"Free Justice"

Clara Foltz

Inventing the Public Defender

BY BARBARA BABCOCK

More than a hundred years ago, Clara Foltz called for "free justice"—a public defender to match the public prosecutor. This conception was her greatest achievement, and the institution of public defense is her finest legacy. I tell the story in full detail in *Woman Lawyer: The Trials of Clara Foltz* (Stanford University Press 2011).

Admitted to practice in 1878, Foltz was the first woman lawyer in California, and probably the first in the far west. She was a trial lawyer at a time when nice women did not litigate, and she was often the only woman 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." (Barbara Allen Babcock, *Inventing the Public Defender*, 43 Am. Crim. L. Rev. 1267, 1282 (2006) [hereinafter *Inventing*].) Initially, many of her clients were poor people accused of crime: they were among the few desperate enough to rely on a woman lawyer.

As an outsider and newcomer to the criminal courts, Foltz saw the injustices ignored by the regulars, who she said were "deadened in feeling by constant contact." She observed "innumerable innocent boys and girls, men and women . . . robbed by shysters . . . neglected by irresponsible court appointees," plead guilty or go to trial without an adequate defense, end up in jail, or, even if acquitted, leave the courthouse impoverished and embittered. (*Inventing*, *supra*, at 1310–11.)

It was not a great mental leap from Foltz's first-hand observations to the idea that the state was responsible for a fair presentation of both sides of the case. She probably first proposed a public defender in lectures she gave to supplement her income as a lawyer in the 1880s. Over the years, Foltz continued to urge and refine her conception. In the 1890s, she began her organized campaign to make the idea a reality. She drafted a public defender statute, lobbied for its passage, and wrote law review articles supporting it.

At the same time she spoke of justice for the accused, Foltz's subtext was equal treatment for women lawyers in the courtroom. Too often she had found 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. Even though they thought she had an unfair advantage, the prosecutors also experienced it as a peculiar humiliation to lose to a woman. Some 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.

The highest point in Clara Foltz's campaign for a public defender was her speech on the subject at the 1893 Chicago World's Fair, formally known as the World's Columbian Exposition. As the intellectual auxiliary to the physical exhibits, there was a series of great public meetings on subjects such as religion, philosophy, and literature. Foltz unveiled her arguments for a public defender at the Congress of Jurisprudence and Law Reform, on a platform featuring distinguished judges, professors, and practitioners.

She gave an amazing speech—unlike any other at the congress—for its passionate delivery coupled with its total originality. The speech was a combination of sophisticated constitutional arguments and frank revelations about police perjury and prosecutorial misconduct. She spoke of the right to counsel and compared it to the other "great constitutional rights guaranteed to each citizen." None of these other rights could be conditioned on the accused's ability to pay—"a condition that renders the guaranty inoperative." Seventy years before the US Supreme Court decided as much in *Gideon v. Wainwright*, 372 U.S. 335 (1963), Foltz argued that the right to counsel must mean that the accused "is entitled to defense, and that that defense shall be full, adequate and free." (BABCOCK, WOMAN LAWYER, *supra*, at 309–11.)

Before the elite of the legal profession, Foltz brought forth her creation: "For every public prosecutor there should be a public defender chosen in the same way and paid out of the same fund." 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. Her defender would engage the law's presumption of innocence on a deep level, investigating every case for favorable evidence and plea bargaining with more than the defendant's willingness to forego trial. At trial, the defender would summon witnesses, seek expert testimony, and prepare to cross-examine.

In constructing this figure, Foltz had no models. No defender like the one she described had ever existed, nor were there common law precedents for it. She explained that in ancient England there was no right to defense counsel at all. The prosecutor and the judge were supposed to attend to the rights of the accused. But this old machinery had fallen away and prosecutors no longer considered themselves "ministers of public justice," but adversaries determined to win at all costs. In his hour of greatest need, the accused person who could not afford counsel was left in the savage state, she said, of self defense.

After Foltz launched the public defender movement, it became directly connected through her person and, more generally, with the movement for female suffrage. In California, women won the vote in 1911, cast their ballots for the first time in 1912 in Los Angeles, and with their participation, the first public defender in the world was established in that city. Clara Foltz took credit for the L.A. office, which in turn spurred a nationwide movement in the Progressive Era, resulting in the establishment of many more offices. In 1921, the Foltz Defender Bill enabled public defenders throughout California.

Today, the public defender is the main channel for representation of those who cannot afford counsel everywhere. But even though it is firmly established in the legal landscape, public defense has never been really understood by nor had the complete support of the community, its elected representatives, or even the profession as a whole. In a recessionary economy especially, Foltz's vision of a commanding defender backed by the full resources of the state is seldom realized.

In her public defender writings, Foltz noted that the "evils" of inadequate representation are "the constant subject of comment by courts and bar associations, but the wrongs continue." (*Inventing*, *supra*, at 1314.) So it is today with studies and articles on the failed promise of *Gideon*. The latest is an important book by Norman Lefstein documenting the dire condition of public defense, and calling the profession to action. (SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE (ABA 2011).) It seems fitting that our two books were published in the same year because both of us have roots in the Public Defender Service for the District of Columbia, where I was the first director, and he was the second, and where we developed the ideals of adequate representation that inspire us still.

Lefstein makes a devastating case about the situation of most defenders (not all, but most), who become overwhelmed with caseloads and clients they cannot possibly serve adequately, no matter the amount of their skill or devotion. In actual execution, Clara Foltz's vision of "criminal courts reorganized upon a basis of exact, equal and free justice" is often mocked. Until we as a people and as a profession return to Foltz's founding principles and make the law truly "a shield as well as a sword," we will not reap the benefits of free justice that she promised: the "blessings which flow from constitutional obligations conscientiously kept and government duties sacredly performed." (*Inventing*, *supra*, 1314–15.) ■

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