

COMMENTARY

Western Women Lawyers

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The Western states, last to join the Union, were first to include women in political and public life. Historians offer various explanations: that women earned their rights by sharing a hard, dangerous existence far from organized society and government; that men created clement legal conditions expressly to lure women to the region; that the men and women who ventured toward the continent's edge were an unusual bunch with uncommon views and tolerances. Whatever the reasons, woman suffrage came first in the West—by many years: Wyoming, Colorado, Utah, and Idaho in the nineteenth century; Washington, California, Arizona, Oregon, Montana, and Nevada in the early twentieth century.¹ Not until 1917, only three years before the Federal Amendment,² did an Eastern state adopt woman suffrage.³

Suffrage is, of course, the actual and symbolic measure of political equality in a democracy. But the American women's movement, from its foundation,⁴ also sought access to the professions—particularly the legal profession.⁵ Early women activists saw the law as a powerful tool for changing women's place as well as an absorbing and rewarding kind of work. But

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1. BEVERLY BEETON, *WOMEN VOTE IN THE WEST: THE WOMAN SUFFRAGE MOVEMENT, 1869-96*, at 155 (1986) (indicating dates for women granted suffrage in the West: Wyoming in 1890; Colorado and Idaho in 1893; Utah in 1896; Washington in 1910; California in 1911; Arizona and Oregon in 1912; Montana and Nevada in 1914).

2. U.S. CONST. amend. XIX.

3. GEORGE BROWN TINDALL, *AMERICA: A NARRATIVE HISTORY* 818 (1984) ("Not until New York acted in 1917 did a state east of the Mississippi adopt universal suffrage.").

4. The women's rights movement began in this country in 1848 at Seneca Falls, New York. At the call of Elizabeth Cady Stanton and Lucretia Mott, about 300 people met and passed a Declaration of Sentiments, based on the Declaration of Independence, as well as twelve resolutions. 1 *HISTORY OF WOMAN SUFFRAGE* 67-73 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 1881).

5. One of the Seneca Falls resolutions called for "the securing to woman [of] an equal participation with men in the various trades, professions and commerce." 1 *HISTORY OF WOMAN SUFFRAGE*, *supra* note 4, at 70-71, reprinted in AILEEN KRADITOR, *UP FROM THE PEDESTAL: SELECTED WRITINGS IN THE HISTORY OF AMERICAN FEMINISM* 187-88 (1968). Law was particularly mentioned in the body of the Declaration that complained of man closing to woman "all the avenues to wealth and distinction." *Id.* at 71.

the law proved second only to the ministry in its resistance to the entry of women.⁶

As the paradigmatic public profession, law had little connection with the domestic sphere, the world of nurturance and tender feeling that nineteenth century women were supposed to inhabit. Lawyers were ideally thought to be bold, brilliant, aggressive, incisive, and ruthless in the interests of justice—or of a client. Nothing could be more inconsistent with the social image of the “true” woman in the nineteenth century.

Again—as with woman suffrage—the Western states and particularly some of those in the Ninth Circuit (though Wyoming and Colorado were also especially good) were far better than others in admitting women to the Bar. In researching the history of the early women lawyers, I have found that the way in which a place receives its first female attorneys exposes something of its political and social character.⁷ The quiet acceptance that women lawyers found in most Western states contrasts with a resistance in many other locations revealed in brutish high court opinions casting aspersions on women’s capacity and competence. I have yet to find an opinion in Ninth Circuit states that matches the often-quoted Chief Judge of Wisconsin who held that “[r]everence for all womanhood would suffer in the public spectacle” of women practicing law.⁸ The law schools of the Ninth Circuit generally opened their doors early as well—though as we will see, not always without prodding.

Ninth Circuit women were the second⁹ and fifth¹⁰ to join the Bar of the U.S. Supreme Court, and the first woman to join it—in 1879—did so after passage of legislation sponsored by the Senator from California, a lawyer.¹¹ From the Ninth Circuit came the first two women to serve as Assistant Attorneys General in the United States: Annette Adams from Northern California (appointed by President Wilson),¹² and Mabel Walker Willebrandt

6. Barbara J. Harris explains that “female doctors could claim that their careers were natural extensions of women’s nurturant healing role in the home, and that they protected female modesty by ministering to members of their own sex. By contrast women lawyers were clearly intruding on the public domain explicitly reserved to men.” BARBARA J. HARRIS, *BEYOND HER SPHERE: WOMEN AND THE PROFESSIONS IN AMERICAN HISTORY* 110 (1978).

7. See generally CALLED FROM WITHIN: EARLY WOMEN LAWYERS OF HAWAII (Mari Matsuda ed., 1992).

8. *Matter of Goodell*, 39 Wis. 232, 247 (1876).

9. Laura Gordon, from California, was the second woman admitted on February 3, 1883. HAMPTON L. CARSON, *THE SUPREME COURT OF THE UNITED STATES: ITS HISTORY* 439 n.6 (1891).

10. Clara Shortridge Foltz, also from California, was the fifth woman admitted on February 3, 1883. *Id.*

11. Belva Lockwood was the first woman admitted to practice before the United States Supreme Court. She lobbied for several sessions before the Congress for legislation admitting women to practice in the federal courts. Act of Feb. 15, 1879, ch. 81, 20 Stat. 292. Its passage in 1879 coincided with Clara Foltz’s suit against Hastings College of the Law to gain admission. See text accompanying note 19 *infra*. The main proponent of the bill was the pro-suffrage Senator from California, Aaron Sargent, whose wife, Ellen Clark Sargent, was an early suffrage leader. 3 *HISTORY OF WOMAN SUFFRAGE*, *supra* note 4, at 108-10. For a more detailed description of these events, see Barbara Babcock, *Clara Shortridge Foltz: “First Woman,”* 30 ARIZ. L. REV. 673, 704-05 (1988).

12. Sandra P. Epstein, *Women and Legal Education: The Case of Boalt Hall*, PAC. HISTORIAN,

from Los Angeles (appointed by President Harding).¹³ From the Ninth Circuit too came the first woman to serve on the United States Supreme Court.¹⁴

So far as facts and figures go, especially comparative ones, the Ninth Circuit looks good in historical perspective for women in the law. But let us refocus for the balance of this piece on an individual life. By closing in on a single subject, we can see how the outward achievement does not always reflect the same inner reality for women lawyers as it does for men lawyers. I hope to show you, too, through a single individual life why today—even though there are no tangible barriers, no statutes or local rules, no customs or traditions that stand in women's way, we worry still about gender bias.

The life I take as my example is that of the first woman to be a lawyer among all the states of the Ninth Circuit—the Portia of the Pacific—Clara Shortridge Foltz.¹⁵ Let me, first, lay out in encyclopedic fashion, the major events of her remarkable life. Foltz joined the California Bar in 1878, when she and the state of California were both twenty-nine years old. In the previous decade, she had migrated with her husband of thirteen years and their four children, first from Iowa to Oregon and then to San Jose, California, arriving for the brunt of an economic depression featuring bank, crop, and moral failures.

Within a few years, she had borne a fifth child, suffered the desertion of Jeremiah Foltz, and turned to law study and public speaking to maintain her family and keep her children together with her. She lobbied through a bill allowing women to be lawyers, then took advantage of it that same year—1878. From obscure housewife, she had within months become known throughout the state as “the lady lawyer, Mrs. Foltz.”

The depression of the 1870s ended in California with a constitutional convention, especially cathartic because it was held in the midst of extensive working class protest. The woman suffragists led by Clara Foltz and her

Fall 1984, at 5, 7-11 (discussing career of Annette Adams, who was also the first woman to be an Assistant United States Attorney in Northern California).

13. See generally DOROTHY M. BROWN, *MABEL WALKER WILLEBRANDT: A STUDY OF POWER, LOYALTY, AND LAW* (1984).

14. Sandra Day O'Connor, appointed in 1981, is from Arizona.

15. Major secondary sources for Foltz's life include: Barbara Babcock, *Reconstructing the Person: The Case of Clara Shortridge Foltz*, in *REVEALING LIVES: AUTOBIOGRAPHY, BIOGRAPHY AND GENDER* 131-40 (Susan Groag Bell & Marilyn Yalom eds., 1990). Corinne Gilb wrote the Foltz entry in *NOTABLE AMERICAN WOMEN: A BIOGRAPHICAL DICTIONARY, 1607-1950*, at 641 (Edward T. James, Janet Wilson James & Paul S. Boyer eds., 1971) [hereinafter *NOTABLE AMERICAN WOMEN*]. Two contemporary summaries of her life work appear in 1 *NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY, CURRENT VOLUME C* 308 (1930) and OSCAR T. SHUCK, *HISTORY OF THE BENCH AND BAR OF CALIFORNIA* 828 (1901). For numerous newspaper, periodical, and other contemporary articles, see sources cited in Babcock, *supra* note 11; Barbara Babcock, *Clara Shortridge Foltz: Constitution-Maker*, 66 *IND. L.J.* 849 (1991) [hereinafter Babcock, *Constitution-Maker*]. For a discussion of events in Foltz's later career, see generally Mortimer D. Schwartz, Susan L. Brandt & Patience Milrod, *Clara Shortridge Foltz: Pioneer in the Law*, 27 *HASTINGS L.J.* 545 (1976). See also Virginia Elwood-Akers, *Clara Shortridge Foltz: California's First Woman Lawyer*, 28 *PAC. HISTORIAN* 23 (1984); Nicholas Polos, *San Diego's "Portia of the Pacific,"* *J. SAN DIEGO HIST.*, Summer 1980, at 185.

friend Laura Gordon,¹⁶ soon to be the second woman lawyer in the state, came very close to winning a provision in the 1879 constitution. What they achieved instead, with the help of the Workingmen's Party delegates, were two clauses, unprecedented in any American Constitution, guaranteeing women access to employment¹⁷ and education.¹⁸

The background to the passage of the clauses was the struggle by Foltz and Gordon to attend the newly established Hastings College of the Law. Denied admission by Directors who apparently believed that women might practice, but should not learn, the law, the two women sued, representing themselves. They prevailed in the trial court, and eventually in the California Supreme Court.¹⁹ But the final victory came too late for Clara Foltz, who was already a busy lawyer supporting her family and no longer had time for formal study.

Ever restless and adventurous, Foltz moved to San Diego in the late 1880s, where she practiced real estate law and started a daily newspaper. After returning to northern California for a few years, she set out on a nationwide lecture tour culminating in New York City, where in 1896 she joined the Bar to considerable press coverage. By some accounts, she was the first woman to argue in the city courts. She also started the Clara Foltz Gold Mining Company with a group of prominent businessmen, and sued a restaurant that refused service to her and Trella, her older daughter, because they had no male escort.

By the turn of the century, she was back in San Francisco after a short period of practice in Denver. Specializing for a time in oil and gas law, she published *Oil Fields and Furnaces*, a trade and technical magazine. When she lost her home and office in the 1906 earthquake, she moved to Los Angeles for the last third of her life where she was appointed the first woman deputy district attorney (1911-13) and during the same period served on the State Board of Charities and Corrections, the first woman in that important job. For a few years (1916-18), she published her own magazine, *The New American Woman*.

In 1911, when California women won the vote, Clara Foltz stood all night receiving congratulations as one of the few original suffragists who would live to cast a legal ballot. She yearned to add the United States Senate to her firsts, but ended by campaigning instead for her brother, Samuel Shortridge, who was elected twice, serving from 1921-32. Though she was mentioned for national posts and federal judgeships, her career was past its prime by the time women had even a remote chance for such offices. The first woman federal judge was appointed in 1934, the year of Clara Foltz's

16. NOTABLE AMERICAN WOMEN, *supra* note 15, at 68-69 (Gordon Entry).

17. CAL. CONST., art. XX, § 18 (1879).

18. CAL. CONST., art. IX, § 9 (1879); *see also* Babcock, *Constitution-Maker*, *supra* note 15, at 892-99 (describing the passage of the clauses).

19. *Foltz v. Hoge*, 54 Cal. 28 (1879).

death.²⁰

She practiced law continuously for fifty years and unlike most lawyers of the period, either male or female, she was renowned for her jury work. Her greatest achievement as a law reformer was to conceive the idea of a public defender, which she presented compellingly as the representative of the California Bar at the 1893 Chicago World's Fair and lobbied for in many state legislatures, successfully in California. Her several law review articles on the subject are crisp and convincing in their formulation of the radical notion that the government should pay for the defense of the criminally accused.²¹

A brilliant career by any measure—yet toward the end of it Foltz told a reporter that women had not yet made it to the top of the legal profession. No woman, she maintained, had yet taken the final step by showing the learning, “force of character, and intellectual independence” to be “a constitutional lawyer.”²² Among all of Foltz's admirable qualities, modesty due or undue, was not one. She did not easily conclude that there were no women, not even herself, among the profession's elite. Her statement was the result of many years of trying hard, and failing, to be a “constitutional” lawyer.

Her first effort was when she applied to Hastings and the Directors (including some celebrated constitutional lawyers of the day) responded: You may hustle with the common herd in ordinary practice, but the higher realm of legal learning, of theory and scholarship, is not for you. She always regretted her lack of formal education, but when Foltz spoke of “constitutional lawyers,” she meant more than well-credentialed or well-trained. She meant a type of lawyer, like women under the separate spheres ideology, who inhabits a finer and purer world than his counterparts. Unlike commercial or criminal or corporate practitioners, constitutional lawyers concern themselves with the public good, with justice and virtue. As statesmen rather than politicians, they rise above brute compromise and strategic struggle.

Clara Foltz could not be a constitutional lawyer because she was always battling for recognition and compromising her dreams; she was an advocate, engaged in self-interested group promotion and lobbying on all levels. She knew at the end of her life that for all her fame, she had never come close to the inner circle of power and prestige in the profession. When Foltz said that women were not yet “constitutional lawyers,” she saw with some sadness that the very activities that set women on the path, had prevented their entry into the city on the hill.

Constitutional lawyers have an ease and grace about them that is not

20. Florence Allen was appointed to the Seventh Circuit Court of Appeals by President Franklin Roosevelt in 1934.

21. Clara Shortridge Foltz, *Public Defenders*, 25 CHI. LEGAL N., Aug. 12, 1893, at 431 (text of speech at the Congress of Jurisprudence and Law Reform, World Colombian Exhibition, 1893); Clara Shortridge Foltz, *Public Defenders for Criminals*, 31 AM. L. REV. 393 (1897).

22. *Woman as Constitutional Lawyer Next Step: Mrs. Clara Shortridge Foltz Hopes for Future*, S.F. CHRON., Aug. 9, 1922.

available to outsiders. Even when she had not met open resistance and rejection, Foltz experienced the daily strain of being a novelty, of having her very presence and gender always subject to comment. The remarks were not necessarily disapproving, as Clara Foltz once said in her cheerful way: "They called me the lady lawyer, a pretty soubriquet which did much for me, for of course to be worthy of so dainty a title I was bound to maintain a dainty manner *as I browbeat my way through the marshes of ignorance and prejudice.*"²³ But dainty soubriquet often masked censure and suspicion; many who uttered the phrase "lady lawyer" considered it an oxymoron. What was a *lady* doing after all, out in the marshes?

The stories of early women lawyers are full of strategies for dealing with the small slights and the large exclusions. Humor has, for instance, often served as a shield. For Clara Foltz, it was a sword as well. She once retorted to a trial opponent's ridicule by exclaiming: "Counsel intimates with a curl on his lip that I am called the lady lawyer. I am sorry I cannot return the compliment, but I cannot. I never heard anybody call him any kind of a lawyer at all."²⁴ When another adversary charged that she did not belong in the courtroom, Foltz responded: "A woman would better be almost any place than home raising men like you."²⁵

But it was less direct insult than omnipresent scrutiny that made life so difficult for the pioneer women lawyers. I wonder at their courage when I think how hard it is to work under a critical gaze: how it exacerbates the fear of failure and aggravates the human sense of unworthiness that has no gender.

I won't continue in this vein because a good use of the historical genre leaves the audience to draw its own connections with the present. Rather than spin out for you why things have not necessarily changed so much for women in 100 years, I will close with a story from Clara Foltz's trial career, and conclude with her professional credo, first formulated in the drama of a closing argument.²⁶

The year is 1889 or 1890 in a San Francisco courtroom. The judge has appointed Foltz to represent a young Italian immigrant charged with arson. One Thaddeus Stonehill is her opponent; in Foltz's description, he "had been a captain in the Southern Confederacy, but by common consent everybody called him Colonel, after the manner of those gallant, loving-hearted, Southern people, who seem never to weary in their friendly intercourse with

23. Clara Shortridge Foltz, *Struggles and Triumphs of a Woman Lawyer*, NEW AM. WOMAN, Oct. 1916, at 11, 11. *Struggles and Triumphs of a Woman Lawyer*, was the title of Foltz's monthly autobiographical column in her magazine, *The New American Woman*, published in Los Angeles from 1916 to 1918.

24. Clara Shortridge Foltz, *Struggles and Triumphs of a Woman Lawyer*, NEW AM. WOMAN, Jan. 1918, at 4, 4 [hereinafter Foltz, *Struggles*, Jan. 1918].

25. SHUCK, *supra* note 15, at 828 (Clara Foltz entry).

26. I have constructed this story from Foltz, *Struggles*, Jun. 18, *supra* note 24, at 4. See also SHUCK, *supra* note 15, at 548 (Stonehill entry).

each other.”²⁷

The aptly named Stonehill, combat veteran of two wars, did not take well to his woman opponent. Noting that he “was at his best,” Foltz later described his summation with her own interpolations:

He had “no use for a woman at the bar,” (unless she were a defendant). . . . [H]e flayed “ambitious women who have no sense of the fitness of things . . . women who have no child (I had five), no husband (I was a widow), no home,” (I had the dearest, cleanest little home in San Francisco). . . . “SHE IS A WOMAN,” bellowed this learned limb of the law; “she cannot be expected to reason; God Almighty decreed her limitations, but you can reason, and you must use your reasoning faculties against this young woman. . . .”²⁸

I think of her listening to this direct attack in the unrelievedly male atmosphere of that courtroom and realizing that after all the rejection and humiliation she had overcome, she might at this moment, lose everything. If Colonel Stonehill’s ploy of putting her on trial were successful, no paying client would risk hiring a woman lawyer in the future.

“My time had come at last,” she wrote describing the scene many years later. “The court room was crowded. I rose all trembling and ashamed. I felt as though my clothes had all slipped off of me and that I stood there nude before the Court and the jury.”²⁹

Clara Foltz began:

If your Honor please and gentlemen of the jury: Counsel opened his argument with the astounding revelation that I am a woman. It was a wonderful announcement—fit epigram for a god to have spoken. And yet, after this magnificent burst of blazing genius the sun does not appear to be darkened nor the moon paled by the contrast.

. . . .

I am that formidable and terrifying object known as a woman—while he is only a poor, helpless, defenseless man, and he wants you to take pity on him and give him a verdict in this case. I sympathize with counsel in his unhappy condition. True, the world is open to him. He is the peer of all men—he can aspire to the highest offices, he can carry a torch over our streets during a political campaign and sell his vote for a dollar and a half on election day, and yet he isn’t satisfied. Like Alexander, who wanted more worlds to conquer, he wants verdicts, and in order to awaken your sympathy for him he tells you that I am a woman and he is only a man.

. . . .

But counsel insists that I am a woman. Gentlemen of the jury, of the atrocious crime I plead guilty. Into this world I have brought five healthy children. By my industry I have supported them till some are even now stepping from youth and maidenhood into the broader estate of manhood and womanhood. And I repel the covert slur and innuendo that came with the words, “She is a woman”—words intended to depreciate me and my

27. Clara Shortridge Foltz, *Struggles and Triumphs of a Woman Lawyer*, NEW AM. WOMAN, Feb. 1918, at 9, 9 [hereinafter Foltz, *Struggles*, Feb. 1918].

28. Foltz, *Struggles*, Jan. 1918, *supra* note 24, at 10.

29. *Id.*

efforts before you in this cause, words none the less obnoxious because spoken under the cloak of a honeyed compliment. In the name of the mothers who nursed you, and of the wives and maidens who look love into your eyes I resent this hidden appeal to a supposed prejudice of this jury. I resent this ill-concealed slur and covert innuendo that the presence of woman in a law suit contaminates her and that her sex must militate against her client. And I resent for you gentlemen, whose mouths are closed, the implication that you are small enough and narrow enough to bring prejudice into the jury box, and the insulting inference that you could be induced to visit punishment upon this defendant in violation of your solemn oaths. . . .

. . . .

And now let us take it altogether. I am a woman and I am a lawyer—and what of it? It is not so new or wonderful a thing. I am practicing law in this city; I have offices in one of its largest buildings, and I go daily to and from those offices sober and in my right mind. I am certainly not unknown to the bench and bar of California. And gentlemen, I came into the practice of my profession under the laws of this State, regularly and honestly, and . . . I have come to stay. I am neither to be bullied out nor worn out. I ask no special privileges and expect no favors, but I think it only fair that those who have had better opportunities than I, who have had fewer obstacles to surmount and fewer difficulties to contend with should meet me on even ground, upon the merits of law and fact without this everlasting and incessant reference to sex—reference that in its very nature is uncalled for and which is as unprofessional as it is unmanly.³⁰

The jury returned a “Not Guilty” verdict without leaving the box.³¹ Clara Foltz won her immediate case; her greater cause remains for us to achieve.

30. *Id.* at 15.

31. Foltz, *Struggles*, Feb. 1918, *supra* note 27, at 9.