criminal Procedure of the N.Y. County Lawyers Association, in The Office of the Public Defender in Los Angeles, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 441, 442 (May 1914-Mar. 1915) (discussing the case of Frank Walden).
55. Id.
56. The Foltzian defender might try for a procedure that we used in Washington D.C. when I was a public defender in the 1960s. In cases where a mental examination showed the defendant to be insane, the prosecutor would agree to an uncontested insanity defense. The procedure went like this: both sides waived jury trial; the defense would stipulate to the government’s case against him in an agreed upon statement of facts (saving the government large sums); a psychiatrist would testify to the elements of the insanity defense (without adversary cross-examination).
57. Smith & Bradway, supra note 47, at 44-45.
58. Id. at 44.
59. Id.
60. Id. at 44-45.
61. Id. at 45.
62. Foltz’s defender, presuming all clients innocent, might, for instance, investigate the case herself and then negotiate with the prosecutor having the favorable evidence in hand.
63. Smith & Bradway, supra note 47, at 58 ("[T]he defender plan serves the defendant just as well as the paid assigned counsel plan and... is inherently a more efficient and more economical method for getting the necessary work done.")
way impossible for Foltz to claim. The Los Angeles defender boasted, for instance, of obtaining a light sentence on a guilty plea by showing that his client was starving and seeking work when he stole. Though this representation cost more than an appointed lawyer who would plead without investigation, it was a lot less expensive than Clara Foltz’s defender who might well take these appealing facts to a jury. In short, the Progressive defender was more efficient, precisely because he was less concerned with achieving the best possible result for each accused than with making the system generally fair and impartial.

B. Competing Visions: The Foltzian and the Progressive Defender in New York

The different visions—individual advocate versus Progressive public servant—drove much of the debate about defenders during the 1920s, when it was a hot topic. Nowhere did the arguments on each side play out more plainly than in New York. On the Progressive defender side was Mayer Goldman, who wrote the first book on Public Defenders and devoted his career to the subject. Goldman’s defender had twin duties: “to protect the innocent” and to “see that the guilty is fairly punished—not over-punished.” He would not go to trial with a client he thought was guilty.

To those who carped that the public defender should represent everyone, Goldman responded that private counsel could refuse to defend the guilty, and prosecutors to charge the innocent, so why should not the public defender have the same option. Perhaps because his defender was so different from Foltz’s, Goldman never mentioned her name. Clara Foltz did not speak of him either.

64. Foltz claimed some cost-savings from the public defender’s single calendar and criminal expertise. Foltz, Public Defenders, supra note 15, at 401. But her full-service defender for all who asked was expensive. For her argument on cost, see infra, notes 324-28.


68. See Goldman, Public Defenders, supra note 47, at 280 (explaining that public defenders would not try to get an acquittal for a guilty defendant); see also Smith, supra note 16, at 120 (explaining that public defenders would not actively put on a perjured defense).

69. Goldman, The Public Defender, supra note 66, at 66-67. Goldman does not imply that the public defender would turn away a guilty client, but that he would represent him properly, presumably by working out a fair guilty plea. See also Smith, supra note 16, at 120-121 (arguing that going to trial with a guilty defendant is a matter of individual ethics; generally the public defender will not knowingly use perjured testimony or false evidence).

70. Goldman, The Public Defender, supra note 66, at 87-96 (presenting an appendix of the chronology of the development of public defender services and listing the founding of the Los Angeles public defenders office in 1913, but without mentioning Clara Foltz). As to earlier history, Goldman mentioned ancient Rome and medieval Spain as some nineteenth century European examples of provision for the criminally accused. Id. at 9-11.
Goldman’s critics were less opposed to the idea of providing counsel for poor people than they were to making the function public and non-adversarial.\textsuperscript{71} Both sides in the New York debate claimed the Legal Aid Society as its ancestor and model. The Society was a private charity that had started before the Civil War to assist German immigrants.\textsuperscript{72} By the mid-1870s, however, it had focused on legal needs, and spread to other nationalities and cities.\textsuperscript{73}

Legal Aid Society lawyers helped poor immigrants cope with cheating employers, slum landlords and predatory lenders,\textsuperscript{74} mostly by negotiation, conciliation and education. They went to court only as a last resort. Mayer Goldman’s public defender would offer this same type of representation, and some reformers thought that Legal Aid societies should just add criminal cases. A few Societies did just that.\textsuperscript{75} But the flagship New York office, instead of adding a criminal division, chose to spin off a new independent organization.\textsuperscript{76}

The Voluntary Defenders were private lawyers who donated their services for adversarial individual representation on the Foltzian model. Goldman’s opponents argued that this was better than his proposed public defender because the poor received the same defense that the wealthy had.\textsuperscript{77} Others urged that the Voluntary Defenders were superior because they were private, and that the state should not be


\textsuperscript{72} See A Special Committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender Association, \textit{Equal Justice for the Accused} 43 (1959) [hereinafter \textit{Equal Justice for the Accused}] (discussing the founding and systems in other cities); John MacArthur Maguire, \textit{The Lance of Justice: A Semi-Centennial History of the Legal Aid Society} 1876-1926, at 269-76 (1928) (describing Legal Aid History and the Voluntary Defenders spin-off); J. P. Schmitt, \textit{History of the Legal Aid Society of New York} 1876-1912, at 3 (noting “public-spirited American citizens of German birth” founded the legal aid society in New York in 1876); Harrison Tweed, \textit{The Legal Aid Society: New York City 1876-1951}, at 7 (1954) (discussing the Legal Aid Society and one of its Presidents Arthur von Briesen); Arthur V. Briesen, \textit{The Legal Aid Society, 1 Legal Aid Rev.} 2 (1903) (providing a short history of the New York legal aid society); Smith & Bradway, supra note 47, at 84 (discussing the Voluntary Defenders and the Legal Aid Society).

\textsuperscript{73} Kate Holladay Claghorn, \textit{The Immigrant’s Day in Court} 479 (1923) (noting that in 1916, there were forty-one Legal Aid Societies in thirty-seven cities).

\textsuperscript{74} See id. at 468-509 (discussing the various societies and the types of cases in which they helped immigrants).

\textsuperscript{75} Maguire, supra note 72, at 269 (noting that New York Legal Aid originally designed a branch to take criminal cases, but never did take a real volume); cf \textit{Los Angeles County Charter} § 23, at 20 (2006), available at http://lacounty.info/charter.pdf (describing the public defender who takes both civil and criminal cases).

\textsuperscript{76} See Smith & Bradway, supra note 47, at 84; see also Maguire, supra note 72, at 269-76 (describing Legal Aid History and the Voluntary Defenders spin-off). At first, the Voluntary Defenders were a group of prominent lawyers who donated their services. See id. at 271-72. But later they added an office that supported and investigated the cases, backing up the volunteers. See id. at 272. Later still, the Voluntary Defenders were absorbed into the Legal Aid Society. See id. at 84.

\textsuperscript{77} See, e.g., Forster, supra note 71, at 382 (opposing the creation of a public defender office).
in the defense business. Yet others believed it was the non-delegable responsibility of the profession to aid the destitute and oppressed. In the end, the Voluntary Defenders beat out Mayer Goldman’s Public Defender in New York.

Foltz herself did not address the difference between the Progressive model and her original idea. Maybe she agreed with the shift, or thought it one of emphasis only (and maybe it was). At any rate, the Progressives established the Public Defender as a working institution, and of that she surely approved. Twelve public defender offices were founded between 1914 and 1926. Moreover, as a result of the stir about conditions in the courts and the need for lawyers, some jurisdictions that did not adopt a public defender did start providing payment for appointed counsel.

Another outgrowth of all the activity and debate around public defenders in the Progressive era was widespread acceptance of the principle that defense lawyers were necessary to a fair trial, and even that the government was responsible for providing them. The United States Supreme Court held as much in the Depression-era case, Powell v. Alabama. Calling the right to counsel one of “those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,’” the Court emphasized the state’s duty toward those who are friendless, despised and ignorant of their rights when they come to court. Though it said nothing of public defense, Powell set the stage for Gideon v. Wainwright. I like to imagine Clara Foltz, reading the case in 1932 just two years before her death, and finding echoes there of her plea for “exact, equal and free” justice and for making the law “a shield as well as a sword.”

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78. See Public Defenders, WASH. POST, Feb. 12, 1897 (predicting “we shall see the best lawyers volunteering to defend the poorest defendant—competing for the honor of such service”).
79. See Fifth Report, supra note 71, at 2-3 (opposing Goldman’s proposal and saying that it is not such a new idea; referring to Foltz’s bill, but not by name); Maguire, supra note 72, at 253-82; Smith & Bradway, supra note 47, at 84.
80. Warren F. Spaulding, State Provision for Defending Poor Persons Accused of Crime, 10 J. AM. INST. CRIM. L. & CRIMINOLOGY 618, 618-620 (May 1919-Feb. 1920) (noting that eight jurisdictions had passed public defenders bills though only one was state-wide; sixteen states provided compensation for appointed counsel, and twenty-six appointed counsel but did not pay them); see also Betts v. Brady, 316 U.S. 455, 466, (1942) (holding that there is no due process right to counsel); id. (Black, J., dissenting) (noting that all but nine states have provided for appointed counsel through statute or court opinion).
81. Smith & Bradway, supra note 47, at 77; Spaulding, supra note 80, at 618.
82. 287 U.S. 45, 71 (1932). Seven young black men riding the rails looking for work were charged with raping two white women who had also been on the train. Id. at 50-51. Even though the trial court appointed all the attorneys in Scottsboro to represent the defendants, and one lawyer volunteered his individual efforts, the Supreme Court found that the defendants were effectively denied counsel. Id. at 53-56, 71.
83. Id. at 67 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).
84. Id. at 71.
85. 372 U.S. 335, 341-45 (1963) (holding that the right to counsel is a fundamental right).
II. SOURCES AND FORCES SHAPING FOLTZ'S PUBLIC DEFENDER

I deplore the fact that the law does not provide for a public defender as well as a public prosecutor. Do you think this poor innocent man would have applied to a woman to defend him if he had money to pay some distinguished male member of the bar?

— Clara Foltz: Summation in People v. Wells, 1892

When Clara Foltz spoke at the World's Fair in 1893, she was one of a tiny band of women lawyers in the country—208 according to the 1890 census. Most of them were, like their almost 90,000 male counterparts, local practitioners hardly known beyond the courts in which they appeared. Foltz, by contrast, enjoyed a nationwide reputation. Her celebrity had started with her entry to the Bar and subsequent efforts to attend law school in northern California in the late 1870s.

Deserted by her husband in the midst of an economic depression, Foltz turned to law as a way to support her five children. The first obstacle she faced was the California Code, which provided that only white men of good character could be lawyers. Her amendment simply substituted the word "person" for "white male," thus opening the profession to minority races, though the opposition was focused on females. After a terrific struggle, the women won, and Foltz was the first to use the newly minted statute, to the accompaniment of nationwide publicity dubbing her the Portia of the Pacific.

The first-woman hyperbole had hardly passed before the next wave of publicity gathered around Foltz's effort to attend the newly established Hastings Law

87. The Case Argued, S.F. EXAMINER, Oct. 15, 1892, at 3.
93. Id.
94. See, e.g., A WOMAN OF THE CENTURY 294 (Frances E. Willard & Mary A. Livermore, eds., Gale Research Company 1967) (1893) ("Her success has . . . won for her the complimentary title, 'Portia of the Pacific.'); The TUNEFUL CLARA, L.A. TIMES, Nov. 12, 1888, at 2 (calling Foltz the "fair-browed Portia of the Pacific Coast"); N.Y. TIMES, Sept. 27, 1878, at 4 (calling Western women lawyers Pacific Coast Portias).
School. Refused because she was a woman, she did what any lawyer in her position would do. She sued Hastings, successfully arguing that it was part of the University of California, which was co-educational since its founding. For good measure, Foltz and her suffrage friends lobbied through an amendment to the California Constitution making the Women Lawyer’s Bill part of the fundamental law. It was the first such clause in any American state’s constitution.

The triumph was mitigated in her own case, however, because Hastings appealed and even though she ultimately won, Foltz no longer had time to attend law school. Her well-known personal struggle served to give Foltz credibility, particularly in making her public defender proposal. Having surmounted almost inconceivable barriers herself, she could hardly be dismissed as a mere theorist, an overly sympathetic female, or one ignorant of harsh realities. But where did she get the idea in the first place? How did a seriously undereducated single mother of five living in the far West long before women had the vote, reformulate the practice of criminal defense law?

A. Clara Foltz: “The First Woman”

Clara Foltz’s own experience as a woman lawyer was the most important influence on her public defender idea. When she opened her practice, she quickly discovered that it was hard going for anyone without independent wealth or family connections. For a woman lawyer, especially one practicing without a husband, father or brother, it was almost impossible, at least initially, to attract paying clients. In her first years of practice, Foltz mostly helped dependent women obtain divorces and represented poor people charged with crime. At least with the divorce cases, there was a chance of a fee if she could win a property settlement for the wife. But only the most destitute criminals were desperate enough to turn to a woman lawyer and, in fact, many of Foltz’s early criminal clients did not choose her, but received her services by court appointment.

When she appeared in court, Foltz found a male bastion second only to the
polling place. She wrote that the courtroom had "degenerate[d] into an arena" where "acrimonious contests" were waged between "men striving for verdicts." Though actual physical blows, "bawdy stories," and off-missed spittoons were waning in the west, courtrooms were still places nice ladies simply did not go. Clara Foltz once described how a lone woman felt in the courthouse, "faced by a male judge, flanked by a male jury, surrounded by male lawyers generally, with a male clerk and bailiff, and a mob of male bipeds in the lobby . . . . A woman, especially if she is a timid one, is at a terrible disadvantage in such a place."

As an outsider and newcomer to the criminal courts, Foltz saw the injustices suffered by criminal defendants that were ignored by the regulars, who she said were "deadened in feeling by constant contact." As a woman, she observed such telling details as "the soiled linen, the whiskey breath" of the shyster as well as innocents "too dazed to understand their rights and legal position." She also saw the incompetent appointed lawyers at work.

It was not a great mental leap from Foltz's first-hand observations to the idea that the government was responsible for a fair presentation of both sides of a criminal case. When Foltz spoke about the public defender, all the underdog clients and the lone woman experiences of the last fifteen years figured in her formulation. Precisely because she had been there, she knew it would change everything for the criminally accused to be represented by a lawyer endorsed by the state and backed by its full resources.

At the same time she spoke of justice for the accused, however, Foltz's subtext was equal treatment for women lawyers in the courtroom. Too often she had found

statute. The obligation of the government to provide free counsel for the indigent was rejected early on in California, however, and the refusal was reaffirmed just a few years before Foltz joined the Bar:

Such a promise, however, cannot be implied where it is the duty of the attorney to perform the services when called upon by the Court to do so. It is part of the general duty of counsel to render their professional services to persons accused of crime who are destitute of means, upon the appointment of the Court, when not inconsistent with their obligations to others.'

LaMont v. Solano County, 49 Cal. 158, 159 (1874) (quoting Rowe v. Yuba Co., 17 Cal. 61, 63 (1860)). See also THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 334 (1st ed. 1868) [hereinafter COOLEY, 1st ed.] (noting that defense counsel has a duty "not to withhold his best exertions in the defence of one who has the double misfortune to be stricken by poverty and accused of crime. No one is at liberty to decline such an appointment, and it is to be hoped that few would be disposed to do so"); Spaulding, supra note 80, at 618-19 (citing the location where counsel was appointed for indigents).

102. "Court jokes, bawdy stories, and badgering witnesses in the West have largely passed away." Lockwood, supra note 21, at 331.
103. Fair Women and the Law: Mrs. Clara Foltz Makes a Cutting Reply to the Cold Criticisms of Judge Coffey, S.F. EXAMINER, Sept. 2, 1894, at 9 (speaking of a woman litigant, though the quote was equally applicable to herself as the lone woman lawyer).
herself on trial, along with her clients. Prosecutors reacted harshly to what they saw as the unsporting advantage she had with the all-male juries. Irrationally, they also experienced it as a peculiar humiliation to lose to a woman. Some prosecutors routinely attacked both Foltz and her client—him for his alleged crime and her for doing the dirty, unfeminine work of representing criminals.

While suffering these personal attacks as plain Mrs. Foltz, she imagined a titled government official—herself perhaps—of equal status with the prosecutor. A public defender would elevate the representation of the criminally accused so that all reputable lawyers, especially women, could do the work without risking personal opprobrium.

B. Unfair Prosecutors

In addition to equalizing the sides, Foltz’s defender would provide a powerful check on prosecutorial misconduct. Based on her observations and experience, Foltz believed that prosecutors had lost their sense of mission, and that only an equal adversary could assure fairness in the courts. Her picture of the failed public prosecutor was almost as arresting as her image of a public defender, and

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107. See, e.g., Babcock, First Woman, supra note 90, at 1250-51 & nn.80-81, 1278 n.197 (citing newspaper articles that documented typical arguments against allowing women to become lawyers, including their supposed unfair ability to sway male jurors); Barbara Allen Babcock, Western Women Lawyers, 45 STAN. L. REV. 2179, 2185-86 (1993) [hereinafter Babcock, Western Women Lawyers] (relating Foltz’s responses to these kinds of attacks); Babcock, Women Defenders, supra note 98, at 3-11 (describing typical arguments Foltz and others would face that attempted to thwart women’s attempts to practice law); Aspiring Lady Lawyers, DAILY ALTA (S.F., Cal), Feb. 25, 1879, at 1 (complaining about the advantages women may have).

108. See, e.g., Aspiring Lady Lawyers, supra note 107 (noting that “if this lady should go before a jury with as good a speech as she made in her own behalf, she would have an advantage of which the Bar might well complain”); Current Legislation, SACRAMENTO RECORD-UNION, Feb. 26, 1878, at 1:

It is not mere eloquence, nor melodious utterance, nor logical force, nor imaginative capacity that brings great forensic successes. For want of a better term, it is commonly said that lawyers who have won difficult jury cases are endowed with a mysterious attribute called personal magnetism. Now it is precisely this mysterious attribute, already well established as an adjunct to men’s success at the bar that is objected to when women are in question.

See also Babcock, Women Defenders, supra note 98, at 9-10 & nn. 31-36 (discussing the above-quoted articles).

109. See Babcock, Women Defenders, supra note 98, passim (detailing men’s fears evident in their arguments against women lawyers); Babcock, Constitution-Maker, supra note 90, at 923 n.78 (observing that newspapers of the day noticed the irony of some men’s simultaneous underestimation and fear of woman lawyers’ abilities); Current Legislation, SACRAMENTO RECORD-UNION, supra note 108 (“Men are afraid of the competition.”).

110. See Clara Foltz, Struggles and Triumphs of a Woman Lawyer, NEW AMERICAN WOMAN, Jan. 1918, at 34-36 [hereinafter Foltz, Struggles] (describing prosecutorial tactic of using her sex against her and relating her triumphant argument countering the assault); see also Babcock, Western Women Lawyers, supra note 107, at 2185-2186 (recounting Foltz’s rebuttal to a gender-based attack).

111. See Foltz, Duties, supra note 15, at 416-18 (discussing abuses of the District Attorney); Foltz, Public Defenders, supra note 15, at 393, 395-97, 402 (arguing “the arrested” must have counsel to combat the evils of the District Attorney); Foltz, World’s Fair Speech, supra note 15, at 249 (discussing District Attorney abuses and arguing that having a public defender is the only way to stop them). All make the point that the prosecutor no longer protects the rights of defendants, necessitating a public defender to perform that function. In explaining her thesis, I will quote from the three interchangeably.
the existence of one necessitated the other.\footnote{112}

To make this entirely new connection, Foltz drew primarily on one of her own cases setting important precedent on prosecutorial misconduct, and also on two mid-1890s New York trials in which the district attorney exceeded all bounds in an apparent effort to put the first woman in the electric chair. Finally, Foltz collected an in-depth picture of the case law and published it under the title, \textit{Duties of District Attorneys in Prosecutions}.\footnote{113}

Foltz opened her attack on the prosecutor by picturing the ideal, a powerful male figure: “strong of physique, alert of mind, learned in the law, experienced in practice and ready of speech.”\footnote{114} He was “a minister[] of public justice, aiding the court in a solemn investigation of crime . . . laying bare the truth, whatever it may be.”\footnote{115} In the days before the accused had counsel or even the right to testify on his own behalf, it was the duty of the State’s attorney to “produce all the facts both for and against” the accused.\footnote{116} Even the judge joined in seeking out favorable evidence and every defendant in this due process Eden was “fairly treated and perfectly secured in the benefit of all those rules and maxims of law and evidence . . . necessary for the protection of the prisoner and the good of the state.”\footnote{117}

Having set him up, Clara Foltz, a preacher’s daughter, made a gripping sermon of his fall. It was a tale of power corrupting. “[T]he vanity of winning cases” and the lust for gold turned him into an “indiscriminate public persecutor[,]” whose motives were mainly his own “[i]nterest, vanity, avarice, and fear.”\footnote{118} Gone was “that free and impartial investigation which was the pride and boast of the English law.”\footnote{119} Even the prosecutor who had some twinges about trying a case on weak evidence “soothes his conscience by putting the responsibility on the jury.”\footnote{120}

Then, she said, he would turn around and mislead that very jury at every stage of the trial.

Foltz detailed specific bad practices: the custom in some states of paying prosecutors by the conviction, for instance. She also denigrated the very common

\begin{itemize}
  \item \footnote{112} Foltz, \textit{World's Fair Speech}, supra note 15, at 249.
  \item \footnote{113} Foltz, \textit{Duties}, supra note 15.
  \item \footnote{114} Foltz, \textit{World's Fair Speech}, supra note 15, at 248.
  \item \footnote{115} Foltz, \textit{Duties}, supra note 15, at 415.
  \item \footnote{116} Foltz, \textit{World's Fair Speech}, supra note 15, at 248 (going on to say it was the duty “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”).
  \item \footnote{117} Foltz, \textit{Duties}, supra note 15, at 416.
  \item \footnote{118} \textit{Id.} at 415-16. Other misperceived motivations:
    \begin{itemize}
      \item To pander to and uphold a friendly police in its frequent blunders; . . . the unfortunate belief, engendered by the office itself, apparently, (for they all have it after a few years' service,) [sic] that the accused is always guilty, though the presumption of law is the other way, and in fact over one-half are actually found not guilty; . . . fear of public criticism if they fail to convict . . .
    \end{itemize}
  \item \footnote{119} Foltz, \textit{Public Defenders}, supra note 15, at 395.
  \item \footnote{120} \textit{Id.}
\end{itemize}
system of joining “hired counsel” 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.”

Even police perjury, not a subject usually discussed in learned discourse, was the prosecutor’s fault. He “brings to his aid a detective and police force ever too ready to forge a missing link in the legitimate testimony.”

For authority, Foltz drew first on her own “experience and observation.” She had seen, for instance, a new policeman admit on cross-examination that he was “instructed . . . to color his testimony.” Other sources she named were a judge, a criminal lawyer, and a court stenographer who “said he never knew a case where a pertinent fact was missing, but what it could be supplied at the last moment by the police.”

1. People v. Wells

Foltz’s main inspiration for the fallen statesman-prosecutor came out of a trial she lost because of her opponent’s misconduct. In fact, she filed her brief on appeal in that case shortly before she made her public defender speech at the World’s Fair. The sense of injustice and desire for vindication any lawyer feels when appealing entered into her speech, as did some of her arguments. The case was People v. Wells.

Before his arrest, Wells had been a successful real estate man with an office near Foltz’s in San Francisco. But he was in jail and broke when he turned to her for representation. The case against him involved a forged mortgage given for a large sum in gold, and the question was whether Wells was a victim or a perpetrator of the fraud. Against Foltz was an experienced prosecutor determined to defeat the famous woman lawyer.

“Around and behind him [was] an army of police officers and detectives ready

121. Foltz, World’s Fair Speech, supra note 15, at 248. Foltz dropped this point from her law review articles, perhaps because she had continued the hired counsel practice in her statute. See Foltz Defender Bill, supra note 30.
125. Id.
126. Id.
127. 34 P. 1078 (Cal. 1893).
128. The facts of the case are well reflected in the record on appeal in Wells, which includes some of the trial testimony as well as the briefs of each side. See id.; see also Defendant’s Brief, People v. Wells, 34 P. 1078 (Cal. 1893) (No. 21027) (Calif. State Archives, Foltz Archive) (on file with author); Respondent’s Brief, People v. Wells, 100 Cal. 459 (1893) (No. 21027) (Calif. State Archives, Foltz Archive) (on file with author). The trial proceedings are also well reflected in extensive coverage by the San Francisco dailies. See, e.g., The Examiner (S.F., Cal.), Oct. 11-14, 1892; The Call (S.F., Cal.), Oct 11-14, 1892; The Chronicle (S.F., Cal.), Oct. 11-14, 1892.
to do his bidding, and before him . . . a plastic judge with a large discretion often affected by newspapers,” as Foltz described the scene during her speech at the World’s Fair.\(^{129}\) She objected to the prosecutor’s unethical conduct at every turn, but lost the verdict. In her forceful appeal, she relied heavily on an earlier case, People v. Lee Chuck.\(^{130}\)

Lee Chuck was convicted of shooting a man on the streets of San Francisco.\(^{131}\) In a hard-fought trial, the prosecutor deliberately inserted inadmissible evidence in an offer of proof made in front of the jury.\(^{132}\) The California Supreme Court found that even with “due allowance . . . for the desire of every lawyer to win his case,” the district attorney had fallen below the standard of fairness and impartiality, and had failed to “remember that it is not his sole duty to convict.”\(^{133}\) But the court did not reverse the conviction on this ground.

Three years later, the San Francisco district attorney employed the same tactic in the Wells trial, this time slipping inadmissible material into a question on cross-examination. To Foltz’s invocation of Lee Chuck in her brief, the district attorney taunted: “[t]his Court may stand like Jupiter Tonans, with the lightnings of rebuke flashing from their uplifted hands till weary of the task, without any apparent change in the deportment of prosecuting officers.”\(^{134}\)

Within weeks of filing Wells, Foltz was on the World’s Fair platform describing the prosecutor: “[h]e 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 . . . .”\(^{135}\) Soon after her return, she won the Wells appeal.\(^{136}\) The opinion sounded just like Clara Foltz:

> It is too much the habit of prosecuting officers to assume beforehand that a defendant is guilty, and then expect to have the established rules of evidence twisted, and all the features of a fair trial distorted, in order to secure a conviction. If a defendant cannot be fairly convicted he should not be convicted at all . . . .\(^{137}\)

The California Court not only used strong language, but also reversed the conviction even though the trial judge had upheld Foltz’s objections. Wells was
thus a powerful precedent and Clara Foltz used it often in her public defender writings. Forty years later, the United States Supreme Court cited Wells as the most "apposite" case on prosecutorial misconduct.  

In its first full dress opinion on the subject in Berger v. United States, the Court used now familiar words about "striking hard blows," but not "foul ones," and spoke also of the prosecutor's "duty to refrain from improper methods calculated to produce a wrongful conviction . . . ." It referred to Wells and a handful of other cases to support a generalized duty of fairness but cited no treatises or other commentary on the subject. In 1896-97, Foltz found the same dearth of authority when she wrote her article, Duties of the District Attorney in Prosecutions.

2. Foltz's Authorities on Duties of the District Attorney in Prosecutions:
Wharton and Case Law

The idea of an impartial statesman-prosecutor was not widely articulated or popularly accepted in the late nineteenth century. Aside from cases like Lee Chuck and Wells, the only authority Foltz gave for her generalized duty of fairness was "Wharton on Criminal Law § 3003." Since Wharton was the leading authority on American criminal law, a single citation might have been sufficient—except that the version she used was over twenty years old.

Foltz cited the 1874 edition (probably the one she studied for bar admission), the only one of nine editions that had a separate section on prosecutorial duty. Though dated, Wharton's Section 3003 was right on Foltz's point. It articulated the prosecutor's duty as

138. Berger v. United States, 295 U.S. 78, 89 (1935). Berger is still the leading authority on prosecutorial misconduct. It cites five lower court cases, and says of those that Wells is the most "apposite" precedent on the higher duty of the prosecutor. Id.

139. Id. at 88.

140. See Carolyn B. Ramsey, The Discretionary Power of "Public" Prosecutors in Historical Perspective, 39 Am. Crim. L. Rev. 1309, 1312 (2002) ("Although the seeds of the modern position that a prosecutor should adopt a neutral stance, similar to that of a judge, were sown by the late nineteenth century, this was not the inevitable or even the dominant view."). Professor Ramsey's splendid study of prosecution in nineteenth century New York makes the point from a cache of clippings and case studies. See id. at 1343.


143. See Francis Wharton, A Treatise on the Criminal Law of the United States § 3003 (7th ed. 1874) [hereinafter Wharton, Criminal Law]; Francis Wharton, A Treatise on Criminal Pleading and Practice (8th ed. 1880 and 9th ed. 1889) [hereinafter Wharton, Criminal Pleading and Practice].
[A] sworn officer of the government ... not merely to execute justice, but to preserve intact all the great sanctions of public law and liberty. No matter how guilty a defendant may in his opinion be, [he] is bound to see that no conviction shall take place except in strict conformity to law.\textsuperscript{144}

Wharton also cautioned prosecutors to remember that their words carry extra weight because they represent the people at large as “independent officers of the state.”\textsuperscript{145}

Departing from his customary copious citation, Wharton provided no authority at all for Section 3003. He had many cases in hand on bad district attorneys, but he saved them for the parts of the treatise devoted to the duties of counsel at specific points in the trial: opening statements, presentation of evidence, and closing argument. In these sections and cases, the ideal of the statesman prosecutor was present as subtext though rarely stated explicitly.\textsuperscript{146}

In Duties, Foltz used Wharton’s technique. After her discussion of the generalized obligation of fairness and impartiality, she turned to the prosecutor’s failure at each stage of the trial.\textsuperscript{147} Building on her Wells brief, which had focused on California law, she discussed 200 cases from 34 jurisdictions. Taken together, her compendium showed that the prosecutors of the land were out of control and carried the unspoken message that a public defender could remedy the situation.

Piling up the examples, Foltz proceeded with plentiful citation through each stage of the trial, starting with the “simple and easy” rules\textsuperscript{148} about the Opening Statement—rules “frequent[ly]” violated in case after case.\textsuperscript{149} In an almost antic spirit, she compiled a list of “justice-polluting” epithets, the “choice vituperative literature emanating from the prosecutor’s office,”\textsuperscript{150} including: “black thief—black as hell itself”; “bloody assassins”; “contemptible brute”; “grocery bully”; “midnight assassins”; “mean, wicked, low-down, dirty devil”; “pusillanimous puppy”; “sugar-loafed, squirrel-headed Dutchman”; and “terrible desperadoes.”\textsuperscript{151}

\textsuperscript{144} Wharton, Criminal Law, supra note 143, at § 3003.

\textsuperscript{145} Id.

\textsuperscript{146} See, e.g., Id. at § 3008 (citing numerous cases to support his proposition and explicitly cautioning prosecutors to remember they are not “advocates for a party struggling for a verdict” but “ministers of public justice, called on to develop evidence for the adjudication of the court”). Foltz in Duties, possibly relying on her memory, attributed this language to Section 3003. Foltz, Duties, supra note 15, at 415 n.1.

\textsuperscript{147} See generally Foltz, Duties, supra note 15. Special thanks to Michael Subit, Angie Schwartz, and Rae Woods for reading the cases Foltz cited. They found her research to be accurate and on point.

\textsuperscript{148} Id. at 417. Like Wharton, Foltz stressed the moment when the newly sworn jury was “fresh” and “free from bias.” Id. This is a moment when the prosecutor must be “eminently cautious and exact in his pre-announcement to the jury.” Id. See also Wharton, Criminal Law, supra note 143, at § 3008.

\textsuperscript{149} Foltz, Duties, supra note 15, at 417. Foltz cited a dozen well-chosen cases from seven states, as well as a few English examples. None of the examples overlapped Wharton’s section 3008, which indicates that Foltz did her own research here. Id. at 417 nn. 2-10.

\textsuperscript{150} Id. at 421-22.

\textsuperscript{151} Id.
In a similar riff on closing arguments, Foltz wrote of the common-law privilege that protected a lawyer from suit for statements material to the issue or inquiry before the court.\textsuperscript{152} She gave twenty examples of prosecutorial remarks beyond the pale of privilege, including the gem comparing a witness to a "upas tree that blighted and killed everything within its influences . . ."\textsuperscript{153}

Foltz sardonically summed up: "after outraging defendant's rights in the opening statement, violating the law of evidence and the rules of court in the production of testimony, injecting new matter, personal belief, unlawful comment, illegitimate deductions, and personal abuse into his closing argument," one would think the prosecution officer "would feel satisfied."\textsuperscript{154} But no, "[h]e invades the province of the court and presses the giving of unfair instructions; and a weak court too often yields."\textsuperscript{155}

Foltz's main example on biased jury instructions was not her Wells triumph, but a case she had lost on appeal many years earlier.\textsuperscript{156} William Morrow took the stand and denied stealing a gold watch and chain; the judge instructed the jury that they could disbelieve his testimony unless they found it "convincing."\textsuperscript{157} Unconvinced, they convicted, and Foltz had her first case for a client in the California Supreme Court. The year was 1881.\textsuperscript{158}

In an eight-page handwritten brief, she made the sophisticated points that the instruction violated the right of the defendant to testify and burdened the reasonable doubt standard. Foltz lost Morrow (albeit with two dissenting opinions) because the majority was unwilling to overrule an old precedent allowing a trial judge to comment on the special nature of a defendant's testimony.\textsuperscript{159} Over the years, though the appellate court continued to cast doubt on the instruction, prosecutors continued to urge it.\textsuperscript{160} In Duties, Foltz cited Morrow and subsequent cases for the sluggish pace of progress through rebuke and reversal. Again unspoken was the need for an oppositional figure like the public defender who could maintain a steady lobby for law reform.

\textsuperscript{152} See Edward P. Weeks, A Treatise on Attorneys and Counselors at Law § 110 (1878) [hereinafter Weeks, On Attorneys] (describing the privilege). Weeks was the first treatise on the law of lawyers. It was published in San Francisco the year that Clara Foltz joined the Bar. See Foltz's citation of it as authority for court appointment of counsel in Public Defenders, supra note 15, at 399 n.1.

\textsuperscript{153} Foltz, Duties, supra note 15, at 420.

\textsuperscript{154} Id. at 423.

\textsuperscript{155} Id.

\textsuperscript{156} See People v. Morrow, 60 Cal. 142 (1882).

\textsuperscript{157} Id. at 147; see also Foltz, Duties, supra note 15, at 424 n.2.

\textsuperscript{158} Her only previous case was her own when Hastings appealed the order to admit her. Foltz had filed her Morrow brief in 1881. Brief of Appellant at 4, People v. Morrow, 60 Cal. 142 (1882) (No. 10674) (Cal. State Archives, Foltz Archive) (on file with author).

\textsuperscript{159} See Morrow, 60 Cal. at 147 ("The case of The People v. Cronin . . . was determined nearly fifteen years ago . . . . We see no reason to disturb it now.").

\textsuperscript{160} See People v. Van Eman, 43 P. 520, 521, 523 (Cal. 1896). Foltz cites this case in Duties, supra note 15, at 424 nn.5-6.
Foltz argued that appellate review could not assure justice for defendants because it was too slow, and because of "vicious legal assumptions" like the possibility of harmless error or of curative instructions.\textsuperscript{161} These were "[f]alse in fact and pernicious in practice," she wrote, drawing on her courtroom experience.\textsuperscript{162} "The mind is not a slate and a judge's charge a sponge that can wipe from it every word once written . . . . One cannot forget at will; much less reject matter actually in the mind, in forming a belief."\textsuperscript{163} With a trace of bitterness, she pointed out the defense lawyer's dilemma when faced with prosecutorial misconduct. If he fails to ask for a corrective instruction, the appeals court may refuse to hear the point. But if the judge does instruct, then the Court may find the error cured.\textsuperscript{164}

As numerous and shocking as the cases were, Foltz said they were mere "illustrations of the vices" because "poor defendants cannot appeal, so that the wrongs done them are not recorded."\textsuperscript{165} She concluded \textit{Duties} with a summary of the "untold evil" wrought by errant prosecutors; she emphasized the "enormous expenditures for appeals and new trials."\textsuperscript{166}

Foltz's contemporary audience knew she was referring to a recent much-publicized reversal on account of prosecutorial excess.\textsuperscript{167} Only a jury acquittal had saved a second, similar case from the same appellate fate.\textsuperscript{168} Both trials featured women accused of murder and both were important subtexts to Foltz's \textit{Duties} article.

3. \textbf{Women Accused: Maria Barbella (aka Marie Barberi) and Mary Alice Fleming}

Maria Barbella was a poor immigrant who killed her lover, Dominic Cataldo. At her trial, two inexperienced and overmatched attorneys appointed by the court

\textsuperscript{161} Foltz, \textit{Duties}, supra note 15, at 424 ("It would naturally seem that if the record shows that a right of the defendant was actually invaded, from which would naturally follow an injury that might have affected the verdict, the court would consider the matter. But such is not usually the case.").

\textsuperscript{162} \textit{Id.} at 425. Foltz's comments, which are now commonplace, were unusual in her time, and grew from her first-hand experience before juries.

\textsuperscript{163} \textit{Id.}

\textsuperscript{164} \textit{See id.} at 424-25. Foltz did not object to the requirement that counsel seek an instruction in order to lay a foundation for appeal, but to the presumption that an instruction could cure the prosecutor's errors. Thus, wrote Foltz, "in order to get into the appellate court [he] is obliged to raise such a conclusive presumption as to preclude him a remedy." \textit{Id.}

\textsuperscript{165} Foltz, \textit{Duties}, supra note 15, at 424.

\textsuperscript{166} \textit{Id.} at 426 (identifying other social costs of bad prosecutors: "they crush the patriotism of the wronged defendant and awaken in him and his friends a spirit of hatred against the state; they destroy public respect for the district attorney's office and invite contempt for the dignity of the court.").

\textsuperscript{167} People v. Barberi, 149 N.Y. 256, 43 N.E. 635 (1896) (discussing problems with the prosecutor's cross-examination and with the charge to the jury).

\textsuperscript{168} People v. Fleming; \textit{see infra} notes 178-89 and accompanying text. Foltz referred to "the remarkable conduct of counsel in the recent trial of Mrs. Fleming," as an example of flawed prosecution. Foltz, \textit{Duties}, supra note 15, at 415.
thoroughly botched the case,\textsuperscript{169} failing even to straighten out the spelling of her name so that she went down in legal history as Marie Barberi.\textsuperscript{170} Without the check of adequate defense counsel, the prosecutor abandoned all niceties in order to convict.

When Barberella testified through an incompetent translator, the district attorney hounded and abused her.\textsuperscript{171} Speaking man to man, he cautioned the jurors: "[i]f you acquit Maria Barberella, you will implicitly grant to every woman in this city who has an illicit relationship with a man the right to cut his throat with impunity."\textsuperscript{172} Likewise, the trial judge instructed them to do their duty as men and to remember that "[t]he law does not distinguish between the sexes."\textsuperscript{173} Upon conviction, he sentenced her to death.\textsuperscript{174}

Then, in a story straight out of light opera, an American woman married to an Italian Count intervened in the case and employed top lawyers to appeal it.\textsuperscript{175} At the same time, a movement combining suffragists and society ladies with death-penalty opponents formed around Maria's cause, creating a sympathetic public atmosphere.\textsuperscript{176} In April 1896, the appellate court reversed the conviction and returned the case for a new trial in which "all competent proof may be given in the regular and orderly way, and all the questions presented in [a] temperate and dispassionate manner."\textsuperscript{177}

The month after the Barberi reversal, Mary Alice Fleming went to trial for matricide—before the same judge with the same prosecutor. She was accused of


\textsuperscript{170} I will refer to Barberella when speaking of the person, and Barberi when speaking of the case. Certainly these bumbler were no match for the District Attorney who was said to have successfully prosecuted more murderers than anyone in the entire United States. The Sunday World's Woman Jury in the Fleming Case. The World Reports a Disagreement—Seven Jurors Are for Acquittal, Three for Conviction and the Remaining Two Vote "Not Proven"—Some Interesting Opinions, Sunday World (New York), June 28, 1896, at 23 (quoting Foltz on expertise of district attorney) [hereinafter Woman Jury in the Fleming Case, Sunday World].

\textsuperscript{171} Barberi, 149 N.Y. at 276 (reporting that the prosecutor asked the defendant five times why she cut his throat and twice why she killed him).

\textsuperscript{172} Pucci, supra note 169, at 8.

\textsuperscript{173} Id. at 82.

\textsuperscript{174} See id. at 84 (explaining that she was convicted of first-degree murder and the sentence for that crime was death). Barberella was scheduled to be the first woman executed in the electric chair since it was installed in 1889. Id. at 97. Twenty-one men had been electrocuted by 1893. Stuart Banner, The Death Penalty 188 (2002) (giving a history of the introduction of the electric chair in New York).

\textsuperscript{175} Pucci, supra note 169, at 86-92. The book was written by the great-granddaughter of the Countess de Brazza. Id. at xvii.

\textsuperscript{176} Not everyone was so sympathetic, however. See Maria Barberi[sic] Not an Innocent, Brooklyn Daily Eagle, Aug. 3, 1895 at 6 (explaining the District Attorney's case); Conference of Colored Men, N.Y. Times, July 30, 1895 (reporting that at a meeting of black Republicans, one speaker denounced the support of the "red handed murderess" Barberella by people who said nothing when black women were lynched in the South).

\textsuperscript{177} People v. Barberi, 18 CRIM. L. MAG. & REP. 449, at 462 (Apr. 21, 1896).
poisoning her mother’s clam chowder. 178 Unfazed by the appellate rebuke, the district attorney engaged in the same florid displays of hostility toward the defendant as he had done in Barbella’s trial. He portrayed Fleming as a slave to sexual passion who needed her inheritance to lure back a wandering lover; he also made much of her irregular life—never married with three children she supported from a successful breach of promise suit. 179

Unlike Barbella, however, who was dumbstruck by the personal attacks, Fleming had skilled lawyers from the first, who investigated her case, successfully cross-examined the government’s experts, and argued passionately for a verdict in her favor. Fleming’s defense was simple innocence—though there was arsenic in the corpse, there was none in the chowder. Mrs. Fleming’s mother was an arsenic eater—a health and cosmetic fad. The all-male jury acquitted, 180 and so did an all-female shadow jury assembled by the New York World to follow the evidence and render a second verdict. 181

Clara Foltz was the chief spokesperson for the “World’s Women Jury,” and her expansive critique of the prosecutor was printed and picked up by other journals. 182 Of the arsenic in the body, Foltz said: “[s]he may have kept it about her. People blunder with rat poison, laudanum and didn’t-know-it-was-loaded guns, and she may have blundered with the arsenic.” 183 In any event, Foltz pointed out, “the poison was not traced to Mrs. Fleming. With the detective and the police force and drug store records at hand, no attempt to show a purchase was made.” 184

Even seeking the death penalty on such a flawed case was an outrage in Foltz’s view. “No normal mind,” she said, could have found for certain that the mother even died of arsenic poisoning, much less who administered it, or whether there

178. Jury selection in the Fleming case started on May 11, the trial commenced on May 25, and the verdict was returned on June 24, 1896. The trial was extensively covered in all the New York dailies. I have relied mainly on the New York Times and Sunday World accounts, especially on Clara Foltz’s description of the evidence. Mrs. Fleming and the Sunday World’s Woman Jury, These Twelve Clever Women Who Think for Themselves are Considering the Evidence and Will Render a Verdict from the Woman’s Standpoint When the Case is Closed, Sunday World (N.Y.), June 21, 1896 at 21 (including a full-page spread, with thanks from Mrs. Fleming to the jury). This was the week before the verdict. The week after in another long story, the women’s verdict was discussed. Woman Jury in the Fleming Case, Sunday World (N.Y.), supra note 170, at 23.

179. See, e.g., Hints at a Conspiracy, N.Y. Times, June 12, 1896, at 8 (reprinting the examination of Mrs. Fleming’s lover); Quick Verdict Expected, N.Y. Times, June 23, 1896, at 8 (stating the defense’s argument that though she was “morally perverted,” she did not have murder in her heart).

180. Women in Celebrated Criminal Cases, 18 Crim. L. Mag. & Rep. 479-81 (1896) (comparing male jury’s unanimous acquittal in Fleming to women jury’s 7-3 and 2 undecided vote).


182. Id. Foltz’s remarks were the bulk of the World’s long story on June 28, 1896. They were reprinted in Editor’s Note, 54 Alb. L.J. 38-39 (1896). Though the editor disapproved of the practice of shadow juries, he praised Foltz’s perspicacity. Id.; see also Women in Celebrated Legal Cases, 18 Crim. L. Mag. & Rep. 479, 480-1 (1896) (noting Foltz is a “practicing lawyer in New York City, and is nearly as well known there as in California, where she achieved an enviable reputation”).


184. Id.
was intent to kill.\textsuperscript{185} \"[W]e do not commit judicial murder on suspicion in these
days.\"\textsuperscript{186} Unfortunately, the modern prosecutor has lapsed into a \"very rickety and
unlawful way of thinking\" everyone guilty until innocence is proved, Foltz said.\textsuperscript{187}

She also accused the prosecutor of withholding certain exculpatory information
from the defense, adding that: \" Suppressing evidence is little less than crime.\"\textsuperscript{188}
Summing up her critique, Foltz said: \"[s]uch cases should not be tried, for a verdict
of guilty is almost certain of reversal, a long trial is wanton waste of the people's
money and an outrage on the unfortunate defendant.\"\textsuperscript{189}

A month after Fleming's acquittal and Foltz's censure of the prosecutor, she
published \textit{Duties}.\textsuperscript{190} The sequence suggests that she may have started collecting
cases to use on appeal in the event of a conviction. In format and tone, \textit{Duties}
is like an appellate brief, and its lame conclusion calling on courts to control their
officers could well have replaced the usual plea for reversal.\textsuperscript{191} On the other hand,
there are many more cases than a working lawyer would deploy in a brief, and few
from the relevant jurisdiction.

Perhaps instead of a brief, Foltz planned from the beginning of her research to
write an article on prosecutorial misconduct playing off the publicity generated by
\textit{Fleming} and \textit{Barberi}. In searching the digests and periodicals, she discovered a

\begin{footnotesize}
\textsuperscript{185} Id.
\textsuperscript{186} \textit{Woman Jury in the Fleming Case}, \textit{Sunday World}, supra note 170, at 23. The use of the term \textquote{judicial
murder} suggests that Foltz was a death penalty opponent. \textit{See}, e.g., Hugh O. Pentecost, \textit{The Crime of Capital
Punishment}, 1 Arena 180-181 (1890) (using the term \textquote{judicial killing} when arguing against capital punishment);
\textit{see also} Clara Foltz, \textit{Should Women be Executed?}, 54 Alb. L. J. 309 (1896) (\textquote{If Marie Barberi is guilty of
murder she should receive the same punishment that would be meted out to a man for the same offense.}). Her
plea was against class legislation, and more subtly against the death penalty. \textit{See} Howard Gillman, \textit{The
\textquote{quoting Clara Foltz and noting the power of the idea that the law was entirely neutral and should never favor one
group over another}.

\textsuperscript{187} \textit{Woman Jury in the Fleming Case}, \textit{Sunday World}, supra note 170, at 23. In her \textit{World}
critique, Foltz made other points about the prosecutor's misconduct that were not repeated in \textit{Duties}. One of her points was the
use of additional hired counsel by the prosecutors, a practice she condemned in \textit{Duties} as opening the \textquote{treasury to
pillage}.

\textsuperscript{188} Id.

\textsuperscript{189} Id.

\textsuperscript{190} The verdict was returned on June 24, 1896. Foltz's critique in \textit{World} was published on June 28, 1896 and
her \textit{Duties} article was published in July 1896.

\textsuperscript{191} \textit{See} Foltz, \textit{Duties}, supra note 15, at 426 (\textquote{It is certainly time for trial courts to so discipline their
officials, that they will preserve a decent respect for law and the established rules of justice.}).
\end{footnotesize}
shocking number of cases in a “seemingly increasing stream,” and used them to lay the groundwork for the introduction of her public defender statute. At any rate, soon after publishing Duties, Clara Foltz launched her statutory campaign.

C. Reformism and the Public Defender

In exploring the forces that shaped Foltz’s original conception of the public defender, I have looked at her first-woman and courtroom experiences, especially her confrontation with corrupt and overbearing prosecutors. Next, I consider the relationship of the public defender to the general nineteenth century reform ethos—especially to feminism.

1. Feminism and Other Reform Movements

Foltz was a second generation feminist—not converted to the movement but raised in it. One of her earliest memories was hearing Lucy Stone speak in her father’s church in the little town of Mount Pleasant, Iowa. Her only formal schooling (from eleven to fourteen) was at Howe’s Seminary, which was founded on principles of coeducation, women’s rights, and the abolition of slavery. Clara Foltz’s first popular lecture was on Impartial Suffrage and her last public act was a campaign for Governor of California on an Equal Rights ticket. Throughout her varied career, her primary identification was as a woman’s rights advocate, and according to her own story, her struggles were all for this cause.

Movement women were at Foltz’s side in everything she did. Two examples were Laura Gordon and Myra Bradwell. Gordon, the second woman lawyer in California, lobbied the Woman Lawyer’s Bill with Foltz, joined in the suit against Hastings, and pressed for the women’s amendments to the Constitution. Bradwell, the editor of the Chicago Legal News, and the unofficial dean of women lawyers, was largely responsible for Foltz’s great opportunity to speak at the World’s Fair.

192. Id. at 422.
193. Allen, supra note 16, at 43; see Babcock, Constitution-Maker, supra note 90, at 861 (“As a girl, she heard Lucy Stone speak on woman suffrage.”).
195. See In a New Field, New Northwest, Feb. 22, 1877, at 2 (The “lecture was a well written production, and was well delivered, frequently calling out protracted applause.”).
196. Shortridge’s Sister Out for Governorship: She Whacks Her Male Rivals in California, N.Y. Times, Feb. 15, 1930, at 3; Obituary, Mrs. Clara Foltz, Lawyer, is Dead: Suffrage Champion and First Woman to Practice Law on Pacific Coast; Tried to be Governor, N.Y. Times, Sept. 3, 1934, at 13 (stating that she received 8000 votes).
197. See Babcock, Constitution-Maker, supra note 90, at 865-68 (describing the similarities between Gordon and Foltz, including strong oratory skills and failed marriages); Babcock, First Woman, supra note 90, at 1249, 1266, 1273-74 (noting that Gordon joined Foltz in what Foltz called her “desperate struggle” to pass the Woman Lawyer’s Bill).
198. See Mrs. Foltz Admitted to the N.Y. Bar, 27 Chi. Legal News 429, 437 (1896) (“Myra Bradwell, as Chairman of the Woman’s Branch of the Law Reform Congress, in 1893, invited Mrs. Foltz to deliver a paper
The movement supplied her not only with comrades and contacts, but with modes of operation. From long years of cause lobbying, Clara Foltz had learned the techniques: generating and milking publicity, supplying arguments and statutory text, and appealing personally one-on-one to power-wielders. She also transferred classic liberal arguments for suffrage to public defense. Locke’s social contract theory for instance, which movement rhetoricians used to urge women’s equal citizenship, worked well in the new context. “[E]ach citizen surrenders his natural right to defend himself and pays his share for the support of the State, under the implied contract that . . . the government will defend his life and liberty from unlawful invasion,” Foltz said at the Fair. “When therefore the rights of a person are assailed it is the duty of the government to provide him defense.”

Women’s rights anchored Foltz’s other causes because it endowed her with a reformist approach to life. She wanted suffrage as a badge of full citizenship,
and she also thought women voters would make government more responsive to human needs. Similarly, she believed that once women became lawyers, they should work to improve the administration of justice. The Public Defender was an example of the kind of ideal women would contribute. In fact, as we shall see after exploring other movements connected with the public defender, the first office in Los Angeles was tied directly to women's suffrage victory in California.

An explanation of the connection between suffrage and the public defender was offered in a report on women professional workers written in 1921, the year after the final suffrage victory: “[w]omen lawyers and leaders in the long fight for the franchise have gained an extensive legal and political education which they are putting at the disposal . . . of the ignorant and helpless and exploited everywhere.” On the subject of women lawyers, the study continued: “Their relative detachment from vested interests and large property transactions leaves women free to devote themselves to the human and preventive side of law, to the cause of ‘Justice and the Poor’ . . . . Indeed, they “seem admirably fitted to fill the post of ‘public defender’ now so widely advocated.”

Though feminism was her working principle, Foltz was far from a single-issue activist. She engaged the entire “sisterhood of reforms,” as Thomas Wentworth Higginson designated it; membership in one implied support for all the others. Higginson himself, perhaps best known for leading a Black regiment in the Civil War and for championing Emily Dickinson, included in his personal “sisterhood” not only abolition and feminism, but also temperance, prison reform, eradicating the death penalty, eliminating child labor, and establishing merit civil service. Foltz espoused Higginson's causes and more.

Prison reform especially was closely related to the public defender idea. Those who worked among the incarcerated were the first to see that many people were imprisoned for lack of a lawyer rather than for any crime they had committed. As early as mid-century, a prison reform magazine in Boston called for public representation of the factually innocent.

204. Cf. “The Blue Book”: WOMAN SUFFRAGE, HISTORY, ARGUMENTS AND RESULTS 53-54, 57 (Frances M. Björkman & Annie G. Porrill, eds., 1917) (suggesting that “women's first care after their enfranchisement was to put through a most extraordinary legislative program” in California, that included a provision of a public defender for poor persons).
205. ELIZABETH KEMPER ADAMS, WOMEN PROFESSIONAL WORKERS 73 (1921).
206. Id. at 73-74 (“Women lawyers are of course especially needed in matters concerning the protection and welfare of women and of children; they are needed in legal aid societies . . . .”).
207. Id. at 74.
209. MEYER, supra note 208, at 8.
210. See A County Attorney for the Defense of Criminals, 8 PRISONERS’ FRIEND, Oct. 1855, at 58 (calling for the appointment of an attorney for indigents accused of minor crimes); A District Attorney for Poor Criminals, 9 PRISONERS’ FRIEND, Oct. 1856, at 41 (quoting an article from the Boston Herald on the necessity and advantages of
In Foltz’s early practice, she had many imprisoned clients who were seeking pardons from the governor. Most had previously been ill-served by appointed or even retained lawyers at trial.211 Charles Colby, for instance, wrote from death row that he had spent all his savings on inadequate counsel, when “they got the best lawyer in Santa Cruz . . . to prosecute.”212 From the scaffold, he thanked Foltz, for her “earnest and zealous efforts”213 while lamenting her late entry into his case. Cases like Colby’s may have inspired Foltz’s idea that the public defender should be available to all the accused, even those who could pay a fee.

Foltz was tied to prison reform through her pardon practice, and also through her suffragism. Many suffragists, especially the lawyers, were prison reformers.214 Foltz was the first woman to serve on the California Board of Charities and Corrections.215 Though her appointment came before women had the vote in California, it was made in recognition of her prominence in the movement as well as her efforts on behalf of prisoners.216 Foltz was also responsible for the first parole bill in the state, matrons (instead of male guards) in jails, and the separation of juveniles from adult offenders.217

such an attorney). Originally called Hangman, this publication began in 1845 as an anti-death penalty weekly, but soon took on a broader agenda and started publishing monthly. History of the Prisoners’ Friend, 1 Prisoner’s Friend, Sept. 1848, at 3. The Prisoners’ Friend claimed to be “the only journal known in the world that is wholly devoted to the Abolition of Capital Punishment and the Reformation of the Criminal.” Id.

211. For indigents, pardons were their only form of appeal since they had no lawyers to file regular briefs for them. Even courts that appointed counsel did so only for trial. Foltz, Duties, supra note 15, at 424 (“[P]oor defendants cannot appeal, so that the wrongs done them are not recorded.”). Not until Griffin v. Illinois, 351 U.S. 12 (1956) did the Supreme Court hold that if the state provides a right to appeal, it must also appoint counsel for the indigent convict.

212. Letter from Charles Colby to Dr. Snowden (December 20, 1879), Application for Pardon, (on file with the California State Archives and with the author); see People v. Colby, 54 Cal. 37 (1879), 54 Cal. 184 (1880); Margaret Koch, Santa Cruz County, Parade of the Past (1973) (stating that Colby was a forty-year-old Scandinavian whose name was Anglicized from Kohlhanser and that his case received unusual attention because he was the last man publicly hanged in Santa Cruz).

213. Life for Life, Alta California, Mar. 6, 1880, at 1 (quoting from an open letter to the People of California that ends with thanks to Clara Foltz); see also Charles Colby Hanged, S.F. Chron., Mar. 6, 1880, at 3 (describing Colby’s hanging).


216. Id.

217. Id. (discussing her advocacy of the public defender, prison parole, and police matrons); see supra note 32. For her later career see Schwartz, supra note 95. Foltz introduced the first parole bill in California. Bench and

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2. The Nationalist Movement

Toward the end of the nineteenth century, two new movements joined “the sisterhood of reforms.” 218 Both included suffrage and public defense in their agenda—and Clara Foltz in their vanguard. Nationalism and the Woman’s National Liberal Union were both short-lived, linked with each other and appealing to multi-issue reformers like Foltz. 219 Nationalism was also the direct ancestor of Progressivism.

It started with the publication in 1888 of Looking Backward, a novel by an unknown Boston lawyer, Edward Bellamy. 220 The book pictured an American utopia, promised for the year 2000, in which everyone contributed to and was cared for by the state, which also owned the major industries, railroads, and means of communication. 221 Every citizen would be an equal partner in a National corporation, and would serve in the National Industrial Army between ages eighteen and forty-five: hence, the name “Nationalism.” The Army would do all the work from housekeeping to history teaching.

Looking Backward was an immediate and astounding best-seller and was considered by some to be second in influence in the entire century only to Uncle Tom’s Cabin. 222 Americans on the eve of a major economic depression and alarmed at the ever-widening gulf between rich and poor, embraced the vision of a new society founded on old principles of universal equality. Nationalist clubs sprang up all over the country. 223

Women, as “the greatest victims” of the previous civilization, would benefit most from Nationalism. 224 They would be free actors and independent thinkers.

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218. Meyer, supra note 208.
220. Id. at 58-63. The “industrial army” is divided by sex, and organized on the basis of skill and interest, with shorter hours and lighter loads as an inducement for the more menial tasks. Id. at 60-63.
221. See generally Edward Bellamy’s Utopia in His Time and in Ours, in Looking Backward, Boris ed., supra note 219, at 1.
223. Looking Backward, Boris ed., supra note 219, at 156.
instead of "ennuied, undeveloped, and stunted at marriage, their narrow horizon bounded so often physically by the four walls of home and morally by a petty circle of personal interests."²²⁵ Suffragists in particular flocked to Nationalism.²²⁶ Clara Foltz, living in San Diego, was a founding member of a Nationalist club that boasted six hundred souls, "including the elite of the intellectuals of the city."²²⁷ By 1890, she was President of her local group.²²⁸

Nationalism would work its massive societal change in a civilized way. First, people were to reshape the social environment through legislation. Then in time, normal evolutionary processes would lead to transforming humankind itself; a phenomenon one wit called socialism with a "silk hat."²²⁹ Most of Nationalism's specific proposals, though quite radical in and of themselves, were mere interim measures, good until evolution had worked its magic and Utopia was achieved.²³⁰

One such interim measure for improving the criminal process was a public defender for the accused. In the New Nation, a movement publication, Bellamy urged its creation as one of the "first steps toward nationalism . . ."²³¹ He wrote

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²²⁵. Id.

²²⁶. Buhle, supra note 223, at 78 n.71 (quoting the Cal. Nationalist, Apr. 10, 1890); see also Franklin Rosemont, Bellamy's Radicalism Reclaimed, in Looking Backward, 1888-1888, at 173-74 (Daphne Patai, ed.) (mentioning involvement of Elizabeth Cady Stanton, Lucinda Stone, Julia Ward Howe, Caroline Severance, and temperance leaders Francis Willard and Mary Livermore); William Leach, Looking Forward Together: Feminists and Edward Bellamy, in 2 Democracy 120, 122, 129, 133-34. (Jan. 1982) (listing a number of feminists involved in Nationalism).


²²⁸. Theodore W. Fuller, San Diego Originals: Profiles of the Movers and Shakers of California's First Community 145-46 (California Profiles Publications 1987) (noting that Foltz presided over the local Nationalist Club described as "a short-lived movement to socialize basic industry").

²²⁹. F. I. Vassault, Nationalism in California, 15 Overland Monthly 659, 660 (1890).

²³⁰. Contemporary critics attacked the movement on the grounds of its inclusiveness. Nicholas Paley Gilman, Socialism and the American Spirit 195 (1900) (noting that the movement was little more than an "invitation to the sentimentalists to come to the front and take charge"); John Hope Franklin, Edward Bellamy and the Nationalist Movement, 11 New Eng. Q. 739, 762 (1938) (stating that Bellamy approved, as steps to nationalism, of such reforms as state publication of school texts and regulation of grain elevators). See generally supra note 219.

²³¹. Let Us Have Free Justice, 3 The New Nation 214 (Apr. 29, 1893); see also Bowman, supra note 219, at 231-32; Lipow, supra note 219, at 28, 75-76 n.53; How Poor and Rich Can Be Equalized Before the Law, 2 The New Nation 434 (July 9, 1892); How to Secure Free and Speedy Justice and Stop Lynching, 2 The New Nation 419-20 (July 2, 1892)

[If a public prosecutor suffices to protect the interest of the people, surely a public defender, equally without private interest in the case, is all the accused can reasonably ask . . . . It should be his business to present the prisoner's side in every case brought to the bar, without charge to the prisoner, who should be allowed to have no other counsel . . . .

Id.
that "[t]here are many abuses . . . resulting from the inequalities of wealth, which cannot be remedied until society is radically reconstructed, but the injustice as between rich and poor in the administration of the criminal law is not one of them."^{232}

Bellamy would make criminal defense a public function and eliminate private lawyers altogether. This would put the poor and the rich on an equal par, with a vengeance: "the poorest man . . . would be sure of a fair defense . . . and the richest man would not be able to get anything more . . ."^{233} Free justice—no paid attorneys in criminal cases—was Bellamy's slogan.^{234}

His public defender would serve justice rather than the accused. The "presentation of the prisoner's case would be fair, temperate and adequate, but . . . no special pleading or special devices would be employed to delay or defeat justice."^{235} On the other side, the prosecutor, unprovoked by defense tactics, would not exhibit that "vindicitiveness toward the prisoner which now so often scandalizes justice, but would confine himself, as he always should, to a clear presentation of the evidence."^{236}

Bellamy believed that the client-paid advocate was "the root cause" of all the problems in the criminal courts.^{237} Some of "the keenest, most astute men of the professional classes" find their livelihood in "thwarting, delaying and trippling up justice at every step."^{238} He would abolish the rich man's defense lawyer along with the jury he misled, and the presumption of innocence he wielded.^{239} These three elements made criminal trials into a spectator sport, a competitive show, when they should be orderly and calm examinations of the evidence.

As we have seen already, Clara Foltz's defender differed in critical ways from the Nationalist model.^{240} Far from abolishing the presumption of innocence, Foltz would apply it across the board; every accused was innocent in the eyes of the law.^{241} She was, moreover, a jury-lover who had made her reputation through

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232. How Poor and Rich Can Be Equalized Before the Law, supra note 231, at 434; see also Let Us Have Free Justice, supra note 231, at 231-32 (lamenting the disparate treatment of the poorest and richest citizens in criminal proceedings).

233. Let Us Have Free Justice, supra note 231, at 231-32.

234. See, for example, the sources cited in note 231.


236. Id.

237. Id.; see also Lipow, supra note 219, at 28 (quoting Edward Bellamy, Looking Backward, 2000-1887, (1917)) ("It would not seem reasonable to us, in a case where the only interest of the nation is to find out the truth, that persons should take part in the proceedings who had an acknowledged motive to color it.").

238. How to Secure Free and speedy Justice and Stop Lynching, supra note 231, at 419-20.

239. Lipow, supra note 219, at 75 n.53 (discussing Bellamy's interest in abolishing the jury system and the presumption of innocence).

240. Section 7 of the Foltz Defender Bill provides that the defendant may have the services of the public defender and his own private counsel. Foltz Defender Bill, supra note 30.

241. Foltz saw representation of individuals as protection of the innocent: "[T]he protection of the innocent is far more important to the State than the prosecution of the guilty," Foltz, World's Fair Speech, supra note 15, at 248. For Foltz's view of the centrality of the presumption of innocence, see infra text accompanying notes 268-84.
rousing summations. Winning verdicts was practically the only public power a woman could wield.

Though Foltz disagreed on the shape of the Nationalists’ proposed public defender, the interest they stirred was surely encouraging. For the first time in history, moreover, the idea of public defense was discussed and debated at a nationwide meeting: the organizing convention of the Woman’s National Liberal Union in Washington D.C. in early 1890. Foltz was there, via her Suffrage and Nationalist associations, leading the discussion. The whole story of the convention is rich and complicated; I will tell enough here to illustrate the connection of nineteenth century reform movements, and especially the link between suffrage and public defense.

3. The Woman’s National Liberal Union

The Woman’s National Liberal Union (WNLU) was the brainchild of Matilda Gage, author with Susan B. Anthony and Elizabeth Cady Stanton, of the first three volumes of the History of Woman Suffrage.\(^{242}\) After many years of loyal lieutenantcy, however, Gage abandoned the mainstream movement because she thought it inadequately attuned to the dangers of the male-dominated church. She put out a nationwide broadside summoning free thinkers in religion and politics (Suffragists and Nationalists among others) to join together in a new organization.\(^{243}\) Clara Foltz signed the official Convention Call and was an active participant in the formation of the WNLU.\(^{244}\)

One entire afternoon of the three-day convention was spent on the public defender.\(^{245}\) Foltz was the leading speaker on the subject, though William Aldrich, a friend of Gage’s, and the underwriter of the convention,\(^{246}\) was responsible for

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243. THE LIBERAL THINKER (Syracuse, N.Y.), Jan. 1890 (this was the first issue of the magazine, which was established to be the organ of the Woman’s National Liberal Union).

244. Id.

245. For a description of the discussion of the convention, see WOMAN’S NATIONAL LIBERAL UNION: REPORT OF THE CONVENTION FOR ORGANIZATION 75-78 (Matilda Joslyn Gage ed., 1890) [hereinafter Gage, REPORT] (discussing the accused, public defenders, and criminal law).

246. See 5 THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 65-66 (James T. White & Co. 1897) [hereinafter NATIONAL CYCLOPAEDIA] (discussing his appearance at the convention). William Farrington Aldrich (1853-1925) was from New York, and had moved to Alabama after the Civil War and established an extensive coal mining business. He won a seat in the House of Representatives three times, each time by Contesting the award of the election to his opponent. He served from 1896-1900. See BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 519 (1989) (giving a brief history of Aldrich); SHELDON HACKNEY, POPULISM TO PROGRESSIVISM IN ALABAMA 67 (1969) (providing an account of the arcane politics of Alabama in this period and generally of the relationship of 19th and 20th century reform and mentioning Aldrich as a Republican “endorsed by the Populists”); TWENTIETH CENTURY BIOGRAPHICAL DICTIONARY OF NOTABLE AMERICANS (Rossiter Johnson ed., 1904) (giving a brief overview of Aldrich’s life).

The connection of Aldrich and Gage was probably through his wife, Josephine Cables, a prominent
putting it on the agenda. Aldrich had a proposal combining the Bellamy and Foltz public defenders.\textsuperscript{247} His model would represent everyone, eliminating private counsel, but they would also be adversarial advocates: “of equal ability to the District Attorney, and their reputation and professional success should be based on the number of acquittals they secure for the unjustly accused.”\textsuperscript{248} Aldrich promised ten thousand dollars (contingent on twenty others giving a like amount) to anyone who would “advocate [the public defender], assist in formulating the plan, and keep a watchful eye over the operations . . . in New York, Boston, Philadelphia, Chicago and Washington, D.C. . . . .”\textsuperscript{249}

At the convention, Aldrich spoke briefly before introducing Clara Foltz, to “tell of many instances that have come under her observation, regarding innocent people who have been imprisoned simply because they had no one to defend them.”\textsuperscript{250} Foltz told those stories, and delivered her patented attack on the district attorney who strives for conviction even when he knows “all that is on the side of the defence.”\textsuperscript{251} She also had her usual lines about the “pitiful pittifoggers” appointed to defend, and ended with a call for a public official to protect the innocent.\textsuperscript{252}

The Washington Post reported, “early in her remarks, [Foltz] gained the sympathy of the audience and her strong words frequently called out bursts of applause.”\textsuperscript{253} In the discussion period, male lawyers in the audience challenged Foltz’s depiction of inadequate representation. Foltz and Aldrich responded vigorously to critics, and then Belva Lockwood, the first woman lawyer admitted to the Supreme Court Bar, took the floor.\textsuperscript{254}

Theosophist, and editor of Occult World, who was a good friend of Gage’s. On Josephine Cables Aldrich, see A Woman of the Century 16 (Frances E. Willard & Mary A. Livermore eds., Gale Research Company 1967) (1893). See also National Cyclopaedia, supra, at 66 (“With his tenderhearted and sympathetic wife, he was the originator and first to advocate the creation of a new office in the courts, that of public defender, to have all the privileges and be clothed with the same rights before the grand jury and the court [as the public prosecutor], his duty being the defense of the poor and unfortunate who have no means of employing the best legal talent.”)

\textsuperscript{247} William Aldrich, Public Defenders, The Liberal Thinker (Syracuse, N.Y.), Jan. 1890, at 3-4.

\textsuperscript{248} Id. Aldrich’s plan, like Bellamy’s, would eliminate private counsel, yet Aldrich seemed more concerned about unjust convictions (of the poor) than with unjust acquittals (of the rich).

\textsuperscript{249} Id. Aldrich also wanted the public defender advocate “to secure such legislation, both State and National, as to make the plan a permanent part of our legal machinery.” Id.

\textsuperscript{250} Gage, Report, supra note 245, at 72-79.

\textsuperscript{251} Id. at 75-79.

\textsuperscript{252} A “Liberal” Platform, Wash. Post, Feb. 26, 1890, at 6. Toward the end of her speech, almost as an afterthought, Foltz turned to “the purposes of this convention” and decried the tactics of the suffrage leaders who had worked for 40 years with no real results. Attack on the Woman Suffragists, The Woman’s Tribune (Wash., D.C.), Mar. 15, 1890, at 85.

\textsuperscript{253} A “Liberal” Platform, supra note 252 (noting also that Foltz’s speech included a “recital of her experiences in injustice to accused persons in that State”).

Lockwood told of her sixteen years at the Bar, in court most days, representing “several hundreds of criminals,” and of seeing “perfectly innocent” people sentenced to jail.

I have known colored men and women too who have lain in jail for years because they have no money . . . I am glad the convention has taken up this topic, for if there is anything that wants looking after in this country, it is criminal justice. I wish the women on the platform would go into the police courts . . . and see what I have seen, and know what I have known.255

In her report on the convention, Gage remarked on the gender differences in the reactions to the public defender proposal.256 Famous women lawyers, Clara Foltz and Belva Lockwood, took on men about the need for the office. They spoke from their experience—first as suffragists and outsiders, which had led them to law, then as lawyers called into criminal practice by necessity, seeing with fresh eyes the injustices of the system.257

No one objected that the public defender was unrelated to the objects of the meeting. Maybe this was just good manners since Aldrich was paying for the convention. More likely, most of the people there saw a connection between public defense, suffrage, free thought, nationalism, prison reform and the myriad other causes represented at the Woman’s National Liberal Union. Indeed, as it turned out, the public defender debate was the most noteworthy event at the convention—at least in long-term influence.258

The WNLU faded swiftly from the scene—there was never a second national convention. Its progenitor, Nationalism, also declined as rapidly as it had risen.

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255. Gage, REPORT, supra note 245, at 78.
256. Matilda Gage, Woman’s National Liberal Union, The FREETHINKERS’ MAGAZINE, May 1890, at 263 (“[I]t was remarkable to note in what different spirit the proposition was received by the lawyers taking part in the discussion; the men opposing, the women sustaining it.”).
258. No record I can find puts Foltz and Aldrich together again in a public defender effort and neither ever mentioned the other, though both continued working on the idea. And here is a suggestive item: they were both at the Republican National Convention in 1896. Compare William Aldrich, Alabama Republicans, N.Y. TIMES, Apr. 12, 1896, at 2 (discussing Aldrich’s appearance at the convention) with Woman Suffragists Hopeful, Expect to Secure a Favorable Plank in the Platform, N.Y. TIMES, June 14, 1896, at 3 (discussing Foltz’s appearance at the convention). Shortly thereafter, Foltz started her nationwide statutory campaign for a public defender statute. It may be that the Aldrich offer was still open, and that she hoped to be paid for the idea she had been giving away for free.
Their inclusiveness—anyone could be a member who believed in sex and social equality—was the downfall of both movements. By most accounts, Nationalism failed because its followers were too diverse to form a party or fix a platform. Yet the movement had a significant afterlife, especially in California, where the People’s Party took up Nationalism’s various causes, and then itself melded smoothly into twentieth-century Progressivism.

4. Progressivism

Along with measures to regulate corporate greed and excess, especially by railroads, Progressives inherited from their Nationalist and Populist predecessors a commitment to woman suffrage and other social reforms embedded with it, including public defense. In fact, the intense Progressive-era interest in public defense coincided with the last great push for a federal amendment granting woman suffrage.

In California, the two causes were coupled even earlier. By 1911, Progressives had elected the Governor of the state and controlled both legislative houses. They proposed a number of regulatory and democratic reforms, including woman suffrage (and the referendum and recall), and held a special election to ratify the ones that required constitutional amendment. Los Angeles, the hotbed of Californian Progressivism, went even further and passed a new city charter that included the possibility of a public defender. Foltz claimed credit for it all and for the establishment of a statewide defender option in California, which passed the same

259. MacNair, supra note 219, at 217-220 (describing the scene in April 1890 when the Nationalists made their only attempt at a political convention and were faced with instant schism). See generally supra note 230.


261. For the connection of woman suffrage with other reform movements, see Edwards, Pioneers at the Polls, supra note 203, at 90.

262. See Walton Bean & James Rawls, California, An Interpretive History 251-259 (1988). “[I]n full control of both houses of the state legislature, the progressives confidently set out to establish a new order of politics in California.” Id. at 251. Franklin Hichborn, Story of the Session of the California Legislature of 1911, at 15-17, 24 (1911).

263. See Smith, supra note 16, at 117 n.2 (noting the establishment of the public defender); see also Los Angeles County Charter, § 23, at 20 (2006), available at http://iacounty.info/charter.pdf (last visited Nov. 7, 2006); Elmer J. Miller, A New Departure in County Government; California’s Experiment with Home Rule Charters, 7 Am. Pol. Sci. Rev. 411 (1913) (describing charter provisions); Equal Justice for the Accused, supra note 72, at 43-46 (mentioning Los Angeles, in addition to other places, where legal services for indigents were created).
year the Nineteenth Amendment was ratified.264

III. FOLTZ’S CONSTITUTIONAL ARGUMENTS FOR THE PUBLIC DEFENDER

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.

— Clara Foltz, Public Defenders, 1897265

At the end of her 1897 campaign in support of her statute, Foltz wrote an article entitled Public Defenders and published it in the prestigious American Law Review. Her evident purpose was to cement her own place in history, and to provide constitutional arguments for future proponents, and her first argument was a pragmatic appeal to the universal need for counsel. No matter how innocent the defendant or how ironclad his defense, he cannot act for himself.266 Picking from her own experience the three hardest things a trial lawyer does, Foltz wrote that no defendant would be able to “lay the foundation of an expert’s testimony or impeach a witness” or distinguish competent from improper evidence.267 She then moved to the constitutional underpinning of her proposal.

A. The Presumption of Innocence

To “the unthinking suggestion . . . that a criminal deserves no consideration” because he is guilty,268 Foltz had a two-fold answer. First, she emphasized that “[o]ne-half of those arrested and charged with crime are actually innocent.”269 She cited statistics from New York, Chicago and San Francisco, which she apparently gathered from official reports and her own investigation.270 Even the plea rate was

264. See Allen, supra note 16 (noting that she stood “for half the night” receiving congratulations); see also BENCH AND BAR, supra note 16 (noting she was “successful in having the office created by the Los Angeles County Charter”).
266. For this proposition, Foltz footnoted “the old saw that ‘a man who is his own lawyer has a fool for a client’ . . . enforced by the experience of Horace Greeley, in a series of libel cases, where he appeared for himself with disastrous results and was compelled to admit his inability.” Id. at 397 n.2. Foltz was referring to a pre-Civil War case where Greeley represented himself against a skilled lawyer. See L. D. INGERSOLL, THE LIFE OF HORACE GREELEY 122-145 (1873) (quoting at length from Greeley’s tract on the subject).
268. Id. at 402.
269. Id.
270. Id. at 402 n.1. In New York, only sixty percent of the felony arrestees and fifty-four percent of the misdemeanor accused were “even held to answer.” Id. Of these she added, “[t]he district attorney refused to make known the percentage of actual convictions.” Id. Her Chicago and San Francisco examples were sketchy, but suggested conviction rates of thirty-one and forty-two percent, respectively. Id. Furthermore, Foltz noted rates of
suspect because “innumerable innocent boys and girls and men and women” plead guilty because they are “too dazed to understand their rights and legal position . . . or a fine is cheaper than counsel and they can better stand the disgrace than the money loss.”

Second, she argued that many who might seem guilty are not actually so. This was always Foltz’s first point to soften up the audience for her more fundamental and challenging proposition. “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.” So Foltz answered the perpetual puzzle proposed to defense lawyers—how can you defend someone you know is guilty?

A professional lives out the law’s presumption; all clients are innocent until the state meets its burden and the jury returns its verdict. Foltz drew no distinctions between counsel’s duty to the actually innocent and those who had only the presumption to sustain them. Both were the same before the law, and thus the same to the lawyer. The right to counsel applied equally, and it followed that justice should be free for the innocent and for the presumed innocent. A capable public defender should be available to all.

At the World’s Fair, Foltz had invoked “[t]he common conscience of men” and “the great heart of the people” to support this point. In Public Defenders, she gave no authority at all, though well-known sources discussed the lawyer’s role in defending the guilty. Thomas Cooley’s Constitutional Limitations, the most familiar treatise of the day had a very usable passage on the subject. Even if a

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police over-arrest: “the fallibility of the judgment of the police is strongly suggested by the fact that in New York City, during the year ending October 31, 1896, the police arrested 2,455 people as ‘suspicious persons,’ every one of whom was discharged.” Id. at 401 n.36.

271. Id. at 393.

272. Id. at 402.

273. For an answer, see, for example, Barbara Allen Babcock, Defending the Guilty, 32 CLEV. STAT. L. REV. 175 (1983) (offering various rationales for defense work); Babcock, Duty to Defend, supra note 3, at 1515-20 (suggesting that all lawyers bear the responsibility for defense).


275. Though there was not a huge literature on professional ethics, the duties of a defense lawyer toward a guilty client were mooted in works that Foltz likely knew. In addition to Cooley and Weeks, On Attorneys discussed supra note 152, see also JAMES RAM, A TREATISE ON FACTS AS SUBJECTS OF INQUIRY BY A JURY (4th ed. 1890); John Downey Works, About Lawyers’ Morals—The Responsibility of Laymen, CENTURY MAG. (Jan. 1888), reprinted in OSCAR T. SHUCK, BENCH AND BAR IN CALIFORNIA, 421(1889) (explaining a lawyer’s duty never to refuse for personal reasons “the cause of the defenseless or oppressed,” even if he knows he is guilty). On the other side of the issue were frequent exhortations to be honest with the court as its officer, to put duty to society and court above all others. Id. at 420. For further citations on both sides, see Norman W. Spaulding, The Myth Of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics, 71 FORDHAM L. REV. 1397 (2003).

276. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (2d ed. 1871) [hereinafter COOLEY, 2d ed.]. First published in 1868, it was ‘the most widely used American law book” through many editions. PAUL D. CARRINGTON, STEWARDS OF DEMOCRACY; LAW AS A PUBLIC PROFESSION 8 (1999); see also Stephen A. Siegel, Historism in Late Nineteenth-Century Constitutional Thought, 1990 WIS. L. REV. 1431, 1487 (1990).
defense lawyer became convinced of his client's guilt, Cooley said, he must continue his advocacy to assure that "a conviction is not secured contrary to law."\textsuperscript{278} "But"—and next came the existential question that Cooley did not answer—"how persistent counsel may be in pressing for the acquittal of his client, and to what extent he may be justified in throwing his own personal character as a weight in the scale of justice, are questions of ethics rather than of law."\textsuperscript{279}

On the question of ethics, Cooley merely laid out the dilemma. "No counsel is justifiable who defends even a just cause with the weapons of fraud and falsehood, and no man on the other hand can excuse himself for accepting the confidence of the accused, and then betraying it by a feeble and heartless defense."\textsuperscript{280} Clara Foltz told the lawyer how to avoid a "feeble and heartless defense"—her answer was to treat every client as innocent from initial contact until verdict.\textsuperscript{281}

One of her classic trial stories illustrated Foltz's method.\textsuperscript{282} Appointed to represent a poor Italian immigrant on a charge of arson, she said she believed in her client at once, that this approach was "a habit of mind with me."\textsuperscript{283} In her closing argument, she relied on the presumption:

It is oftener the good heart and the sound sense of the jury, the innate spirit of right and appreciation of justice that renders a verdict than the seeming logic of a prosecuting officer, who too often moved by a selfish ambition to win, [forgets] that the accused is presumed to be innocent until proven guilty and that this presumption obtains at every stage of the case and remains with him until the verdict is rendered.\textsuperscript{284}

\textit{B. "Constitutional Obligations"}

Many decades before \textit{Gideon}, Clara Foltz argued that the Constitution required free defense counsel for everyone. She also argued that the government could not meet its obligation through the appointed counsel system. These arguments were both sophisticated and original. Opening with Blackstone, Foltz explained that though counsel was historically denied in ancient England, judges and prosecutors

\begin{itemize}
\item \textsuperscript{277} Cooley, 2d ed., supra note 276, at 361-62; see also Weeks, On Attorneys, supra note 152, § 184, at 323-29. Though she did not cite Cooley, Foltz was familiar with Weeks. Foltz, Public Defenders, supra note 15, at 399 n.1.
\item \textsuperscript{278} Cooley, 2d ed., supra note 276, at 361 ("The worst criminal is entitled to be judged by the laws . . . .")
\item \textsuperscript{279} Id. at 362 (emphasis added). Cooley continued, "and if his conviction is secured by means of a perversion of the law, the injury to the cause of public justice will be more serious and lasting in its results than his being allowed to escape altogether." Id. at 361.
\item \textsuperscript{280} Id.; Weeks, On Attorneys, supra note 152, § 184, at 325 n.1. Weeks takes his section on defending the guilty verbatim from Cooley, which he cites, except for the "heartless defence" sentence, suggesting that Weeks did not agree with it.
\item \textsuperscript{281} Foltz, \textit{World's Fair Speech}, supra note 15, at 249; Foltz, Public Defenders, supra note 15, at 402.
\item \textsuperscript{282} For her account of the arson case see Foltz, \textit{Struggles}, supra note 110, at 4; see also Babcock, Western Women Lawyers, supra note 107, at 2184-86.
\item \textsuperscript{283} Foltz, \textit{Struggles}, supra note 110, at 4.
\item \textsuperscript{284} Id. at 11.
\end{itemize}
protected the rights of the accused and produced evidence on his behalf. 285 “Under such a system counsel was not greatly needed . . . . The procedure was reasonably fair and wholly free.” 286 By contrast, she said, counsel was never forbidden in the United States, but neither was it ever free. Federal and state constitutions provided the right, but the accused must pay or go without counsel, “and, thereby go without justice.” 287

The right to counsel, Foltz continued, is “subject to the same rules of interpretation” 288 as all the other Constitutional guarantees, which means that it “ought not to be impaired, nor burdens imposed to its perfect exercise.” 289 She gave many examples of burdening a right.

Suppose the legislative power should add to the guaranty of a speedy trial the proviso, or condition, provided he pays for it, suppose it should add to the guaranty of a trial by jury, the condition, provided he pays for their services: suppose it should add to the guaranty of confronting the witnesses against him, the condition that he pay the witness fees and mileage. 290

“So abhorrent is such a course to the sentiment of justice prevailing in the country, that courts have resolutely set their faces against it,” Foltz concluded in her World’s Fair speech. 291 However, for the article, she found only meager authority for the “fundamental rule that a constitutional right cannot be impaired by burdening it with obligations.” 292 She relied on a state case, a federal diversity action, and a ruling by John Marshall in the 1807 trial of Aaron Burr. 293 The cases

285. Foltz, Public Defenders, supra note 15, at 394 & n.4 (citing William Blackstone, 4 Commentaries *355). Foltz’s text follows Blackstone very closely. The denial of counsel was most absolute in death penalty cases; at “the time of separation of the colonies from Great Britain, there were 160 crimes on the English statutes punishable by death . . . .” Id. at 394 n.7.
286. Id. at 394.
288. Id. at 250.

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293. Id. (“If we were to-day unfettered by custom, the plain construction would be that all these rights should be free, because a right ought not to be impaired, nor burdens imposed to its perfect exercise.”) (citing Greene v.
struck down statutes conditioning the right to a jury trial on posting a bond and
risking an enhanced sentence.\textsuperscript{294} Both held that it violated due process (or the law
of the land) to ‘‘treat the innocent, who are unable to furnish the required security,
as if they were guilty and [to] punish them, while still presumed innocent, for their
poverty, or want of friends.’’\textsuperscript{295} Though these pre-war precedents were a little
cracky, their mention of the presumption and use of due process made them apt for
Foltz.\textsuperscript{296}

Her other citation was to the transcript of the trial of Aaron Burr for treason.\textsuperscript{297}
Burr subpoenaed a letter written to the President by the key witness against him,
and Jefferson claimed executive privilege.\textsuperscript{298} Presiding as the trial judge, Justice
Marshall held that

\[ \text{The right of an accused person to the process of the court to compel the}
\text{attendance of witnesses seems to follow, necessarily, from the right to examine}
\text{those witnesses; and, wherever the right exists, it would be reasonable that it}
\text{should be accompanied with the means of rendering it effectual.}\textsuperscript{299} \]

By her citation of the Burr case, Foltz implied that the state must also effectuate
the right to counsel by making it full, adequate and free. The appointed counsel
system was inadequate partly because it was not free. ‘‘The accused is under actual
legal obligations to pay for it, and if he ever gets any property the lawyer can
enforce the payment for his services,’’ Foltz wrote.\textsuperscript{300}

Briggs, 10 F. Cas. 1135. (C.C.R.I. 1852) (No. 5746); see Transcript of Oral Argument at 158-9, United States v.
Burr, 25 F. Cas. 30 (C.C. Va. 1807) (No. 14692D); Saco v. Wentworth, 37 Me. 165. (Me. 1853)).

294. Greene and Saco arose from early state efforts to regulate liquor sales and were sub judice at the same
time. Both statutes provided seizure of liquor and forfeiture, with a jury trial only available by posting security
and risking a greater penalty. In Saco, a criminal case, the Maine court simply struck down the state statute. Saco,
37 Me. at 165. Greene was a federal civil case in diversity jurisdiction to recover forfeited liquors. Greene, 10 F.
Cas. at 1136. The court acknowledged that the case involved ‘‘important questions, arising under the constitution
and laws of the state,’’ but found deciding them ‘‘a duty, which we should neither seek nor avoid, but perform.’’ Id.
at 1139. The court ultimately struck down the statute. Id.

295. Greene, 10 F. Cas. at 1140. Both of the state constitutions (Maine and Rhode Island) protected all persons
from being deprived of liberty or property ‘‘unless by the judgment of his peers, or the law of the land.’’ Id. at 1139.
Law of the land was used interchangeably with due process prior to the passage of the Fourteenth Amendment.
See Greene, 10 F. Cas. at 1140; see also Cooley, 1st ed., supra note 100, at 351 n.2 (including a state-by-state
survey of due process wording); David M. Gold, The Tradition of Substantive Judicial Review: A Case Study of
Continuity in Constitutional Jurisprudence, 52 Me. L. Rev. 355 (2000) (reviewing substantive judicial review in
Maine from the 1800s to the New Deal); John Marquez Lundin, The Law of Equality Before Equality Was Law, 49
Syracuse L. Rev. 1137, 1141, 1174 (1999) (discussing legal history prior to the 14th Amendment and citing
Saco).

296. Cooley, 1st ed., supra note 100, at 353 n.2 (citing Greene and referencing the Greene court’s
interpretation of due process and the law of the land).

297. Foltz, Public Defenders, supra note 15, at 398 n.3 (citing Transcript of Oral Argument at 158-9, United
States v. Burr, 25 F. Cas. 30 (1807)).


299. Id. at 32.

300. Foltz, World’s Fair Speech, supra note 15, at 249 (adding that there were few actual suits because ‘‘the
statute of limitations has run against his lawyer’s claim by the time [the client] gets out of prison’’).
Undercutting this point was a venerable case, *Carpenter v. Dane*, approved by Cooley and adopted in a number of jurisdictions, holding the government responsible for the lawyer’s fee. Foltz knew the case; indeed she cited it and even lifted some of its language. It came close, for example, to her point about unconstitutional burdens, holding it “a little like mockery to secure to a pauper these solemn constitutional guaranties for a fair and full trial [and then deny him counsel] who could alone render these guaranties of any real permanent value to him.” But Foltz did not mention *Carpenter* in her section on the inadequacy of appointed counsel—perhaps because paid lawyers would in theory remove the burden on the right and thus undercut her constitutional argument. It would also patch up the appointment system and make radical reform less urgent.

Generally, opponents of the public defender urged that the appointed counsel system was the better way to provide counsel. Good lawyers were willing to serve the indigent accused as a matter of professional obligation even though they were not paid in most jurisdictions. At least, those were views commonly held by those who had never been in a large volume baseline criminal court. Foltz had been there, and had seen first-hand the tremendous pressures on the genteel appointed counsel system from the effects of immigration and urbanization.

She saw too that the legal elites were turning away from criminal practice and knew little of the true state of affairs in the courts. Assailing their comfortable beliefs, she spoke of “innumerable innocent boys and girls, men and women... robbed by shysters... neglected by irresponsible court appointees,” pleading guilty or going to trial without an adequate defense, in jail or even if acquitted,

301. *Carpenter v. County of Dane*, 9 Wis. 274, 275 (1859); see COOLEY, 1st ed., supra note 100, at 334 n.1.
302. Foltz, *Public Defenders*, supra note 15, at 400 n.2 (citing *Carpenter* and arguing that it was unfair to the lawyers to commandeer their services without payment).
303. *Carpenter*, 9 Wis. at 251

[Is the right to meet the witnesses face to face, and to have compulsory process to compel the attendance of unwilling witnesses, more important, or more valuable to a person in jeopardy of life or liberty, than the privilege of having the benefit of the talents and assistance of counsel in examining the witnesses, or making his defense before the jury?

Id.

304. *Carpenter* made it clear that it was not promoting radical change by acknowledging the complaints of the Bar that sometimes courts appointed lawyers for people who could afford to pay. Id. at 253 (“This is wrong, and the practice ought to be abandoned.”).
305. When Foltz presented the public defender on a nationwide platform for the first time, at the Woman’s National Liberal Union Convention, the male lawyers in the audience objected that there was no need for it because the appointed counsel system worked well. Gage, *Report*, supra note 245, at 77. Much editorial reaction to Foltz’s public defender statute took the same view. *See, e.g.*, *Public Defenders*, THE WASH. POST, Feb. 12, 1897, at 6.
impoverished, and embittered. In Biblical phrases, Foltz depicted a defense that was "but a shadow of the substance sought for," or "ask[ing] for bread and receiv[ing] a stone."

While acknowledging that occasionally good lawyers defend, Foltz said that "[i]n practice appointees come from the loafers in court and from the young, the untried and inexperienced in the profession." She ridiculed the argument that court appointment provided needed training for tyro-attorneys. "Is it the State's business to furnish victims to young lawyers . . . ? Are we so in need of more lawyers that the State should sacrifice its duty to encourage them?"

Contemptuously, she denounced the common advice, given by appointed lawyers without investigation or regard for the individual situation, to "earn consideration by 'saving the county expense,' and throw[ing] himself on the 'mercy of the court.'" Foltz found this plea-bargaining disgusting: "[t]hink of the spectacle of a court remitting part of a criminal's legal punishment for a money consideration!! [sic] And yet who has not witnessed it?"

Her description of the inadequacies of appointed counsel revealed Foltz's expectations for the public defender and indeed for all defense lawyers. They should investigate the cases, prepare the law, summon witnesses, advise the client on the plea, and use all ethical means to achieve the most favorable verdict at trial. She lauded the skills of the good lawyer, and found it unfair to compel "credit to a pauper" for their use.

Acknowledging that "[p]rofessional ethics and sometimes the law require the lawyer not to reject the cause of the defenseless or oppressed," Foltz argued that

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308. Foltz, World's Fair Speech, supra note 15, at 249; accord Hebrews 11:1 (King James) ("[F]aith is the substance of things hoped for . . ."); Matthew 7:9 (King James) ("[I]f his son ask for bread, will he give him a stone?").
309. Foltz, Public Defenders, supra note 15, at 399 ("Once in a while the court braves the resentment of a busy lawyer and appoints him . . . [or] a brilliant young lawyer, generally in novels, successfully defends."). Foltz may have been thinking of GERTRUDE ATHERTON, PATIENCE SPARKHAWK AND HER TIMES (1895), which was said to be based partly on the Barberi and Fleming cases, see supra Part II.B.3, in which a skilled defense lawyer acting without a fee, saves the falsely accused woman from the electric chair at the last possible second.
311. See, e.g., id. at 402; Public Defenders, supra note 38, at 6 ("[I]t would deprive the young criminal lawyer of the chance to take the first steps in his profession.").
313. Id. at 399.
314. Id. at 399 n.2.
315. Foltz mentioned that appointed counsel were "often caught up without a moment's notice and compelled to go to trial without time to prepare on the law or to secure testimony." Id. at 399. Her Public Defender would not enter guilty pleas without investigation, or plead a client "caught in the mesh of misunderstanding or circumstantial evidence." Id. at 399. See also Foltz, World's Fair Speech, supra note 15, at 249 (discussing the failures of the appointed counsel system).
316. Id.
317. Foltz, Public Defenders, supra note 15, at 400; see, e.g., CAL. CIV. PRO § 282 (1889) ("It is the duty of an attorney and counselor . . . [n]ever to reject, for any consideration personal to himself, the cause of the defenseless
this did not mean the lawyer must be generally available for court appointment. She compared the physician’s ethic of care for the sick. “[Y]et no one would think of compelling a physician to be at the free command of an alms-house superintendent.”

The standard justification sounded in the attorney’s obligation to the court as its officer. Foltz suggested that this obligation fell very unequally on the profession. She herself received far more than her share of court appointments. “Why should an attorney be required to give his time and skill and energy—his sole capital—for a book account against a pauper prisoner?” The lawyer’s capital is doubly at stake, Foltz wrote, because “[c]riminal cases, especially pauper ones, are often lost, and every case lost detracts from the reputation of the successful lawyer. There is no justice in asking him to sacrifice such a reputation without compensation.”

Another rationale for the lawyer’s duty to accept appointment was his professional concern with fairness and due process. Foltz objected to this one too. “He is no more interested in seeing justice done than any other citizen is, or ought to be.” She believed in the collective responsibility of all citizens for what happens in the courts. Her defender would entail public participation in criminal justice at the same time it removed an onerous load from the legal profession.

The argument for appointed counsel was mainly a stalking horse for the real objection: the cost of a full service public defender, representing all who asked. On expense, Foltz responded with a little lesson in economics. “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.\footnote{325}

"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 or effort than is now consumed."\footnote{326} In reality, Foltz continued, the public defender would save the system money because the "orderly arrangement of causes for trial could be far better effected between opposing offices than between a district attorney and a dozen lawyers with conflicting civil business."\footnote{327} Moreover, a public defender would become an expert in the criminal law and court practices and thus "could actually accomplish more work with less effort and in less time."\footnote{328}

IV. CONCLUSION: RE-INVENTING THE PUBLIC DEFENDER

In January 2006, the San Jose Mercury-News published an exposé of criminal justice in the county where Clara Foltz first practiced.\footnote{329} It describes the same incompetence and neglect that she portrayed in her speeches and writings. A hundred years after Foltz shocked the jurisprudences, thousands still serve unjust sentences because they did not have adequate counsel.

Prominent in the Mercury-News series is the failed ideal of public prosecution. Foltz described the same fall from "ministers of public justice" to "violent advocate[s] seeking only to win."\footnote{330} On motivation for prosecutorial misconduct the Mercury articles echo Foltz: their desire to "uphold a friendly police in its frequent blunders . . . the vanity of winning cases . . . the unfortunate belief, engendered by the office itself, apparently, (for they all have it after a few years' service) that the accused is always guilty."\footnote{331}

On the defense side, just as in Foltz's day the worst lawyers are the shysters. The Mercury News article describes them as "a class of private lawyers who take a case for a relatively low fee and then boost their profits by avoiding a time-consuming trial."\footnote{332} The guilty plea rate (of eighty percent) is thus suspect and the series gives some heart-wrenching examples of innocent people, and others with strong

\footnote{325. Foltz, Public Defenders, supra note 15, at 401.}
\footnote{326. Id.}
\footnote{327. Id. at 401-02.}
\footnote{328. Id. at 401-02.}
\footnote{329. Frederic M. Tulsky, Tainted Trials: Stolen Justice, SAN JOSE MERCURY-NEWS, Jan. 22-26, 2006. The series is based on an intensive examination of all the appellate cases in a five-year period (727 in total) plus several hundred cases that were not appealed, which were studied through court files and interviews.}
\footnote{331. Foltz, Duties, supra note 15, at 416.}
defenses, pleading because they were badly advised. Moreover, the *Mercury-News*
makes the Foltzian connection between prosecutorial misconduct and inadequate
defense. At trial, incompetent lawyers fail to object to outlandish arguments and
obviously inadmissible evidence. Then in the same logic trap Clara Foltz
depicted, the appellate court holds the point waived. Writing long ago, Clara Foltz said of conditions in the criminal justice system:
“[t]hese evils are the constant subject of comment by courts and bar associations,
but the wrongs continue.” So any observer would say today of the consistent
reports and articles on the failed promise of *Gideon.* Yet, despite the regular
round of studies and commissions, the profession as a whole seems unaware of the
actual situation in the criminal courts; certainly there is no sense of urgency about
it.

The widespread adoption of public defense has had the unintended consequence
of walling off criminal practice from general professional concern. “Leave it to the
public defender” seems to be the attitude, especially among the elite bar. Yet few
public defenders have the resources even to give effective individual representa-
tion, much less to counter the prosecutor systematically, or to lobby for adequate
resources to meet inevitably increasing caseloads.

It is time to renew the original understandings and founding aspirations of
public defense as conceived by Clara Foltz, enacted by the Progressives and
mandated by *Gideon.* From her experiences as jury lawyer and feminist crusader,
Foltz fashioned a powerful, resourceful figure to counter and correct the prosecu-
tor, to balance the presentation of the evidence, and to make the proceedings
orderly and just. Her defender would engage the law’s presumption of innocence
on a deep level—investigating for favorable evidence, summoning witnesses,
seeking expert testimony, and preparing to cross-examine.

Like a good progressive, the defender would also plea bargain but only after
preparing the case, so that there was more to offer than the defendant’s right to
trial. He would work with the prosecutor’s office in designing fair procedures
(for producing favorable evidence for instance), would support programs for
rehabilitation and treatment of offenders, and would lobby on behalf of bills to

333. *Id.*
337. *See generally* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National
Crisis,* 57 HASTINGS L.J. 1031 (2006).
338. Notably, the Santa Clara public defender embraced the *Mercury-News* series. Mary Greenwood, *Opinion,
series accurately describes the frustration our lawyers often experience in the effort to defend the indigent accused
in a grinding adversarial system.”). Greenwood was not the public defender during the period of the study. While
depicting mistakes by public defenders and private attorneys, the *Mercury-News* made the “telling distinction”
that “private attorneys’ failings are often driven by money,” implying that the public defenders err from overwork
or lack of training. *The High Cost of a Bad Defense,* supra note 332.
make the right to counsel real for all the accused.

"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 sword," Clara Foltz said in her peroration at the World's Fair. 339 In return, she promised, "all those blessings which flow from constitutional obligations conscientiously kept and government duties sacredly performed." 340

The promise holds true today.

340. Id.