

WOMEN DEFENDERS IN THE WEST

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Most of the 208 women lawyers captured in the 1890 census did office work, in association with their husbands, brothers, or fathers. Few went to court, and fewer still specialized in criminal defense.¹ Despite the fact that women defenders were a miniscule number within a tiny group, the dark image of a woman appearing on behalf of the criminally accused was commonly invoked against women becoming lawyers at all. Why this was so, and what special qualities women brought to criminal defense is the subject of this essay.

Clara Shortridge Foltz, California's first woman lawyer, was one of the first women defenders. Like most of the others, she practiced criminal defense mainly in the West, where social conventions made it easier to appear and argue before all-male juries. A few of Foltz's stories, along with some others gathered by students in my seminar on women in the legal profession, are the basic sources for this piece.² Women defenders discussed here, in addition to Foltz, are Lelia Robinson, Laura Gordon, and Lavinia Goodell.

Lelia Robinson, who was herself an historian of women lawyers, offers an ideal starting point. She defended criminals in Washington Territory in the mid-1880s. In order to gain this experience, she had migrated from Massachusetts, where she was the first woman lawyer in the state. It was an arduous

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¹ VIRGINIA DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN* (1998) (table) (Decennial growth of women and men lawyers, 1870-1960) (showing 208 women lawyers 89,422 men lawyers in 1890).

² Students in my Stanford Law School seminar, "Women in the Legal Profession," each write a chapter in the life of a pioneer woman lawyer. These are collected with other information on early women lawyers at *Biography Project* <<http://www.stanford.edu/group/WLHP>> [hereinafter cited as WEBSITE]. In this piece, I discuss Clara Shortridge Foltz, my own biographical subject, Lelia Robinson, Laura Gordon and Lavinia Goodell. Other western women defenders whose biographical chapters appear on the website are Kate Kane of Chicago and Mary Leonard of Oregon.

journey to a wild destination and Miss Robinson traveled alone in 1884. Certainly no one would have predicted only a few years earlier, that she would be capable of such a journey. In the late seventies, when she matriculated at Boston University law school, her great worry had been about daily student life: how was she to deal with fellow students, given that no lady should speak to a man unless they had been formally introduced.³

She worked out this problem, and did well at her studies, finishing fourth in a graduating class of thirty-two. But the Massachusetts courts would not admit her to practice on account of her sex. In 1880, following the path of other first women (in fact, citing Clara Foltz's case in California), Robinson turned to the legislature, lobbied through a woman lawyer's bill, and became the first to take advantage of it.

Even duly licensed, she had no offers of employment in Boston. So she hung out her shingle, and found, as she later wrote, that the "embarrassments and difficulties" she encountered without prior training "in an established office are such as none but those who have experienced them can ever realize."⁴ Frustrated because the little business she had was office work, and feeling that "the public judges a woman lawyer, as it does a man, largely by his success in court," Robinson set out for the West. Washington Territory had adopted women's suffrage, and women served on juries there. She figured on courtroom opportunities in a place so liberal on the "woman question."

Practically upon her arrival in Seattle, Robinson was appointed by the territorial judge⁵ to represent the indigent accused. Though "the sound of my own

³ VIRGINIA DRACHMAN, *WOMAN LAWYERS AND THE ORIGINS OF PROFESSIONAL IDENTITY: THE LETTERS OF THE EQUITY CLUB, 1887 TO 1890* (1993) has a biographical entry on Robinson 257-261, as well as reprinting her letters to the correspondence club of women lawyers. 63-67 [hereinafter cited as *Equity Club Letter*, 1887]; 117-128 [*Equity Club Letter*, 1888]; 200-201 [*Equity Club Letter*, 1890]. More on Robinson may be found at Sarah Killingsworth, *Lelia Robinson*, and Mary Nicol, *Lelia Robinson Sawtelle: A Second Look* [hereinafter cited as Nicol, *A Second Look*], *Biography Project*, <<http://www.stanford.edu/group/WLHP>>. Nicol has a section devoted to Robinson's Washington Territory Experience. The quotes in this paragraph are from *Equity Club Letter* 1888, at 126.

⁴ *Equity Club Letter*, 1887, *supra* note 3, at 65.

⁵ Roger Sherman Greene was the Judge for Washington Territory. He was also, and easily, the most distinguished man in the Territory. His grandfather, Roger Sherman, was a signer of the Declaration of Independence and the Constitution. A Civil War veteran, Greene had commanded a "colored" regiment, been wounded at Vicksburg, practiced in New York and Chicago and been appointed by President Grant to the Territorial Court in 1870. In addition to hearing appeals, he held district court ten times a year.

Greene was a devout Baptist and Prohibitionist. After retiring from the Court in 1887, he ran unsuccessfully on the Prohibition party ticket for Congress, and for Governor. He was also a great believer in women's rights, a male ally to the women suffragists. The source of his women's rights stance may lie in the connection between prohibition and women suffrage. He also had three daughters. C.T. CONOVER, *MIRRORS OF SEATTLE* (1923); HISTORY OF SEATTLE WASHINGTON (Frederick James Grant ed., 1891); Judge R. Greene, *Pioneer Justice Dies in Seattle*, SEATTLE TIMES, Feb. 18, 1930; *Equity Club Letter*, 1888, *supra* note 3, at 120-21; Nicol, *A Second Look*, *supra* note 3, at 11-13 (a section on Judge Green's mentorship); Lelia Robinson, *Women Jurors*, 1 CHICAGO LAW TIMES, 22, 25 (1887) [here-

voice in public [was] quite unknown to me," she was soon defending poor men before "mixed juries", i.e. containing men and women. She was the first woman to have this experience, and later wrote that if woman jurors "failed in either direction, it was in sometimes being a trifle too logical, not allowing sweet pity to have its fair influence."⁶ Robinson complained of a particular woman juror who "thought my Chinaman client to be guilty. . . . Whereas he was really quite innocent. [T]he following week on another case, my first peremptory challenge was expended on this lady, whom I did not dare trust again."⁷ Thus, in Washington Territory in 1885, Lelia Robinson became not only the first woman lawyer to argue to a mixed jury, but the first to strike a woman from the panel.

Robinson found that she was good at criminal jury work, and she was also "delighted with the place, climate, people and the bright new civilization" in Washington Territory.⁸ But she grew lonely for her parents and sister in Boston, who had reneged on their promise to follow her. By 1888, she was back practicing in Massachusetts, not doing much in the criminal line. Yet, she found it easier to get established at home this time around because she had been "so broadened and liberalized by my experience in the . . . west that . . . my own greater self-confidence helps people more readily to place confidence in me."⁹

Her story sets the themes here - the immense difficulties faced by early women lawyers, enlarged if they wanted to do trial work, further magnified if the work involved criminal defense. In order to argue before juries, Lelia Robinson left her family and social connections in Massachusetts and traveled alone across the continent. In the West she found opportunity never before known to women.

WOMEN DEFENDERS: THE NEGATIVE IMAGE

Because Lelia Robinson tried her first criminal cases in a place where women, for a brief, bright interlude, had suffrage and served on juries,¹⁰ she did not face one of the main arguments against women lawyers: the fact that they must appear before, and seek favor from, all-male juries. Opponents conjured up a seductive woman defender pleading passionately and personally to twelve men, skewing justice and shaming herself, and all womankind, in the process

inafter cited as Robinson, *Women Jurors*]. Robinson wrote about her jury experiences in this journal put out by a fellow woman lawyer, Catherine Waite.

⁶Robinson, *Women Jurors*, *supra* note 5, at 22.

⁷Robinson, *Women Jurors*, *supra* note 5, at 27.

⁸*Equity Club Letter*, 1888, *supra* note 3, at 121.

⁹*Equity Club Letter*, 1888, *supra* note 3, at 125.

¹⁰Women's suffrage and jury service were in effect in Washington Territory for only five years, from 1883 to 1888. Women did not vote (or serve on juries) again in Washington until 1910. See Mary Nicol, *The Washington Territory Experience*, WEBSITE, *supra* note 2, at 2-11 and sources cited.

(this image had more rhetorical force than a woman lawyer in a cozy office-parlor, writing a will for another lady—a picture closer to reality for most early women lawyers).

The negative image of the woman advocate in a criminal case was constantly raised against Clara Foltz and her friend Laura Gordon when they were trying to become lawyers and attend law school in California in the late seventies.¹¹ “Impressionable male jurors,” their opponents argued, would return “a verdict of acquittal without leaving the box,” and “the law and the facts would be simply ignored.”¹² When Foltz and Gordon sued Hastings Law school for admission, an opposing counsel forthrightly stated his fear: “lady lawyers were dangerous to justice inasmuch as an impartial jury would be impossible when a lovely woman pleaded the case of the criminal.”¹³ Behind the “honeyed compliment” as Foltz called this kind of thing, was a primal terrible image: a woman lawyer wins an acquittal (by using her feminine charisma) for a guilty man (a murderer perhaps) from an all-male jury (chivalry defeats justice).

Women defense lawyers would produce the wrong results, and at the same time, they would degrade themselves. When Lavinia Goodell, the first woman lawyer in Wisconsin, sought to join the bar of the state supreme court in 1876 in order to appeal a criminal case, Chief Justice Ryan wrote a long opinion denying her the right to practice in the higher court. He said that “reverence for all womanhood would suffer in the public spectacle of woman so engaged.” The criminal law itself was especially wrong for women, and women wrong for it. “It would be revolting . . . that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice: all the unclean issues, all the collateral questions, of sodomy, incest, rape, seduction, fornication, adultery, pregnancy, bastardies, illegitimacy, prostitution, lascivious cohabitation, abortion, infanticide, obscene publication, libel and slander of sex, impotence, divorce.”¹⁴

Missing from his parade of horribles were most common law crimes. He

¹¹In the course of researching a biography of Foltz, I have written the story of her entry into the Bar, and of Laura Gordon’s efforts in tandem with Foltz. Barbara Allen Babcock, *Clara Shortridge Foltz: Constitution-Maker*, 66 IND. L.J. 849 (1991) [hereinafter Babcock, *Constitutional-Maker*]; Barbara Allen Babcock, *Clara Shortridge Foltz: First Woman*, 30 ARIZ. L. REV. 673 (1998), [hereinafter Babcock, *First Woman*] reprinted with a new introduction in 28 VAL. U.L. REV. 1231 (1994). For studies of Laura Gordon, and many additional citations, see Renee F. Hawkins, *Laura DeForce Gordon: Fragments of a Feminist Pioneer* (1997); Laura J.C. Davis, *Laura DeForce Gordon as a Spiritualist: Lessons from the Great Beyond* (2000), WEBSITE, *supra* note 2.

¹²Babcock, *First Woman*, *supra* note 11, at 689 n. 80 (citing SACRAMENTO UNION, Jan. 11, 1878).

¹³Babcock, *First Woman*, *supra* note 11, at 711 n. 197 (citing DAILY ALTA, Feb. 25, 1879 at 1).

¹⁴In re Goodell, 39 Wis. 232, 245-47 (1876), reprinted at WEBSITE. Also in Biographical Chapters, on WEBSITE, *supra* note 2. See TERESA M. DERICHWEILER, *THE LIFE OF LAVINIA GOODELL: WISCONSIN’S FIRST WOMAN LAWYER* (1997); LAURI SCHUMACHER, *LAVINIA GOODELL: ADVOCATE FOR PRISONERS* (2000).

did not inveigh against women “mixing professionally” with the more general mine of criminal cases: not a word of violence and murder, train robberies and saloon hold-ups. All his “unclean issues” intimately involved either the female sex, sex itself, or both - things women knew as much about as men. Yet it is not what they knew, but mentioning it in public, or in mixed company, that the chief justice found so repellent.

In another part of the opinion, Judge Ryan cited an old English case involving sodomy committed on a young girl.¹⁵ The question was whether the criminal statute, written in terms of a male victim, covered the case. Justice Ryan found this case relevant to whether the Wisconsin Code allowed Lavinia Goodell to be a lawyer. With ill-disguised satisfaction, he pointed out that “no modest woman could without pain and self abasement” even read this important precedent, much less “so overcome the instincts of sex as to publicly discuss it.”¹⁶ In the same vein, one of the arguments used against Foltz and Gordon was that women lawyers would be embarrassed at trial by the necessity of cross-examining on some indelicate subject.¹⁷ As Justice Bradley of the U.S. Supreme Court had written, concurring in the opinion that Myra Bradwell had no constitutional right to practice law, “the natural and proper delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”¹⁸

WOMEN DEFENDERS AND WOMEN JURORS

The women lawyers were not the only ones who would be defiled by their defense of criminal cases. Other women, symbolically and actually, would be corrupted. The opponents had several well-elaborated arguments about how this would occur. First was the assumption that once women invaded the courthouse as lawyers, then the only way to offset their bad effects on justice, would be to put women on juries. “Upon such a panel the woman lawyer’s seductive and persuasive arts would be wasted.”¹⁹

Though this argument - that women lawyers would produce women jurors - might initially appear far-fetched, it gained credibility from the women law-

¹⁵ In re Goodell, *supra* note 14, at 242 (citing King v. Wiseman).

¹⁶ In re Goodell, *supra* note 14, at 246. Though Chief Justice Ryan’s examples were mostly of women lawyers arguing before juries in criminal cases, he added that even the appellate argument of Goodell’s cause was hampered by her presence in court. (She did not argue her own case.) He noted that the Court had to forego its *reductio ad absurdum* of counsel’s argument about the statutory reference to males including the female also because it could not mention the rape and bastardy statutes in a lady’s presence.

¹⁷ Babcock, *First Woman*, *supra* note 11, at 689 n. 82 (citing SACRAMENTO UNION, Feb. 26, 1878, which contains the argument of an assemblyman against the bill allowing women to be lawyers).

¹⁸ Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873).

¹⁹ Babcock, *First Woman*, *supra* note 11, at 689 n. 81 (citing SACRAMENTO UNION, Feb. 26, 1878 at 1, which contains the argument in the California legislature against the bill enabling women to be lawyers).

yers themselves. Clara Foltz and Laura Gordon, Lelia Robinson and Lavinia Goodell were working for the day when women would be jurors. Becoming lawyers and serving on juries were joined as causes, along with voting, in the movement for equal citizenship.²⁰

To their male adversaries, the prospect of women jurors was as ugly as that of women lawyers. Jurors, like the women lawyers, would be degraded - first by the evidence they would be forced to hear in criminal cases - "all the unclean," etc. Even worse, they would hear this evidence in the forced company of men. Also raised was the specter of the woman mingling in a new social relationship with men in that most intimate setting: the jury box.²¹

Another set of arguments against women jurors had to do with their competence. These arguments were not perfectly consistent. First it was said that women had special expertise, and could help the jury overcome the feminine wiles of women lawyers. On the other hand, some adversaries urged that women as jurors would tend to support their fellow women; and often in the same breath, that jurywomen would vote for the handsomest man. Either way, the argument was that women jurors would not be deciding on the basis of the evidence.

The contentions were often reduced to a syllogism: women lawyers will bring on women jurors (and that's what you strong-minded women want); women jurors will be defiled by hearing dirty evidence and by being sequestered with male strangers; therefore there should be no women lawyers. All of the early women defenders met this argument repeatedly. Few of them were able to refute it from actual experience with women jurors. Thus, when Clara Foltz passed through Washington Territory on a lecture tour, she rushed to the courthouse as soon as she arrived in Seattle - in order to see the wondrous sight - and to experience the vision of mixed juries that had drawn Lelia Robinson across the continent.

The sight - the "grand evidence of progress" - moved her so much that Foltz "had hard work to maintain my self-control."²² Responding to the common claim that there was something indecent, even lewd, about a woman being

²⁰ Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1163-70 (1993) (showing how the struggle for jury service was joined with that for access to the professions and for suffrage); *J.E.B. v. Alabama*, 511 U.S. 127, 142 n.14 (1994) (recognizing the joining of all three causes).

²¹ The history of women's efforts to attain jury service is well surveyed in DEBORAH L. RHODE, *JUSTICE AND GENDER*, 48-50 (1989), Joanna L. Grossman, *Women's Jury Service: Right of Citizenship or Privilege of Difference?* 46 STAN. L. REV. 1115 (1994), and Carole L. Hinchcliff, *American Women Jurors: A Selected Bibliography*, 20 GA. L. REV. 299 (1986). See also, Babcock, *A Place in the Palladium*, *supra* note 20, at 160-74.

²² NEW NORTHWEST, Dec. 17, 1885, p. 4 (Foltz related her sight of a mixed jury to the weekly newspaper published by Abigail Duniway, an Oregon suffrage leader). Lelia Robinson's first impression of women jurors was much the same as Foltz's: "Their faces and manner . . . showed them to be, without exception, cultivated, educated women of fine, delicate feminine instincts" bringing to jury work "the same intelligent conscientious care and attention that they had given for years to their domestic affairs," Robinson, *Women Jurors*, *supra* note 5, at 24.

on the jury, Foltz went on to describe one of the “ladies of the jury: a motherly-looking, intelligent woman, with hands encased in cotton gloves and bonnet strings tied snugly under her chin, listening with conscientious intent to the argument. This earnest woman,” Foltz continued indignantly, was “the reality, the fiction of which has been made the theme of ribald jest and unseemly denunciation for lo! these many years.”²³

WOMEN DEFENDERS AND WOMEN SPECTATORS

Women lawyers would not only necessitate women jurors, but would drastically affect the ambience of the courtroom in another way as well. Women spectators would come whenever women lawyers appeared - to support them. Coming into the courtroom space, especially when women were the subject of the case, was a common tactic of the women’s movement.

One of the most famous uses of the tactic occurred in San Francisco in 1871, long before there were any women lawyers. Laura Fair was tried for shooting Alexander Crittenden, her married lover. Her defense was temporary insanity, brought on, she claimed, because he had “ruined” her - and her daughter as well.²⁴ Crittenden was a well-known lawyer, and his law partner joined the prosecution as special counsel.

The suffragists invaded the all-male enclave of the courtroom to support Laura Fair, because, they said, the lawyers were hell-bent on avenging one of their own. Crittenden was a man “whose acts were identical to hers, and whose excuse for those acts were, to hers as a grain of sand to a mountain of granite,” wrote a suffrage leader at the time.²⁵ The women spectators became an explicit part of the trial drama when the special prosecutor (Crittenden’s law partner) asserted that Laura Fair was a free lover like them, and like them, endangered the home. He ridiculed Fair’s defense that a tipped womb and abnormal menstruation drove her temporarily insane, sneering that meant that a third of the women in San Francisco might commit murder at any moment.²⁶ The prosecution of Fair as an abnormal woman succeeded, and she was awaiting execution when Susan B. Anthony came to town.

After visiting Fair in jail, the eminent national leader added these words to the peroration of her suffrage speech that night. “If all men protected the rights of all women, [as they claim to do], you would have no Laura Fair in your jail tonight.” Barely were the words out than the respectful audience turned into a furious mob, booing, hissing, shaking their fists. Anthony managed to control the crowd with the tactic she had perfected as an abolitionist orator. She waited

²³ NEW NORTHWEST, Dec. 17, 1885, p.4.

²⁴ KENNETH LAMOTT, WHO KILLED MR. CRITTENDEN? (1963) at 123. This work addressed to a popular audience rests on extensive newspaper research as well as on the official transcript of *The Trial of Laura D. Fair for the Murder of Alex P. Crittenden*.

²⁵ *Id.* at 283-84 (quoting a suffrage leader, Emily Pius Stevens).

²⁶ *Id.* at 273.

out their display, and repeated her sentence word for word. She did this three times until the spectators subsided, but Anthony was staggered. "Never in all my experience have I been under such fire," she said later. She cancelled the rest of her lectures, and toured Yosemite instead. Ultimately, after an appellate reversal, Laura Fair was acquitted by a second all-male jury.²⁷

The Fair episode, with its memories of women spectators, was still fresh in the public mind when Clara Foltz and Laura Gordon were arguing their case for admission to law school. One paper reported that the courtroom was filled with "prominent adherents of the woman suffrage movement,"²⁸ and another spoke of large numbers of "the aggressive female sex."²⁹ Their presence was strongly felt: "a beam of pleasure seemed to float over the place when a point was made in favor of the ladies and a sense of disappointment at anything that told against them."³⁰

Rows of ladies, hatted and gloved, with their parasols and walking sticks, many dressed in the latest fashion (polka-dot bombazine), and a few in the new split skirt - this decidedly changed the courtroom atmosphere. It was, however, one thing and perhaps even supportable, when the ladies came to court to listen to arguments about women being admitted to law school, and quite another when they came to hear a criminal case which included "all the unclean issues." Yet soon after Foltz and Gordon became lawyers, their supporters turned out in force to witness their appearance in just such a case.

WOMEN DEFENDERS: THE ACTUAL EXPERIENCE

Opponents feared that women lawyers would drastically change the all-male courtroom, and that their very presence would affect the juries. Soon after they became lawyers, Clara Foltz and Laura Gordon appeared in a criminal case in San Francisco that mirrored many of the dire predictions of their opponents. The case was one of murder, always a sensation in San Francisco, where the whole town would frequently focus on a particular trial. This murder case was made more notable because it came up against a background of recent jury acquittals, so many in fact that some people warned that San Francisco was becoming a mecca for murderers, where anyone could be sure of getting off on a plea of temporary insanity.

The defendant was George Wheeler, a handsome stranger from upstate, who had in fact apparently come to town to kill his sister-in-law, with whom he

²⁷ *Id.* at 285-288; IDA H. HARPER, *THE LIFE AND WORK OF SUSAN B. ANTHONY*, 391-92 (1898); KATHLEEN BARRY, *SUSAN B. ANTHONY: A BIOGRAPHY OF A SINGULAR FEMINIST*, at 238-39 (1988).

²⁸ *SAN FRANCISCO CHRONICLE*, Feb. 25, 1879 at 1, cited in *First Woman*, *supra* note 11, at 708, nn. 184,185.

²⁹ *SAN FRANCISCO CALL*, Feb. 25, 1879 at 1, cited in Babcock, *First Woman*, *supra* note 11, at 708, nn. 184, 186.

³⁰ *Id.*

was having an adulterous affair.³¹ In cases of special concern, the prosecutor would sometimes associate a distinguished private member of the Bar to assist in presenting the case. The prosecutor in Wheeler asked Clara Foltz to join him, not because she was yet very distinguished, but because she was a woman. Evidently, he bought the arguments about the effect women lawyers had on juries. And so did the Wheeler defense lawyers, who sought the services of the only other woman lawyer in the state: Laura Gordon.

When the case came to trial, women spectators vied with men for the best seats in the courtroom, particularly annoying to gentlemen who were required to surrender their places to ladies. The women spectators were there to support the women lawyers. Undeterred by the fact that Foltz was for the prosecution and Gordon for the defense, their suffragist friends were making the point that women belonged in the courtroom just as they belonged at the polls and in the jury box. To opponents of the movement, the womens' attendance simply confirmed that allowing women to be lawyers would ultimately expose others to "all the nastiness that finds its way into the courts of justice." The Wheeler audience did hear some very racy testimony about a young girl "ruined by a missionary minister when she was 14," and about Wheeler's *menage a trois*.

The case of Wheeler, the woman slayer, was the first murder since the Laura Fair trial to call the suffragists to the courtroom in force. For many of the male lawyers, their presence thus evoked a bitter memory. But the women were there to support the women lawyers this time, as they would be whenever Foltz or Gordon appeared, whether the case was sensational or mundane. So many women once came to see Laura Gordon defend a murder case that one paper sarcastically noted: "it appears that the solemn business of the tribunal has been temporarily postponed to accommodate a woman's rights convention Such is the deep interest taken in woman's gallant struggle to break the degrading bonds of ridiculous custom and meet and vanquish the male oppressor in any field."³²

The argument with which we have been dealing is that women lawyers would degrade themselves and lead to the defilement of other women. But the male objections to women lawyers reflected something else as well. One of Clara Foltz's opponents, arguing against her right to attend law school, noted 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."³³ A writer in the *Sacramento Union*, who was covering the case

³¹ The *Wheeler* case is covered daily in the San Francisco newspapers from October 1880 through February 1881. Clippings from *The Call*, *The Chronicle*, and *The Examiner*, are on file with the author. The case is also discussed in THOMAS S. DUKE, *CELEBRATED CRIMINAL CASES OF AMERICA* at 68 (1910).

³² *The Trial of Saldez in Judge Ferral's Court*, SAN FRANCISCO CHRONICLE, Aug. 13, 1880 at 4.

³³ Babcock, *First Woman*, *supra* note 11, at 711 n.198 (quoting the DAILY ALTA, Feb. 25, 1879 at 1).

got the point:

It is not mere eloquence, nor melodious utterance, nor logical force, nor imaginative capacity that bring 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. Men are afraid of the competition.³⁴

Men feared being beaten by a woman in the highly visible arena of the criminal courtroom. When one of her male opponents complained of the unfairness of facing a woman before a jury, Clara Foltz made fun of him:

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.³⁵

Clara Foltz won a quick verdict in the case where she laughed at her opponent's effort to cast himself as underdog. Yet the prosecutor's fear was real: women in the courtroom would drastically change the practice. The exact nature of the change was not left long in doubt. For example, take the *Sroule* murder case that Laura Gordon won, three years after becoming a lawyer. No male lawyer could have done it.

LAURA GORDON AND THE *SROULE* CASE

Remember the central image against the woman as lawyer: that she would use her feminine charisma before an all-male jury to win for a guilty man. Some said that Laura Gordon did just that in the *Sroule* case. Her client had shot and killed another man by accident, when he was actually aiming for Espey, the seducer of his wife.³⁶

The murder happened in the raw little mining town of Oroville in 1883,

³⁴ Babcock, *Constitution-Maker*, *supra* note 11, at 923 n.78 (citing SACRAMENTO RECORD-UNION, Feb. 26, 1879).

³⁵ Clara Shortridge Foltz, *Struggles and Triumphs of a Woman Lawyer*, THE NEW AM. WOM., Oct. 1916, at 11. *Struggles* was the title of Foltz's monthly autobiographical column in her magazine, *The New American Woman*, published in Los Angeles from 1916 to 1918 [hereinafter Foltz, *Struggles*]; Barbara Allen Babcock, *Western Women Lawyers*, 45 STAN. L. REV. 2179, 2185 (1993) (relating early acceptance of women at the bar in the western states).

³⁶ For various tellings of the *Sroule* story, see Hawkins, WEBSITE, *supra* note 2, at 49-50; Lelia Robinson, *Women Lawyers in the United States*, 3 THE GREEN BAG 25, 26-27 (1890), WEBSITE, *supra* note 2; *The Women Who are Helping to Make This a Great City*, THE SAN FRANCISCO CALL, July 18, 1897, at 27.

and the whole community turned on Sproule. They did not give him the benefit of the unwritten law (justifying a man who kills his wife's seducer) because of the carelessness of his aim - Oroville did not approve an incompetent cuckold - and because the deceased had been young and popular. Against the advice "of the most distinguished lawyers in the state," Laura Gordon said, she took the case.³⁷

She had her hands full: Sproule had premeditated murder and committed it. He just missed his intended victim. Not exactly a dream case for the defense - but Gordon focused on the wrong done Sproule. In showing how he had been driven half mad by his wife's affair, Gordon managed to insinuate that the man he had intended to kill, deserved to die at his hand. For this defense to succeed, the wife must be the star witness, revealing the affair, and how it drove her husband to a murderous state (and perhaps even interfered with his aim). She had fled to San Francisco after the murder, but Gordon convinced her to return to Oroville.

Heightening the drama, the other man and *his* wife were witnesses to the shooting. In Gordon's words, "the man he had intended to shoot - the man who had wronged him beyond reparation - was trying in every way to see this woman [Mrs. Sproule]. And she - well her husband was on trial for his life, and she loved the other." Gordon kept her in the next room at the hotel, "and I never left her for fear they would influence her to testify against her husband." All the wife had to do to assure Sproule's execution was to deny the affair.

By the force of her personality, and her oratorical skills, Laura Gordon won the acquittal of Sproule - to the amazement of all. In telling of the victory, she said: "Before the trial they were anxious to lynch Sproule, but when the jury brought in the verdict of 'not guilty' the crowd in the courtroom cheered and carried him on their shoulders through the town. That, I think, was the hardest case I ever had and that was the greatest victory."

The *Sproule* case illustrated one of the hazards for these movement women who were also criminal defense lawyers. In the course of the representation, loyalty to client often clashed with feminist politics. Gordon, for instance, pilloried Mrs. Sproule on the witness stand. Years later, in the same breath in which she related her triumph, Gordon recalled Mrs. Sproule: "the woman fairly groveled at my feet begging me not to prosecute the man she loved. It was awful."³⁸

In a case in the early 90s, Clara Foltz drew much press attention by publicly destroying a young woman, a reformed prostitute trying to start a new life, who was the chief witness against her male client.³⁹ When she was in Washington Territory, Lelia Robinson found herself arguing for a criminal cli-

³⁷ *The Women Who are Helping to Make This a Great City*, *supra* note 36, at 27.

³⁸ *The Women Who are Helping to Make This a Great City*, *supra* note 36, at 27.

³⁹ Trial Record, on file with author, in *People v. Wells*, 100 Cal. 459 (1893) (reversing the adverse jury verdict for prosecutorial misconduct). The trial proceedings are well reflected in extensive coverage by the San Francisco dailies: *THE CALL*, *THE EMMNER*, and *THE CHRONICLE* from October 10-15, 1892.

ington Territory, Lelia Robinson found herself arguing for a criminal client that his conviction should be reversed because women had served on his jury (a denial of due process). Later she ruefully explained that “my business associations made it necessary . . . so that while my sympathies were on one side of the question, my work was done on the other, as sometimes must happen.”⁴⁰

WHY WOMEN BECAME DEFENDERS

Given that the female criminal defense lawyer was so detested a figure, and given the difficulties of their actual experiences, why did women choose, and remain in, that branch of practice? Necessity is a large part of the answer. Though in the last decades of the nineteenth century it was easy to become a lawyer, at least for white males, in terms of formal requirements, it was hard to make a living at it. To put “Esquire” after his name in most of the West, a man needed only to reside and read law for a little while, then to answer a few questions orally asked by the court where he wished to practice. Comity or courtesy among the courts usually secured admission on motion everywhere in the admitting states, and in neighboring locales as well.⁴¹

But a man who was not socially connected, who had neither stake nor established partner, might well fail before he got started. Gordon Bakken in his evocative picture of practice in California from 1850-1890 points out how often lawyers found it necessary to supplement the practice with other occupations—notably office holding and newspaper editing.⁴² Men also banded together in their practices - enabling the purchase of a library and enlarging the client base. These options, particularly office holding, were not as open to women lawyers, though Foltz and Gordon tried the male strategies of running for office and of newspaper publishing. Both also lectured for money to help provide the overhead for their practices in the early days.

Add to the difficulties of any new lawyer the obstacle of being a woman, and it becomes clearer why women turned to criminal defense. Criminal cases were the ones that came their way. Laura Gordon, for instance, said that she sought no specialty, but “seemed to drift into criminal practice as a result of successfully defending a Spaniard charged with murder, within two months after admission to the bar.”⁴³

⁴⁰Robinson, *Women Jurors*, *supra* note 5, at 23; Nicol, *A Second Look*, *supra* note 3, at 17-20.

⁴¹LAWRENCE FRIEDMAN & ROBERT PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910*, 60-64 (1981) (explaining the loose system in California for admission of men to the Bar). For the story of the more difficult time that women had in being admitted, see Babcock, *First Woman*, *supra* note 11.

⁴²GORDON MORRIS BAKKEN, *PRACTICING LAW IN FRONTIER CALIFORNIA* 8-14 and *passim* (1991).

⁴³Robinson, *Women Lawyers in the United States*, *supra* note 36, at 26-27. (This was Valdez, a seaman who killed a shipmate one night on San Francisco’s notorious waterfront in a fight over a woman. It was probably the first jury trial conducted by a woman on the west coast.)

The women who became defenders were almost all on their own as lawyers - they did not practice with fathers, husbands or brothers. Without a male lawyer to bring in cases or appear in court when that was necessary, these women did not have the option of specializing in office work or writing wills for other ladies. Instead, they took the clients they could get, and these were often desperate men accused of crime, desperate enough to hire a woman, or too poor to pay a man's fee.

Criminal clients were sometimes sent to the women by other lawyers (after the client's, and his family's, funds were exhausted). "My office became a sort of rendezvous for the poor and the weak and the despairing" - so Clara Foltz wrote of her early practice. Poor women accused of crime, especially prostitutes, or soiled doves as they were called in the West, came to the women lawyers. Foltz referred to these clients as "our weak little sisters of the so-called underworld."⁴⁴

But the main way that women became defenders was by court appointment, which was the way male lawyers usually acquired their indigent clients as well. Though there was no formal statutory appointment system, a judge might call upon a member of the bar to represent a defendant facing a serious charge.⁴⁵ Clara Foltz described how, when she went to court on her paying cases, the judges would often summon her forward to represent an indigent criminal defendant while she was there. In her diary, Lavinia Goodell described her first criminal appointment:

I was sitting in my office one day, drafting a will when the sheriff called with a message. "Judge Harland has given you a criminal to defend. You will find your client at the jail . . . charged with stealing a watch." It took me rather by surprise. I had had but one criminal defense before; that of a most excellent and highly respectable lady wrongfully accused by enemies But to defend a thief and a tramp was by no means so romantic a prospect. However business was business, and I wended my way to the jail in a pouring rain, only wondering whether my client would take a fancy to *my* watch.⁴⁶

Representing the criminally accused in these circumstances was considered part of a lawyer's duty as an officer of the court. Often, however, the method did not result in the best representation. Clara Foltz described the appointment system:

Those whose ability commands a law business are seldom chosen. The appointees come from failures in the profession, who hang about courts hoping for a stray dollar or two from the unfortunate, or from the kindergartens of the profession just let loose from college and anxious to learn the practice. 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

⁴⁴Foltz, *Struggles*, *supra* note 35, at 9; Barbara Allen Babcock, *Feminist Lawyers*, 50 STAN. L. REV. 1689, 1701 (1998).

⁴⁵FRIEDMAN & PERCIVAL, *supra* note 41, at 170- 173.

⁴⁶Schmacher, WEBSITE, *supra* note 2 (citing Lavinia Goodell, *My Tramp*, THE CHRISTIAN UNION, Dec. 1, 1875).

hired by the State.”

And she continued, “About the wisest course for a pauper prisoner caught up in the mesh of misunderstanding or circumstantial evidence is to plead guilty, earn consideration by ‘saving the county expense’ and throw himself on the ‘mercy of the court.’”⁴⁸

Foltz’s picture was accurate of most appointed counsel and their hapless clients, but anecdotal evidence of the pioneer women defenders shows them doing a lot better in routine criminal matters than the men did. Though driven partly by necessity in their representation, women defenders had an ideological stake in the work beyond the officer-of—the-court rationale available to men. I will turn now to consider the special qualities and contributions women lawyers brought to the defense table.

THE CONTRIBUTIONS OF WOMEN TO CRIMINAL DEFENSE

Close examination of the individual lives of the early women lawyers reveals a self-conscious feminist in virtually every one of them. They considered themselves part of a great movement to transform American society.⁴⁹ This motivating philosophy carried over to criminal defense in a number of ways - on the most basic level, in everything they did they were representing all women. Each woman bore on her shoulders the reputation of every woman in all public performances. This naturally made for better performances.

As radical as it was to seek the vote, jury service or the right to pursue a profession, the late 19th century suffrage movement included even more extreme elements. Many of these socialistic, populist, progressive movements-within-the-main-movement considered inequality and oppression as the root causes of crime, and criminal defendants as victims of a cruel and corrupt system. Nationalism, which sprang up in the late 80s, was an example of one of these sub-movements. Based on Edward Bellamy’s novel, *Looking Backward*, it envisioned a classless society without want and with work for all.⁵⁰ In such a world, crime would be largely eradicated, and what remained would be treated as mental illness.⁵¹ Many of the movement women were Nationalists; Clara Foltz, for instance, was President of the Nationalist club in San Diego.

⁴⁷ Clara Shortridge Foltz, *Public Defenders—Rights of Persons Accused of Crime—Abuses Now Existing*, 48 ALB. L.J. 248 (1893).

⁴⁸ Clara Shortridge Foltz, *Public Defenders*, 31 AMERICAN LAW REV. 393 (1897).

⁴⁹ Babcock, *Feminist Lawyers*, *supra* note 44, at 1699-1708 and sources cited.

⁵⁰ EDWARD BELLAMY, *LOOKING BACKWARD* (1888). (The utopian setting of the novel is America in the year 2000.)

⁵¹ MARIJO BUHLE, *WOMEN AND AMERICAN SOCIALISM 1870-1920*, 75-103 (1981) (on the connection of nationalism and the women’s movement; many sources cited); NICHOLAS PAINE GILMAN, *SOCIALISM AND THE AMERICAN SPIRIT* (1900). For discussions of nationalist politics and ideology, see HENRY R. BEDFORD, *SOCIALISM AND THE WORKERS IN MASSACHUSETTS 1886-1912* (1966); ARTHUR LIPOW, *AUTHORITARIAN SOCIALISM IN AMERICA: EDWARD BELLAMY & THE NATIONALIST MOVEMENT* (1982).

Another example of a radical movement within the larger feminist cause was the National Women's Liberal Union. This was a group of rump suffragists, anarchists and freethinkers who launched their organization at a national convention in Washington D.C. in 1890.⁵² Though most of the meeting was devoted to the wrongs of organized religion, several people, including two women lawyers, Clara Foltz and Belva Lockwood, spoke of the injustices that they had seen in the criminal courts, and called for the government to pay for the defense of those presumed innocent, just as it paid for their prosecution.⁵³

Leftist politics was not the only ideological force driving women to criminal defense. Prison reform became a cause for many around the same time as abolition and women's rights. Moreover, prisoners had long been objects of Christian charity (of which women were the main dispensers), and religious tradition was reinforced by the new vocation of social work for women. Prison reform work naturally led to helping the men with the charges that had landed them behind bars.⁵⁴

For some women, work among the poor was joined with the temperance movement, which had as a central tenet that liquor caused most crime, and that criminals were pitiable victims of a terrible addiction. Lavinia Goodell found daily proof of this theory among her clients. Of one of her criminal trials, she commented: "I found that whiskey was at the bottom of all [my client's] woes, and resolved to take the occasion of his defense to administer a strong dose of temperance to the twelve good and true men who would sit as a jury."⁵⁵ In seeking a pardon for a client, she urged the governor that the community itself was responsible for his crime (and most others) because it licensed the sale of

⁵² The *Union* is best followed through the biography of its founder, Matilda Joslyn Gage. See JAMES AND BOYER, *NOTABLE AMERICAN WOMEN* (Gage entry v. 11, p. 4 (197 1)). Gage wrote and published a summary of the meeting which reflects the radical addresses of Clara Foltz and Belva Lockwood. Matilda Joslyn Gage, *WOMEN'S NAT. LIBERAL UNION, Report of the Convention for Organization* (1890). Matilda Joslyn Gage, *The Dangers of the Hour, reprinted in WOMEN WITHOUT SUPERSTITION: NO GODS-NO MASTERS*, (Annie Laurie Gaynor, ed., 1997)); Bany, *Susan B. Anthony*, *supra* note 27, at 296-299.

⁵³ Foltz's speech was reported in *THE WASHINGTON POST*, Feb. 26, 1890.

⁵⁴ ELIZABETH KEMPER ADAMS, *WOMEN PROFESSIONAL WORKERS* 73-74 (192 1) reflects back on how women lawyers came to be involved with progressive reforms.

Many women lawyers and leaders in the long fight for the franchise have gained an extensive legal and political educating which they are putting at the disposal not only of inexperienced women voters but of all "forgotten" and handicapped groups in the population-foreigners, small tenants and debtors, unskilled and low-paid wage earners, the ignorant and helpless and exploited everywhere. 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. .

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 until a more enlightened administration of law renders such societies unnecessary; they seem admirably fitted to till the post of "public defender" now so widely advocated.

⁵⁵ Lavinia Goodell, *A Day in the Life of a Woman Lawyer*, *THE WOMAN'S JOURNAL*, Nov. 11, 1877.

liquor.⁵⁶

Women brought something extra to the representation of the criminally accused not only because of ideology, but because they shared the outsider status of most of the people they represented. This enabled the women to see injustice in what others might take for granted. An example is one of Clara Foltz's vintage stories.⁵⁷ On the day set for trial in a fraud and extortion case, she "called at the City Jail" [wonderful phrase] only to learn that Wells [her client] had already been carried to court. Wishing to reassure him before the formal proceedings, Foltz hurried over to the courtroom and "sought out the clerk," a large, middle-aged man with a huge mustache.

I inquired for James E. Wells and shyly stated, in a sort of excuse-me-for-living manner that I was his attorney.

"Well," said the clerk, "don't you see him over there?" pointing to a corner of the courtroom. My eyes fastened on a huge wire cage, [in which] my dejected client was sitting. Without another word, I rushed over to free him, but the cage door was padlocked. I shook the door until it rattled so loudly that the bailiff came, almost in a run.

"What's the matter with you, woman?"

"There is nothing the matter with me, sir, but there is something wrong here and it must be corrected at once. My client shall not remain in this court room jail."

"Well you might as well stop your fussin; I'm the patentee of that cage -- got it from Washington, and it's going to stay right here," pointing toward the product of his mechanical genius wherein my poor client sat shivering -- and, as he later told me, afraid lest I would attempt to break open the door and the bailiff would arrest me for disturbing the peace and handle me roughly.

Keeping the defendant in a cage had obvious advantages for prisoner control; its proponents argued that it was only an extension of the English dock, where the defendant sits apart in the courtroom. But to Clara Foltz it was a "relic of barbarism." After a day of trial, she returned to her office and "sat alone long after the city streets were deserted and every other honest woman was asleep," writing a petition to the Mayor, and to the Board of Supervisors demanding the end of the courtroom cages. The next day, she delivered the document to City Hall, but first she stopped by the offices of the *San Francisco Chronicle*, which printed it in full under these headlines:

"Caged Like Tigers"

The Care of Prisoners Made Easy

Ladies Who Declare War on the System

Within 48 hours, the Board of Supervisors passed a resolution, signed by the Mayor, directing the removal of the courtroom cages. This keen sense of injustice, and total disregard for plausible arguments on the other side, was

⁵⁶ SCHUMACHER, LAVINIA GOODELL, *supra* note 14.

⁵⁷ Foltz, *Struggles*, *supra* note 35.

characteristic of Foltz, who had no stake in the way men ran things. A few years before the cage incident, she had, in the same single-handed fashion, spearheaded legislation requiring that juveniles be separated from adults in jails and prisons.

In another case, Foltz hand-wrote an appeal for Frank Morrow, sentenced to six years for stealing a gold watch and chain. He had denied his guilt, but the judge charged the jury to disregard his testimony unless they found it "convincing." The instruction, routinely given in California, was a vestige of the common law rule preventing a defendant from testifying at all because of his special temptation to lie. No one thought to challenge it until Clara Foltz came along. She argued, in terms far ahead of the jurisprudence of her day, that the instruction was a violation of the code section making the defendant a competent witness, and incongruous with the reasonable doubt standard and the jury's special role in assessing credibility. Foltz saw that it was unfair because she was new to the system, had no stake in it, and had experienced the instruction's impact in more than a few criminal cases.⁵⁸

The women defenders felt and exhibited a special empathy with their clients - partly generated by the outsider status they shared, but springing also from maternal feelings. These were forgiving mothers. Toward the end of her life, Laura Gordon spoke in elegiac terms about representing the criminally accused.

The man, poor helpless wretch, gives you his life—practically lays it in your hands and says: Save it. He tells you his every thought and motive. He takes you into his confidence and shows you the dark comers and unseals the closed doors and holds the lanterns of his understanding so that you may examine along the ways his soul has trod and witness the obstacles it has stumbled over. Each life, my friend, each life has so much we cannot understand that sometimes I have looked upon the human being and I have thought, "Oh, no one is to blame - no one."⁵⁹

Lavinia Goodell's diaries likewise reveal her close identification with the criminally accused, and her desire to save them from their fates.⁶⁰ A courtroom artist rendered one of Clara Foltz's clients with his head in her lap, sobbing after a guilty verdict: surely a new scene in law's annals.⁶¹

Clara Foltz often tried to turn her maternal feelings to the advantage of her client. She would argue, in effect, that she, a good woman, would not be at the

⁵⁸ *People v. Morrow*, 60 Cal. 142 (1882). She also wrote that *People v. Cronin*, 34 Cal. 203 (1867), the case establishing the instruction, "had never been accepted by the Bar," and was applicable only in the "peculiarly aggravated" circumstances where a husband had brutally murdered his wife. For an excellent historical account of the various instructions and rules about witness incompetence designed to aid the jury in lie-detecting, see George Fisher, *The Jury's Rise as Lie Detector*, 107 *YALE L. J.* 575 (1997).

⁵⁹ *The Women Who Are Helping to Make this A Great City*, *supra* note 37 (Gordon interview).

⁶⁰ Schumacher, WEBSITE, *supra* note 2.

⁶¹ *SAN FRANCISCO CHRONICLE*, Oct. 15, 1892, at 7 (artist's rendering).

defense table for an undeserving defendant.

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? I am in this case without pay or the hope of reward. I tell you this man is guiltless of the crime of which he is charged.

She would conclude her peroration in a criminal case by saying: "I deplore the fact that the law does not provide for a public defender as well as a public prosecutor."⁶² Her experiences in the criminal courts led her to become the leading proponent of the idea of a public defender, paid by the state, to represent the accused.

Foltz was the first in print with a full plan for such an official. It was the subject of her address at the Congress of Jurisprudence and Legal Reform at the 1893 World's Colombian Exhibition. Her formulation of a public defender was her greatest legal accomplishment, and the best thing that came from the experience of women defenders in the West. The full public defender story must await further treatment, but suffice it to say that Clara Foltz conceived it in the grandest terms:

The remedy for many of the evils of the present criminal court practice lies in the election or appointment of a public defender. 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.

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, and there will come to the State, as a natural sequence, all those blessings which flow from constitutional obligations conscientiously kept and government duties sacredly performed.⁶³

⁶² *Id.* (Wells peroration).

⁶³ *Public Defenders* was printed contemporaneously with Foltz's delivery of it at the 1893 Congress of Jurisprudence and Law Reform, in 25 CHICAGO LEGAL NEWS 431 (Myra Bradwell ed., 1893); with only slight changes in the text, it also appears under the headings *Public Defenders—Rights of Persons Accused of Crime—Abuses Now Existing* in 48 ALB. L.J. 248 (1893), supra note 47. Another article, describing her campaign to introduce public defender legislation in various legislatures, and answering criticisms of the idea, appears as *Public Defenders*, 31 AMERICAN L. REV. 393 (1897). See also A. Mabel Barrow, *Bibliography of Public Defender Material*, 14 J. OF AM. INSTITUTE OF CRIM. LAW. 556 (1924) (crediting Clara Foltz with the idea, and noting that she has not been fully recognized).