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WOMEN'S RIGHTS, PUBLIC DEFENSE, AND THE CHICAGO WORLD'S FAIR

BARBARA BABCOCK*

INTRODUCTION

At the Chicago World's Fair in 1893, distinguished judges, legal scholars and advocates met in an international Congress of Jurisprudence and Law Reform. Women lawyers were there as attendants and participants and two of them were officially on the program. This piece will focus on the contribution of Clara Foltz, the first woman at the California Bar (1878); she spoke on the need for public defenders to match the public prosecutors and improve the quality of criminal justice. It was a speech of breathtaking originality and scope. Though she said nothing at all about women's liberation, Foltz's thoughts grew partly from her experience as a pioneer lawyer and women's rights activist.1

I. WOMEN AT THE WORLD'S FAIR: SETTING THE STAGE

More than a hundred years later, the 1893 Chicago World's Fair continues to excite interest—inspiring works as various as a popular novel about a serial killer and a scholarly exposition on women's art.2 The Fair was one of those historical watershed events that seem to bear endless interpretation and to provide countless illustrations and

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metaphors. Half the population of the United States—26 million people—passed through the Fair’s electronic turnstiles (themselves one of its wonders) between May and September 1893. The visitors came to see the displays in two hundred buildings spread over six hundred acres, with some of the grandest outlined by electric necklaces and reflected in a lagoon plied by gondolas. The first Ferris wheel was the icon of the Exposition, just as the Eiffel tower had been at the 1889 Paris Exposition.

Though the sights were astonishing, it was the symbolism of the Fair that made it important to the huge crowds in attendance. It marked the reunification of the country after the Civil War, and its emergence on the world stage as a great power. The Exposition’s grandeur was proof of progress: more “in the last fifty years than the previous fifty centuries,” said a popular orator, adding, “we live in the best age of history and the most favored portion of the globe.”3 Thus, despite the economic depression, the worst in history, that hit in full force soon after the Fair opened, Americans continued to find hope and inspiration in the gleaming white city.

For American women, the Fair was an important historical moment because they had a significant role in the planning and programs for the first time at any such international exposition.4 The women’s rights movement was greatly enlivened by the Fair, and new alliances formed among the activists, clubwomen and society ladies. Clara Foltz attended the Fair twice, traveling by train from San Francisco. On her second trip, she spoke to a nationwide meeting of women lawyers, and a few days later to the World’s Congress of Jurisprudence and Law Reform. Her Fair activities took her to the pinnacle of her career.

Though the Fair brought women together in new ways, considerable strife marked the opening stages of their participation. The suffragists, led by Susan B. Anthony, spearheaded the effort to accord women an equal place in the planning, exhibits and programs of the Fair. They tried unsuccessfully to persuade Congress to put women on the major planning board for the Fair, but instead there was a separate but equal Board of Lady Managers created. Congress chose “Mrs. Potter Palmer,”

the wife of a Chicago tycoon, as President of the Board. She was stylish, bejeweled, man-pleasing and not an avowed suffragist—not exactly what the movement women had in mind when they fought for an equal place at the Fair. But Mrs. Palmer turned out to be a superb organizer and, in her way, a great advocate for women. She deserves much of the credit for women's prominence at the Fair so many decades before they won political equality.5

Rich Chicago women had a tradition of social concern and moral seriousness, which was not always true of society ladies elsewhere. Along with other wealthy and fashionable women, Bertha Palmer was active in the Chicago Woman's Club, which had fostered Jane Addams' foundation of Hull House in 1889. In the Chicago Club, the society ladies worked together with the women doctors, lawyers and teachers. But the two groups did not, on the whole, overlap socially, nor did they agree on how women should be and how they should present themselves.6

Even before Chicago had won the privilege of holding the Fair, the professional women of Chicago formed an association to prepare for it. They took the name of Queen Isabella and commissioned a statue by a woman sculptor of the monarch holding out her jewels, presumably to Columbus, who was not depicted. The Isabella society members were probably the most disappointed by the formation of the Board of Lady Managers, and very few of their members made it onto that Board.7

As the stress of the huge Fair enterprise began to wear on everyone, the Lady Managers and the Isabellas became increasingly antagonistic. At the center of the controversy was the Woman's Building, which the Lady Managers sponsored and the Isabellas disliked because of the segregation of women's concerns. They also opposed the largely a-political exhibits (fine arts, handicrafts, and literary works) and predicted that the building would be an embarrassing sideshow to the Fair.8


7. WLH Website Bibliographic Notes, supra note 4 (Bertha Palmer and the Isabellas).

8. Anita Miller & Jeanne Madeline Weimann, The Fair Women: The Story of the Woman’s Building, World’s Columbian Exposition, Chicago, 1893, at 39 (1981); Matthew J. Sanders, An Introduction to Phoebe Wilson Couzins (2000), WLH website, supra note 1 (Couzins was one of the few Isabella members of the Lady Managers); WLH Website Bibliographic Notes, supra note 4.
But the Isabellas were wrong about what people wanted. With its human scale and relative comfort, the Woman's Building was an enormous success and Bertha Palmer's lovely face adorned many things sold there from postcards (first widely used at the Fair) to silver spoons. A brilliant tactician, Mrs. Palmer separated the Isabellas from the other women's clubs and organizations by arranging accommodations in the Woman's Building for virtually every other group. Throughout the summer and early fall, most days saw some special program, reception, congress or other occasion in the Woman's building. Only the Isabellas and their large statue were obviously excluded.

Women's meetings at the Fair began most auspiciously with the World's Congress of Representative Women in May, which Clara Foltz attended. The Congress was the first of seventeen great public gatherings held in connection with the Chicago World's Fair. The Congresses were the brainchild of Charles Bonney, a local lawyer and educator, who proposed an intellectual adjunct to the physical exposition. Chicago boosters and businessmen, eager to establish the town as cultivated and civilized, backed him generously.9

A building with two big auditoriums and smaller meeting rooms (now the Art Institute) was constructed to house the Congresses. It was near the Fairgrounds; both opened in May 1893. For the first of the Congresses, Bonney had the brilliant idea of celebrating woman's progress over the past one hundred years. "The woman of the century," or "The World's Congress of Representative Women" was a huge draw, kicking off the rest of the Auxiliary season. Its success showed that women were to be taken seriously at the Fair, and encouraged their demands for greater inclusion in all the Congresses.10

The women's Congress filled the new building, where the workman's hammer was still ringing, (as many speakers pointed out) from morning to night for six days. Ten thousand women in one place on the subject of themselves was a sobering sight to some, and thrilling to


many. The Chicago Inter-Ocean lead ran: “In 1492 a woman sent Columbus to discover a new world; the opening of the woman's congress in this new continent, 400 years later, is evidence that woman has since discovered herself.”11 On the first day of the women’s Congress, Charles Bonney stepped forward from the mass of female celebrities on the platform to proclaim: “The century of woman’s progress . . . carrying [with it] not the degradation of man, but the substitution of the law of love for the law of force.” In her lecture on lawyers, given many times over the fifteen years since she joined the Bar, Foltz made the same point; she believed that women lawyers would improve the profession because they would practice at a high humanitarian level, with “mother-love and solicitude.”12

The women’s Congress was significant in two respects—the range of topics covered in the week and the diversity among the attendants. Foreign women, working women, black women, society women, religious women, reformers of every possible stripe, all were invited and most came. Most participants were invited through their clubs and federations, with many of these holding national conventions under the auspices of the World’s Congress of Representative Women. In addition to non-stop meetings of every size, dozens of receptions and social events were “tendered” to the attendants. Serious topics included Industries and Occupations, Education and Literature, as well as Industrial, Social and Moral Reform.

The summaries of the 80 “report congresses” fill over 800 closely printed pages.13 Not all the meetings at the women’s World’s Congress were on overtly intellectual topics. Indeed critics complained that the total effect was a little light, pointing especially to the dress reformers’ domination of the sessions on “Moral and Social Reform.” Others defended dress as the mother reform because women “shackled by corset and train” would never succeed “in the close scientific study of present social conditions, and in the scientific administration of public charities.”14

12. Lawyers, S.F. CALL, Mar. 8, 1884, at 3; On Lawyers: Mrs. Clara S. Foltz’s Ideas of Shyster Practitioners, S.F. DAILY EXAMINER, Apr. 11, 1885, at 2; Clara Shortridge Foltz, The Struggles and Triumphs of a Woman Lawyer, THE NEW AMERICAN WOMAN, Dec. 1917 [hereinafter Foltz, Struggles]; REPRESENTATIVE WOMEN, supra note 10, at 8–10; BABCOCK, WOMEN LAWYER, supra note 4, at 96.
14. REPRESENTATIVE WOMEN, supra note 10, at 314.
Though the intense interest they aroused at the Congress showed that dress reformers were no longer on the fringe (so to speak), they never attracted Clara Foltz. Her 1893 portraits show her be-trained and corseted, much more like Mrs. Potter Palmer, the Chicago society lady who was head of the Fair’s Lady Managers, than Foltz’s sister-activists in comfortable split skirts. While Foltz was not converted to dress reform, she was very sympathetic to the purposes of another crowd-pleaser at the Congress: the session on Literature and the Dramatic Arts featuring a number of well-known actresses.15

“The participation of [actresses] in the congress marked and indeed made, an epoch in the progressive movement,” bringing together “artists and reformers, formerly aloof from each other,” said a contemporary observer.16 Actresses occupied an ambiguous place in late nineteenth century America. Even the most famous and successful did not fit the ideal of Victorian womanhood. Helen Modjeska, the Polish Shakespearean, who was a great hit in the United States, spoke about the difficulties. The stage “exposes us to many temptations, stimulates our vanity...and takes us...from our family duties.” Yet, she said, acting also develops “a sense of independence and therefore of responsibility.” She lamented the “materialism, or at least a practical spirit” that had made the theater “principally a commercial enterprise” and urged women to support true art. Other actresses echoed Modjeska’s line that women actresses and women reformers had much in common. Clara Morris concluded: “Standing here by the right of kindly invitation, before this great body of brainy, big-hearted women—I feel I am receiving the highest honor of my life.”17

Clara Foltz undoubtedly appreciated the inclusion of the female actors in the Congress because as a dramatic orator and courtroom lawyer, she developed and deployed similar skills and sought acceptance and recognition for them. Several years before the Fair when she was having difficulty making a living, she even considered leaving the law for the stage. All three of Foltz’s daughters had stage careers.

Joining the actors, performers and reformers in the great women’s Congress were the club women. When Susan B. Anthony looked out over the packed rooms, she was impressed by organized womanhood, but she was also dismayed. Ticking off various organizations represented at the Congress (e.g., The Federation of Clubs, 3 years old,

15. Id. at 138–192 (section entitled Literature and the Dramatic Art).
16. Id. at 162.
17. Id. at 175 (address by Clara Morris).
40,000 members; The King's Daughters, 7 years old, 200,000 members), she said of the woman suffrage movement, now in its fourth decade:

I will tell you frankly and honestly that all we number is seven thousand. This great national suffrage movement that has made this immense revolution in this country represents a smaller number of women, and especially represents a smaller amount of money to carry on its work than any organization under the American Flag.

Women's political liberty held the keys to all other reforms, she pleaded: "If only we could call upon the 5 million women in the US who sympathize with us in spirit then we could persuade congress, and state legislatures and change everything."18

The time spent on suffrage at the women's Congress was only the beginning of the turnout for suffrage rallies and speeches in all parts of the Fair. Susan B. Anthony's reception at events over the summer was the best indicator of the positive jolt that the Fair gave the suffrage cause. Every time, everywhere, she spoke, the halls were packed. New generations of women as well as those previously indifferent joined up at the Fair. Anthony's near apotheosis seemed to promise imminent victory in the struggle she led.19

It is impossible to reconstruct all the events that Clara Foltz attended on her trip to the World's Congress of Representative Women. But the newspapers picked her up several times. On May 20 for instance, Foltz was at a "meeting of prominent women connected with the National American Women's Equal Suffrage Association" planning for upcoming campaigns in Colorado, New York and Kansas. Also present were Susan B. Anthony, Elizabeth Cady Stanton, Lucy Stone, Abigail Duniway, Laura Johns, Anna L. Diggs, Rachel Foster Avery, Harriet Taylor Upton, Clara Colby, Anna Shaw, and Carrie Chapman. It would be hard to name more important movement women than these, and must have been a great thrill for Foltz to be among them.20

Another day, Foltz spoke about the poor living conditions of Italian immigrants in San Francisco, at a sub-congress on labor at which about fifteen hundred women were present and "much interest was shown." Jane Addams chaired the meeting. But the central speaker was Mrs. A.P. Stevens of Chicago, a Knights of Labor Organizer, and "one of

18. Id. at 463 (address by Susan B. Anthony of New York: Organization Among Women as an Instrument in Promoting the Interests of Political Liberty).
19. Id. at 77.
the greatest female agitators." An anti-sweatshop resolution was passed and plans made to present it to the Illinois legislature.21

On her May trip, Foltz undoubtedly visited the California Building, one of the hits of the Fair. Some of her closest friends were among the Lady Managers of the state program. From this first visit, Foltz drew the inspiration for bringing together society ladies and movement women to study law, public affairs, and to prepare for women's full political equality. In early 1894 she started the Portia Club in San Francisco, which, according to the History of Woman Suffrage had a large part in the renewal of the movement on the west coast.22 Foltz also credited the Fair with stirring "unusual activity in thought" and with the birth of the "new woman." Though like most who spoke on the subject, Foltz never fully defined the new woman, she talked often of her attributes—mainly that she sought self-improvement and education.23

II. WOMEN'S PARTICIPATION IN THE OTHER AUXILIARY CONGRESSES

Despite the fabulous success of the Congress devoted especially to them, women were initially omitted altogether from the planning of the other congresses. Even the liberal men who were their usual allies, were queasy about including women in the public meetings as planners or speakers, though they would be free to attend. Some of the opposition was based on increasingly dated arguments about women out of their spheres in public. The more modern objection centered on women's competence. From the pages of a progressive magazine, one writer who claimed to be sympathetic to women's progress, warned that if given an equal voice in the Congresses, they would almost certainly "allow zeal to outrun discretion," and "in order to swell their numbers" would include speakers who have "a merely dilettante interest in a subject."24

Some of the men also seemed to feel that the women were ingrates—that they should be satisfied with the attention and success of their own opening Congress. In addition, the women had their own building, where Congresses on topics of special interest to them were

22. 4 HISTORY OF WOMAN SUFFRAGE 479 (Susan B. Anthony & Ida Husted Harper eds., 1901).
23. S.F. CALL, Jan. 25, 1895 (Foltz commented that the reason there was so much talk about the new women after 1893 is that the Fair had stirred "unusual activity in thought."). For more on Foltz, the Portia Club and the "new woman," see BARCOCK, WOMAN LAWYER, supra note 1, at 152–153, 262–267.
held almost daily throughout the Fair. But Bertha Palmer, showing strong leadership, refused to confine women to separate spheres for the intellectual aspects of the Fair. She and her lieutenants set up women's auxiliary committees, which carried out a congress-by-congress struggle over the particulars of participation. In the end, women spoke at fourteen of the seventeen total congresses. (The exceptions were real estate, engineering, and electricity.)

No congress was more contested than Jurisprudence and Law Reform. Myra Bradwell, her lawyer-daughter Bessie Helmer, and two other Chicago lawyers, Mary Ahrens and Catherine Waugh McCullough, were on the women's auxiliary for this Congress. All four of these women were exceptionally brave and forceful. Though Bradwell was in declining health, she was the spiritual leader of the group, while her daughter did much of the actual lobbying work.

Bradwell was a sort of dean of women lawyers, having brought a case to the Supreme Court arguing that the privileges and immunities clause of the newly enacted Fourteenth Amendment gave women citizens the right to pursue any vocation or calling. At the time she sued for bar admission, Bradwell was already the editor of the Chicago Legal News, the most influential legal paper in the west. Though Bradwell lost her case, so that women were relegated to a state-by-state struggle to join the bar, the Illinois legislature passed a woman lawyer's bill. By the time of the Fair, Chicago had more women lawyers than any other city in the world.

In her newspaper, Bradwell wrote that the men fought them so hard on participation that the women thought of holding their own law reform congress, where they "could send an early invitation, giving ample time for the preparation of papers to women lawyers." But "af-

25. Ellen M Henrotin, The Great Congresses of the World's Fair, COSMOPOLITAN MAG., Mar. 1893, at 627; Ellen M. Henrotin, The Coming Congresses at Chicago, 23 WOMAN'S J., 406 (1892). (Henrotin was one of Bertha Palmer's main lieutenants and, as vice-president of the Women's Branch of the World's Congress Auxiliary, proved to be a strong leader herself.)


ter mature deliberation" they concluded that “interests of women in the profession of law would be best conserved by a joint congress,” though the invitations to four women to speak did not issue until “the eleventh hour.”

The two foreign women lawyers invited to speak, Eliza Orme of England, and Cornelia Sorabji of India, could not come due to the last minute invitation. Orme’s paper, The Legal Status of Women in England, was read in her absence by Mary Ahrens; Sorabji’s paper, Legal Status of Women in India, was presented by Bessie Bradwell Helmer. Professor Mossman has compelling biographical studies of Orme and Sorabji in her comparative study of women lawyers, and she discusses their contributions to the Congress in her paper for this symposium.

From among the dozen or so American women lawyers who enjoyed national reputations, Clara Foltz and Mary Greene were chosen by the Bradwell committee. Why these two instead of Belva Lockwood, who had twice run for President in the 1880s or Marilla Ricker, the first federal notary public, for instance, is not clear. Bradwell never said. Foltz and Greene were representative in a sense; from opposite coasts, one an office attorney, specializing in property matters, and the other that rarest of women—a courtroom lawyer. The two would become, in Bradwell’s formulation, the first women “in the history of the world” to speak for themselves “at an international congress of lawyers.”

Though there were only a few hundred people, mostly men, at the Congress, it was in the parlance of the day, a “select” audience—meaning small but impressive. The aristocracy of the American Bar was there as well as dignitaries from other countries: professors, judges, legislators, code-makers and text writers. They met from August 7th–10th, in two sessions a day, one at 10 a.m., lasting into the afternoon, and the next at 8 p.m., often extending past midnight. The complete proceedings are not published anywhere together, so must be picked up and pieced together from law journals, individual accounts and newspapers.

29. Women in the Law Reform Congress, 25 CHI. LEGAL NEWS, Aug. 12, 1893, at 435, reprinted in 48 ALB. L. J. 147 (1893); see also Public Defenders, 28 CHI. LEGAL NEWS, Aug. 22, 1896 (recalling that Myra Bradwell had “invited” Foltz to speak at the Law Reform Congress, where she had presented the public defender idea).


Green later wrote that attendance at the Fair was “the most important event in her whole career” adding that she appeared on “the same platform with leading jurists of the world, such as Sir Richard Webster of England, Hon. David Dudley Field of the United States and jurists from Scotland, Austria, Italy, Russia, Spain and elsewhere.” Clara Foltz referred to the Congress experience as visiting “the holy of holies of my profession.” Louis Frank, a European advocate of women’s rights, especially their right to be lawyers, wrote about the women lawyer’s participation in the Congress that “women lawyers had thus achieved recognition from the most eminent jurists in the world.”

Greene’s speech at the Congress explained clearly the progress women had made in their legal rights to own and manage property after marriage, outlined the further reforms needed, and seemed to accept the proposition that progress would proceed through a combination of common-law development with many legislative fixes along the road to fairness. Like the papers from Orme and Sorabji, Greene’s topic was gendered; essentially it was about fairness to women and called for change within the existing legal system. Showing thorough research and systematic exposition, the paper compared in its style and its approach to change to many of the men’s presentations on topics like the administration of civil justice, the codification of law to make it simpler and more easily applied, the reform of probate law to limit the fortunes that could be transmitted by descent and will.

Greene made the kind of arguments one would expect from a well-educated common lawyer with a scholarly bent, speaking of incremental change. By contrast, Foltz declaimed in jury lawyer, dramatic orator style, and called for revolutionizing the administration of criminal justice; she urged bold constitutional, historical, and public policy arguments in favor of her proposal. Her speech was very different from the presentations of the other women and from the men’s efforts also.

32. **MARY ANNE GREENE, LL. B.: A PIONEER WOMAN LAWYER** 5 (1917). Greene wrote her autobiography in the third person.

33. **BABCOCK, WOMAN LAWYER, supra** note 1, at 309 (quoting Foltz from S.F. CALL, Sept. 14, 1894).

34. **MOSSMAN, THE FIRST WOMAN LAWYERS, supra** note 26, at 65.

35. For a complete listing of the papers at the Congress, at least as they were planned, see **Law Reform Congress, 25 CHI. LEGAL NEWS** 387, July 15, 1893.
III. **FOLTZ'S PUBLIC DEFENDER SPEECH**

Many hours of speeches on heavy topics hardly adapted to oral presentation preceded Foltz on the program. When she took the podium on the second day of the Congress, elegantly attired with fresh flowers at her corsage, a voice that filled the room and a text buzzing with provocative phrases, Clara Foltz must have been refreshing at the least. A woman speaker on this platform was a novelty in itself, a woman with a novel idea and the rolling periods of a theatrical orator, was a sensation in this company.36

Lasting only about half an hour, the speech was short for Foltz, and devoid of personal references or patented stories. To one who knows her biography, however, she is in every line of a text taken from her jury arguments, legal briefs and lectures. Foltz's speech followed the form advised by nineteenth century rhetoricians, starting with an "exordium" on the importance of protecting the innocent. Then she turned directly to the central question of criminal defense: how do we distinguish those deserving of defense from those who are not—the innocent from the guilty?

Her answer: we don't. Until the jury verdict everyone is presumed innocent, and should be so treated. A rights-based presumption of innocence was in itself an unusual idea; Foltz continued with a string of brilliant arguments and observations. I will summarize the main ones here in order to illustrate the tone and originality of her discourse.37

One of her most powerful arguments for public defense was the prevalence of prosecutorial misconduct throughout the criminal justice system. She started by picturing the typical prosecutor, a composite of her opponents, as a powerful male figure: "strong of physique, alert of mind, learned in the law, experienced in practice and ready of speech." He was once "a minister of public justice, aiding the court in a solemn investigation of crime... laying bare the truth, whatever it may be." Here Foltz was relying on Blackstone for her history, and for the ideal of the prosecutor who takes responsibility for the fair presentation of both sides of a criminal case.

Having set him up, Clara Foltz, a preacher's daughter, made a gripping sermon of his fall. It was a tale of power corrupting. "The vani-

37. See generally Babcock, Inventing, supra note 1, at nn. 265–328 (for more on the substance of Foltz's arguments); see also WLH Website Bibliographic Notes, supra note 4 (Foltz's Arguments for Public Defense) (for this and following paragraphs in this article).
ty of winning cases” and “the lust for gold” turned him into an “indiscriminate public persecutor,” whose motives were mainly his own “interest, vanity, avarice and fear.” Then, verbatim from a brief she had recently filed, Foltz added: “Around and behind [the prosecutor] is an army of police officers and detectives ready to do his bidding, and before him sits a plastic judge with a large discretion often affected by newspapers.”

Both the prosecutor and the police, she told her audience, mistakenly believe that “it is the duty of the State to convict whoever is arrested.” The prosecutor “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.” The police, “impelled by vanity to justify its arrests” lend highly “colored testimony and overawing presence.” Again, prosecutorial misconduct and police perjury were far from usual subjects among legal writers and scholars.

After picturing the force mustered to convict the guilty, Foltz compared it to the pathetic “machinery [that] is provided for the defense of the innocent.” If the accused pleads his poverty, she said, the court may appoint a lawyer to defend but these are not usually able men. Instead they are the “failures” or the “kindergarteners” of the profession who have no resources for preparation or investigation. Foltz had used such descriptions of appointed counsel many times, starting with her Lawyers lecture in the 1880s. She described the effect on the defendant of a trial in which all the powers of his government are turned against him. Even if acquitted he “comes from the courthouse a changed man... Disgrace has crushed his manhood and injustice has murdered his patriotism.”

She spoke of the right to counsel enacted in the Federal Constitution, re-enacted in almost every State, which guarantees to the accused certain rights. He may have a speedy trial; he may have a trial by jury; he may meet the witnesses; he may have witnesses in his behalf; and he may have counsel for his defense. It is a grave question whether Congress or the Legislature may add to any of these rights a condition—if the accused can pay—a condition that renders the guaranty inoperative.

Again, this argument that burdening a constitutional right by making it costly can virtually obliterate it, was novel at the time. Moreover, Foltz’s interpretation of the constitutional right to mean that every accused is entitled to “full, adequate and free” representation was far
ahead of its time. Seventy years after Foltz spoke at the Fair, the United States Supreme Court decided as much in *Gideon v. Wainwright.*

Having painted the scene of prosecutor misconduct, neglectful and incompetent defense lawyers, confused and innocent defendants, Clara Foltz then offered her solution. "For every public prosecutor there should be a public defender chosen in the same way and paid out of the same fund as the public prosecutor. Police and sheriffs should be equally at his command and the public treasury should be equally open to meet the legitimate expenses." Unlike the usual run of appointed lawyers, Foltz's powerful advocate would investigate the case, prepare the law, summon witnesses, advise the client on the plea, and use all ethical means to achieve the most favorable result for the defendant, including a verdict at trial. No office such as Foltz described existed anywhere; she was making it up from what she had seen of bad representation in the western courts.

But she did not limit her call for "exact, equal and free justice" to courts she knew first hand. Foltz envisioned a public defender wherever there was a public prosecutor—in every courthouse in the land. Her learned audience was surely amazed at the audacity of her proposal. Perhaps they were also surprised to hear a woman on a topic so apparently removed from the usual stuff of scholarly debate and concern. Not only the subject itself, but the frankness of her language was somewhat unsettling, especially from a woman; it was unusual to refer to "vicious" and malicious prosecutors, "plastic" judges and lying police.

Foltz long remembered that her speech caused a "tremendous sensation" and claimed that *Public Defenders* "called out the most comment and discussion" of any paper read. That seems likely given the comparative liveliness and breadth of her proposal though the proceedings and discussion were not recorded and contemporary newspaper reports were sparse. Most of the Fair coverage the day after Foltz's speech was on other parts of the Congress, taking place in the same building, one having to do with municipal reform and the other with woman suffrage.

Somewhat paradoxically, since the women's appearance before the jurisprudes was a momentous event in the history of women's pro-

gress, the simultaneous meeting on suffrage drew the most attention. It packed in "[o]ne thousand women and a red-headed man," according to *The Chicago Tribune*. Susan B. Anthony, Frederick Douglas, Clarence Darrow, and many old workers like Laura Gordon, and the young women who would lead the next generation were there rather than next door listening to the legal scholars. Swelling the audience were hundreds of women who had never been to a suffrage meeting back home. For the first time in a long while, the vote for women seemed very near. Looking out over the multitudes, Anthony spoke of "wandering in the wilderness of disenfranchisement for forty-five years, five years longer than the children of Israel." But now, at last, she prophesied, the promised land was in sight.

In the same news story reporting on Anthony's moving speech, one paper also noted that at the meeting on jurisprudence and law reform "Miss [sic] Clara Shortridge Foltz of the San Francisco bar, easily carried off the palm" and added that that her presentation "was highly complimented by several of the most eminent jurists present." This accords with Foltz's memory of the instant success of her speech, though Belva Lockwood, writing up her impressions of the Congress noted that Judge Woods of Indiana found Foltz's description of the need for public defense "exaggerated."

It would not be surprising if the public defender idea raised opposition at the Congress. Several years earlier Foltz had spoken on the subject at a convention of rump suffragists and liberal reformers, and roused a debate, along gender lines, with male lawyers attacking the concept, and women lawyers supporting it. Men took it as a criticism of the court system they ran, for one thing. Also, they thought many court appointed lawyers did a good job—and it is true that at least some did, especially in less heavily populated places, where the lawyers knew each other and there was a kind of peer review. Foltz acknowledged that sometimes good lawyers would represent poor people but she said this was not generally true. Of course, as a matter

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40. *Law Reform Congress, CHI. TRIBUNE*, Aug. 9, 1893 ("red-headed man").
of rhetoric, she could hardly present her costly proposal as a minor fix to a system that was working pretty well.

Of more consequence than the immediate reception of Foltz’s public defender speech, is her decision to give it at all. It was a courageous and idealistic thing to do, highlighted by the fact that she had a choice. Foltz had on hand an impressive, well-honed speech on a clearly jurisprudential topic—how law should adapt to the pace of technological change. Written in academic language, exhibiting erudition, and containing an original idea, *Evolution of Law* proposed that the state supreme court act as an advisory council to the legislature to improve the speed and quality of legal change. Rather than wait for the vagaries of litigation to bring a case for review on constitutional grounds, the court would automatically study legislation soon after passage and suggest changes to remedy constitutional defects. This is the paper she delivered at the meeting of women lawyers sponsored by the Isabella Society and held a few days before the Congress of Jurisprudence and Law Reform.44

Foltz’s *Evolution of Law* compares well with the only very famous paper from the World’s Congress. Delivered by Harvard Law Professor James Bradley Thayer, it advocated restraint in Constitutional review of legislative decisions, and would apply the same standard as an appellate court reviewing a jury verdict for sufficiency of the evidence: reversing only when there was no reasonable doubt about the error below. His ideas stirred “deep interest” from the start and today the speech is considered one of the greatest commentaries on constitutional law ever delivered anywhere.45

Though he said nothing specifically political, Thayer’s analysis undermined the invalidation of progressive and protective labor laws by conservative appellate courts. Similarly, Foltz’s *Evolution of Law* speech had a political concern right beneath her legal analysis. Suffrage measures often faced court challenges that tied up their execution, sometimes for years; Foltz’s idea would speed the review. If Foltz had given *Evolution* at the Congress of Jurisprudence and Law Reform, it

44. BABCOCK, WOMAN LAWYER, supra note 1, at 226–231.
would have fit right in with the tenor of the other presentations, especially Thayer’s, the one that has historically gained all the attention.

As her biographer in search of Foltz’s motives without the benefit of her papers, I have long suspected that she wrote Evolution for delivery at the Congress, and then, perhaps impulsively, substituted the speech she gave on Public Defenders. But I am not able to show that. I do know that she was working on a brief in a case she lost because of prosecutorial misconduct when she received the last minute invitation to speak at the Congress. The public defender idea had to be prominent in her mind as Foltz reviewed the abuses at trial and pursued the appeal without hope of financial reward even if she won (which she ultimately did).46

Instead of her erudite paper on effecting change through the legal process, Foltz gave her barn-burner speech about public defense. Using a precious opportunity for personal advancement, on the best platform of her life, she sought to arouse and inform these influential men about conditions in the baseline criminal courts. Most of them had no idea because by the end of the nineteenth century, as the profession grew increasingly stratified, the legal elites were far removed from this type of practice.47 At the same time, urbanization, industrialization and immigration were putting tremendous pressure on the appointed counsel system. Clara Foltz declared that the situation was dire and that strong measures were needed. She went on to draft a public defender statute, write two important law review articles on the subject, and to see the first office in the United States established in Los Angeles. Public defense was part of the new city charter passed with women’s votes in 1912.48

IV. WOMEN’S RIGHTS AND PUBLIC DEFENSE

Foltz did not speak or write at any point of a connection between women’s rights and public defense. Indeed, she never even acknowl-

46. Babcock, Woman Lawyer, supra note 1, at 298–305 (describing People v. Wells, 100 Cal. 459 (1893)).


edged that the women's auxiliary committee was the source of her opportunity to speak at the World's Congress. Instead she said that she represented the California Bar there. Though there is no record of this other than her statements, this is possible since the head of the Bar in 1893 was a close family friend and supporter of Foltz's. She may well have thought it would increase her credibility to speak with the Bar credential rather than the women's invitation, and engineered the sponsorship at the last minute.

Though Foltz did not connect her two great causes, the idea of public defense surely grew from her own practice situation. For anyone without independent wealth or family connections, starting a law business was hard in the nineteenth century. For Clara Foltz, who had no choice but to hang out her shingle alone, it proved extremely difficult, especially in the early days of her practice, to attract paying clients. Instead, she 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 her client. But only the most destitute criminals were desperate enough to turn to a woman lawyer. Indeed, some of her criminal defendants did not turn to her but were assigned by a judge to her for their defense. Foltz suggested that she was called on more often than male attorneys for this duty because she promoted the public defender idea. “Though they laughed at my idea as chimerical,” she wrote, criminal court judges often appointed her to cases “as a sort of try-out of my idea.”

When she went to the criminal courts on behalf of her poor clients, Foltz appeared as an outsider and newcomer. Thus, she saw the injustices ignored by the regulars, who she said were case hardened by constant contact. 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 started urging a public defender a few years after she started practice in lectures she gave in the 1880s to supplement her income as a lawyer.

One of her most popular productions, entitled simply Lawyers, was a humorous account of her lawsuit against Hastings. She then

49. See Allen, supra note 39 (represented Bar). Judge W.W. Morrow, a family friend, former Republican Congressman and currently on the Federal Circuit court, was also the head of the Bar in 1893 and could have made the designation. See OSCAR TULLY SHUCK, BENCH AND BAR IN CALIFORNIA (1888) (Morrow entry).

50. BABCOCK, WOMAN LAWYER, supra note 1, at 290 (quoting from Foltz, Struggles).
went on to talk about the profession generally—especially the inadequacies of appointed counsel and the unfairness of pitting trained prosecutors against shysters, incompetents, or no lawyers at all for the accused. She told her audiences that it would change everything for the criminally accused to be represented by a powerful figure backed by the full resources of the state. At the same time she spoke of justice for the accused, however, Foltz’s sub-text was equal treatment for women lawyers in the courtroom.51

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. At the same time, they 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. The existence of a public defender would make criminal defense more respectable and acceptable for everyone—especially perhaps for women lawyers.

Though in this light, Foltz’s public defender is related to the movement for women’s equality in the legal profession, it is a secondary and indirect relation. Moreover, I think it is a stretch to suggest, as Professor Mossman does, that Foltz’s proposal was “a reform initiative in women’s interest” because it would benefit female defendants (making free counsel available to them). Foltz did not even hint that she was thinking of women more than any other accused in creating the office and she specifically urged a few years later that the sexes should be treated exactly the same by criminal justice system.52

On the other hand, public defense is related to women’s rights in Foltz’s own biography and mainly through her efforts it became part of the reform agenda of some suffragists and progressives. In a larger sense, women’s rights were part of all Foltz’s reform efforts. She wanted suffrage, for example, as a badge of full citizenship, but 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 idea women would contribute.53

51. Id. at 292.
53. "THE BLUE BOOK": WOMAN SUFFRAGE, HISTORY, ARGUMENTS AND RESULTS 53-54, 57 (Frances M. Bjorkman & Annie G. Porritt eds., 1917) (suggesting that "women's first care after their enfran-
CONCLUSION: WOMEN LAWYERS AND WOMEN’S RIGHTS

Professor Mossman and I study pioneer women lawyers, she on a global and I on an individual scale. And each of us admires and benefits from the other’s work.54 We have some differences in interpretation that I will briefly take up here, though not all are specifically related to this symposium. The first has to do with the involvement of first wave women lawyers with women’s rights.

In reviewing Professor Virginia Drachman’s Sisters in the Law: Women Lawyers in Modern American History (1998),55 I argued for more emphasis on the connection between the women lawyers and the women’s rights movement. I relied on Foltz’s life, and other biographical evidence collected at the Women’s Legal History website to show this connection. I also pointed out that the arguments against women becoming lawyers, serving on juries, and voting were all essentially joined. They had to do with women’s proper sphere, the rough male nature of the courtroom and the polling place, and the possible change in women’s nature (un-sexing them) if they left the domestic sphere.

As to the suffrage wing of women’s rights, I think many if not most of the early women lawyers sought political equality. Certainly both sides in the long struggle for the vote assumed suffrage support for women professionals, and vice versa. The suffrage press heralded newly made women lawyers as a great plus for the women’s movement. In Foltz’s life, especially in the 1880s and 90s, the suffragists were constantly at her side, lobbying, supporting her financially, filling courtrooms and lecture halls where she appeared. Moreover, I believe from the biographical evidence, that the opposition to women lawyers was so powerful that connection to a cause greater than their personal ambition was a practical necessity for the early women lawyers.

Initially, Mossman’s objection to my observation about the nexus between the pioneer women lawyers and the women’s rights movement seemed to be one of nomenclature; I wrote that I thought biographical digging would reveal “a self-conscious feminist in virtually every [early] woman lawyer.”56 She pointed out that the term “feminism” did not come into general use until the early twentieth centu-

56. Id. at 1699.
In a later article, Mossman suggested that perhaps I was making a "historical judgement about these women, based on their ideas and actions, rather than merely focusing on the linguistic terminology in use in the late nineteenth century." That's right; but to avoid arguments about the word "feminism" (which I love, but which seems increasingly to rouse needless opposition), I've been sparing in my use of it, especially as to the first-wave women lawyers, since Mossman's comment in her 2006 book.

But in a recently published book chapter Mossman continues to take issue with my presentation of the relation of the pioneer women lawyers to women's rights. Relying on Professor Nancy Cott, she defines "feminism's" three elements: opposition to male hierarchy, recognition that the social situation of women can be changed, and identification with women. Mossman finds that early women lawyers fail on the third factor because they became identified instead with professional standards of merit. She is right that something like this happened—but not in the late nineteenth century. Not until suffrage was achieved did women professionals put aside their female identification and focus instead on the "neutral and meritocratic ideology" of the professions to mark their progress.

The post-suffrage generation of women-lawyers did not have any real choice in the matter; they were so few, and once assimilated to the ethos of individual merit, so removed from each other. As Professor Cott observes: "Without the meritocratic pretensions of the professions women had no warrant for advancement or power within them at all." Thus did women take up "the professional credo that individual merit would be judged according to objective and verifiable standards," and clung to it "even when they saw it travestied in practice."

Mossman's evidence that the ideological divorce between women lawyers and the women's rights movement actually started in the 1880s and 1890s is very thin. Clara Foltz and the other early women

57. MOSSMAN, THE FIRST WOMEN LAWYERS, supra note 26, at 288.
59. Id. at 18.
61. Id. at 234.
62. For instance, she emphasizes a letter from Mary Greene in which she says that she does not have much to do with the suffragists because she disagrees with their emphasis on reform through the ballot, and their rhetoric about the inadequacy of present laws. Mary Jane Mossman, Women Lawyers and Women's Legal Equality: Reflections on Women Lawyers at the 1893 World's
lawyers I have studied put the condition of women at the center of their thought and activities—and worked to change and improve that condition. That is the heart of feminism whatever it is called. Again, though I have yet to do an exact count, my belief based on biographical study is that most of the early women lawyers were feminists in that sense, and many were like Clara Foltz, card-carrying members of the women's rights movement.

As to the presentations at the Congress of Jurisprudence and Law Reform, I don't think there is any way to fit them into a thesis about women lawyers separating themselves from the women's movement. In most respects Mossman's own careful look at the four presentations and the women's individual biographies show the opposite—three of the women spoke specifically on gendered topics, and Clara Foltz launched a movement for public defense that was only indirectly related to women's rights, professionalism or any other known cause. Generally, Professor Mossman calls for a more nuanced assessment of the relationship of the women lawyers to the women's rights movement, and the need to study early women subjects on their own complex terms. I applaud this approach and seek to engage in it myself.