
Volume 28

Number 4 *First Women: The Contribution of
American Women to the Law*

pp.1231-1285

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Recommended Citation

Barbara Allen Babcock, *Clara Shortridge Foltz: "First Woman"*, 28 Val. U. L. Rev. 1231 (1994).

Available at: <https://scholar.valpo.edu/vulr/vol28/iss4/4>

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Articles

CLARA SHORTRIDGE FOLTZ: "FIRST WOMAN"*

BARBARA ALLEN BABCOCK**

INTRODUCTION

Clara Shortridge Foltz (1849-1934) fought for the vote for forty years and lived to cast a legal ballot. She was not equally gratified in her long struggle to gain acceptance for women in the legal profession. Admitted to the Bar in September, 1878, the first woman lawyer in California, she initially made her name as a jury lawyer and then went on to fifty years of successful practice.

Although she frequently entered new fields in her quest for status and recognition, she herself knew that whatever she did, there were insuperable barriers to woman's progress. In her day, no woman could be counsel to large corporate interests, hold high public office, or even be a trusted legal advisor to those who did. By the time a few women were made judges, Foltz was old and infirm. The first female federal judge took office the year Foltz died.

Nevertheless, over her long life, Clara Foltz witnessed the real improvement in how the legal profession received women, especially during the

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** Ernest W. McFarland Professor of Law, Stanford University, LL.B. 1963, Yale University, A.B. 1960, University of Pennsylvania. Professor Babcock was the first woman to head the Public Defender Service in Washington, D.C., the first woman professor at Stanford Law School, and the first to hold an endowed chair.

I wish to thank the dedicated and creative Stanford law students whose research assistance was made possible by a bequest from the Dorothy Redwine Estate: Judith Carrithers, Mary Erickson, Frances Scibelli, Linden Joesting, Lisa Lindalef, Catherine Ruckelshaus, Paula Solario, and Karen Zobell.

The staff of the Stanford Law Library has offered continuous support, and has been imaginative and proficient in locating uncommon materials. A grant from the National Endowment for the Humanities allowed me to accept a fellowship from the Stanford Humanities Center, where much of this Essay was conceived and completed. I appreciate also the valuable support and suggestions of the Stanford Biographer's Seminar. Final thanks are to Thomas C. Grey, colleague, husband, and world-class editor.

Progressive Era, when women professionals had a bright moment. Foltz put out a magazine from 1916-1918 called the *New American Woman* to celebrate these women, and in it she wrote a monthly column entitled "The Struggles and Triumphs of a Woman Lawyer."¹

"They called me the lady lawyer," she wrote in one of these columns, "a dainty soubriquet that enabled me to maintain a dainty manner as I browbeat my way through the marshes of ignorance and prejudice."² But favorable notice and dainty soubriquets often masked an undertone of censure and suspicion; many who uttered the phrase "lady lawyer" considered it an oxymoron. What was a *lady* doing, after all, out in the marshes?

The stories of early women lawyers are full of strategies—though not always acknowledged as such—for dealing with the small slights and the large exclusions. Humor has, for instance, often served as a shield. For Clara Foltz, it was a sword as well. She once retorted to a trial opponent's ridicule by exclaiming: "Counsel intimates with a curl on his lip that I am called the lady lawyer. I am sorry I cannot return the compliment, but I cannot. I never heard anybody call him any kind of a lawyer at all."³

Though she told these stories with gusto, Clara Foltz wanted to be remembered by more than hastily recorded personal anecdotes. She was convinced that she and the other pioneer women lawyers she knew were making history. She could not guess how long it would take before anyone was sufficiently interested to write it.

In this Article, I have reconstructed Clara Foltz's dramatic entry into the legal profession in 1878-1879.⁴ Much of the story is drawn from nineteenth

1. Clara Shorridge Foltz, *The Struggles and Triumphs of a Woman Lawyer*, THE NEW AMERICAN WOMAN [hereinafter *Struggles*].

2. *Struggles*, *supra* note 1, Oct. 1916.

3. *Id.*, Feb. 1918.

4. Other major secondary sources on Foltz's life include Barbara A. Babcock, *Reconstructing the Person: The Case of Clara Shorridge Foltz, in REVEALING LIVES: AUTOBIOGRAPHY, BIOGRAPHY AND GENDER* 131-40 (Susan Groag Bell & Marilyn Yalom eds., 1990) [hereinafter Babcock, *Reconstructing the Person*], Barbara A. Babcock, *Clara Shorridge Foltz: Constitution-Maker*, 66 IND. L.J. 849 (1991) [hereinafter Babcock, *Constitution-Maker*]; Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139 (1993); Barbara A. Babcock, *Western Women Lawyers*, 45 STAN. L. REV. 2179 (1993). Corinne Gilb wrote the Foltz entry in NOTABLE AMERICAN WOMEN: A BIOGRAPHICAL DICTIONARY, 1607-1950, at 641 (Edward T. James et al. eds., 1971) [hereinafter NOTABLE AMERICAN WOMEN]. Two contemporary summaries of her life work appear in 1 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY, CURRENT VOLUME C 308 (1930) and OSCAR T. SHUCK, HISTORY OF THE BENCH AND BAR OF CALIFORNIA 828 (1901). For numerous newspaper, periodical, and other contemporary articles, see sources cited in Babcock, *Constitution-Maker*, *supra* at 849. For a discussion of events in Foltz's

century newspaper accounts. Some of it is based on her letters, found in the collections of other people's papers, and some on her own telling in the "Struggles" column. No doubt my interpretations are also colored by my own experience as a first woman.

Clara Foltz had to lobby for a bill allowing "woman lawyers" and then was first to take advantage of the new legislation. The victory for women was cemented in unparalleled clauses assuring women access to education and employment in the 1879 California Constitution. Although this is a success story, the subject is also how partial and how restricted her triumphs really were.

She could read law as an apprentice, but not in the fancy, uptown firm of San Jose's preeminent practitioner; she could pass a rigorous examination, but not be admitted to California's first law school; she could become a great trial attorney and still face the constant charge that her very presence in the courtroom would skew the processes of justice. As she won grudging admission to the outward forms, but was denied access to the inner reaches of the profession, Clara Foltz had no one to look back to, no one who had been there first to lay the groundwork.

For feminist lawyers today, this need not be true. We are in the process of reclaiming the stories of our forbears,⁵ and this issue of the *Valparaiso University Law Review* adds a distinguished contribution to the growing literature.

WESTERN WOMEN 1868-1875

In legal forums, on lecture platforms, in the press and in private, nineteenth century women seeking change contended with arguments that cut across all

later career, see generally Mortimer D. Schwartz et al., *Clara Shortridge Foltz: Pioneer in the Law*, 27 HASTINGS L.J. 545 (1976). See also Virginia Elwood-Akers, *Clara Shortridge Foltz: California's First Woman Lawyer*, 28 PAC. HISTORIAN 23 (1984); Nicholas Polos, *San Diego's "Portia of the Pacific,"* 2 J. SAN DIEGO HIST. 185 (1980).

5. Because admission to the Bar was governed by the states, through their courts and legislatures, there are many "first-women" stories, and of course contentions about who was actually first. Was it the first woman to join the highest court or any court, for instance, who has the ultimate claim to the top spot?

In addition to the citations found in the articles and essays of this collection, I want to note CALLED FROM WITHIN: EARLY WOMEN LAWYERS OF HAWAII (Mari Matsuda ed., 1992); VIRGINIA G. DRACHMAN, WOMEN LAWYERS AND THE ORIGINS OF PROFESSIONAL IDENTITY IN AMERICA (1993); Catherine B. Cleary, *Lavinia Goodell, First Woman Lawyer in Wisconsin*, 74 WISC. MAG. HIST. 243 (1991); Karen Tokarz, *A Tribute to the Nation's First Women Law Students*, 68 WASH. U. L.Q. 89 (1990) (Phoebe Couzins and Lemma Barkeloo).

their immediate goals, whether to vote, own property or practice law. The issue always became the nature and place of Woman: her sphere. The global terms of the battle roused opposition too great for any individual to meet and made all victories emblematic. Without the aid of a newly organizing women's movement in California, Foltz could not have succeeded. As a movement member and because the struggle was partly over symbols, Clara Foltz's achievements were greater than the accomplishments of an extraordinary individual. Thus, her story has an important context.

In 1868, an enthusiastic audience of about fifty people heard the first public speech in California advocating votes for women.⁶ Clara Foltz was not in the audience. Instead, she was barely surviving on an Iowa farm with two children and Jeremiah Foltz, whom she had married three years earlier at the age of fifteen. As she later recalled, "the life of the child-wife was a troubled one . . . time which could be spared from the cares of maternity was devoted to manual labor, necessitated by family needs."⁷

It was a bitterly different life from that she had envisioned for herself in younger days when she had talked of being a famous orator, perhaps even a lawyer.⁸ As a girl, Clara Shortridge had heard Lucy Stone speak of woman's "disappointment . . . in education, in marriage, in religion, in everything."⁹ Now those words resonated with her own experience.

6. 3 HISTORY OF WOMAN SUFFRAGE 751 (Elizabeth Cady Stanton et al. eds., 1881) (In six volumes covering the years 1848-1920. Volumes 1-3 were edited by Elizabeth Cady Stanton et al., volume 4 by Susan B. Anthony and Ida H. Harper; and volumes 5 and 6 by Ida H. Harper) [hereinafter HWS].

7. Cummins, *Clara Shortridge Foltz*, SAN FRANCISCAN (circa 1883). A reprint of the Cummins article, undated and without a source for the reprint, is in a "Foltz Biographical" file at the California State Library, Sacramento. The ages of her children, mentioned in the article, place it at about 1883. Cummins, one of the leading women journalists of the West Coast, seems to have inspired Foltz's confidence and reports details of her marriage and divorce that are not included in later interviews and official biographical entries. Parts of the Cummins story about Foltz were widely reprinted in newspapers. See, e.g., SAN JOSE MERCURY, Oct. 15, 1884, at 2 n.7. A second, extensive story with many personal details from her early life appeared in the *San Francisco Post* with subtitles such as *A Self-Educated Toiler for Years; A Child Wife; A Young Mother*; reprinted in SAN JOSE MERCURY, Aug. 20, 1882, at 5.

8. Cummins, *supra* note 7.

9. In interviews, Foltz often spoke of hearing Lucy Stone speak. See, e.g., *A Sketch of Clara Shortridge Foltz*, 13 WEST COAST MAGAZINE 42, 43 (1912). Stone's speech from which the quotes are drawn is reproduced in FEMINISM: THE ESSENTIAL HISTORICAL WRITINGS 106 (Miriam Schneier ed. 1972) [hereinafter FEMINISM].

Another formative experience for Foltz was her three years of schooling at Howe's Academy in Mount Pleasant, Iowa. Samuel L. Howe was an abolitionist and a suffragist. 2 NOTABLE AMERICAN WOMEN, *supra* note 4, at 492 (Arabella Mansfield entry). See *infra* note 134 for discussion of Mansfield.

By the time she moved west in 1872, Clara Foltz was ready to proclaim with Lucy Stone: "Leave women . . . to find their sphere. And do not tell us, before we are born even, that our province is to cook dinners, darn stockings, and sew on buttons."¹⁰ In her new western home, Foltz found a movement that would support her grandest ambitions; it was forming around the cause of suffrage.

An issue from the beginning of the women's rights movement,¹¹ suffrage emerged after the Civil War as the focus.¹² The fourteenth and fifteenth amendments assuring the "privileges and immunities" of citizenship and giving former slaves the vote, made women activists assume that their rights would soon follow. Around 1870, the woman suffrage cause drew many new adherents to an idea whose time seemed very near.¹³

But at the very moment that women in new numbers agreed upon suffrage as the goal, they divided over methods and ideology.¹⁴ Susan B. Anthony and

10. FEMINISM, *supra* note 9, at 107.

11. The women's rights movement began in 1848 at Seneca Falls, New York. At the call of Elizabeth Cady Stanton and Lucretia Mott, about 300 people met and passed a Declaration of Sentiments, based on the Declaration of Independence, as well as twelve resolutions. 1 HWS, *supra* note 6, at 67-73; BARBARA A. BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 1, 1-4 (1975). Woman suffrage was included in the document, but was considered the most radical of the demands. The Seneca Falls convention set the terms of the discourse for almost a hundred years. Many of the arguments made by Foltz and her coadjutors in their California battles reflect the Declaration of Sentiments. See *infra* text accompanying notes 53, 100, 220.

12. On the beginnings of the woman suffrage movement in California, see 1-3 HWS, *supra* note 6; contemporary newspapers, especially the *San Jose Mercury* and the *San Jose Pioneer*, and the women's rights press, notably the *Woman's Journal* (Boston), for the decade. The *Woman's Journal* was one of the earliest and the longest-lived of the suffrage newspapers.

The analysis of early suffragism that I found most illuminating is ELLEN C. DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA 1848-1869 (1978) and *The Radicalism of the Woman Suffrage Movement: Notes Toward the Reconstruction of Nineteenth-Century Feminism*, in WOMEN, THE LAW, AND THE CONSTITUTION (Kermit Hall ed. 1987).

See also BABCOCK ET AL., *supra* note 11; R. Davis, Women's Republic (unpublished manuscript, available in California Historical Society); SANDRA L. MYERS, WESTERING WOMEN AND THE FRONTIER EXPERIENCE 1800-1915, at 213-37 (1982) (chapter 8, entitled *Suffering for Suffrage*).

The text *infra* at notes 13-15 draws upon all the above listed sources.

13. The optimism that caused many women to believe that universal suffrage was near at this point was particularly pronounced in the West because Wyoming extended the vote to women in 1869, and Utah in 1870. See B. BEETON, WOMEN VOTE IN THE WEST: THE WOMAN SUFFRAGE MOVEMENT, 1869-1896, at 157-58 (1986).

14. For the standard descriptions of the split in the movement, see ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 145-66 (1968); WILLIAM O'NEILL, EVERYONE WAS BRAVE: THE RISE AND FALL OF FEMINISM IN AMERICA 18-21 (Rev. ed. 1975).

Elizabeth Cady Stanton were outraged that the fourteenth amendment in section two restricted the word "citizen" with the word "male" for the first time in the Constitution. Thus, although they had worked for abolition and Negro rights, they campaigned against the amendment's ratification. They and their followers also opposed the fifteenth amendment because it dealt only with male suffrage. In contrast, other great women leaders, notable Lucy Stone and Julia Ward Howe, accepted the promises of the Republican party that the vote for women was next on the agenda, and supported the amendments. These differences led to the formation in 1869 of two national suffrage associations which remained separate for more than twenty years.

Originally, the difference between the Stanton-Anthony National Women Suffrage Association and the Stone-Howe American Women Suffrage Association centered on continued support of the Republican party as the instrument of reform. But other disagreements fueled the division over the years, ranging from the American's reliance on male leadership to the National's willingness to use racist and nativist arguments in woman's cause. Moreover, the National Association addressed a wide range of issues affecting women, while the American Association pinpointed the vote as the answer to women's oppression and feared diluting suffrage efforts.

The schism among the national leaders was reflected at the state level. Thus, in 1870, at the convention to establish a California suffrage society, there was "much anxiety" about affiliation.¹⁵ An attempt at compromise did not

15. 3 HWS, *supra* note 6, at 754. The early leader on the "National" side was Elizabeth Schenck, who attended the organizational meeting of that association in New York in May, 1869 and was appointed vice-president for California. Schenck, who wrote most of the California chapter for 3 HWS, started suffrage meetings in her parlor immediately on her return from that convention. Laura deForce Gordon was a strong voice joining Schenck for affiliation with the more radical of the organizations. See *infra* notes 24, 200.

On the "American" side, Reverend Charles Ames and his wife Fanny were the leaders. Fanny Ames attended the founding convention of the American society in Cleveland in 1869. The Ames couple soon withdrew from the suffrage cause in California, "when its loyalties proved to be not with the Lucy Stone organization but with the rival movement." 1 NOTABLE AMERICAN WOMEN, *supra* note 4, at 39-40 (Fanny Baker Ames entry). Reverend John Collins, a noted abolitionist, and his wife were also early suffrage activists in California who dropped away, apparently because of the schism. 3 HWS, *supra* note 6, at 754-55; Davis, *supra* note 12, at 224.

DuBois argues, against the general historical view, that the split did not significantly weaken the suffrage movement. When looked at from the "perspective of the growth of feminism . . . the political conflict . . . significantly advanced the movement, liberated it from its subservience to abolitionism, and propelled it into political independence." DUBOIS, *supra* note 12, at 200-01.

Support for the DuBois thesis is found in the letter of a correspondent for the *Woman's Journal*, the organ of the American Association, which reported that separate suffrage societies had formed in California and asked: "Why should it weaken our cause at this stage to have organizations that naturally range themselves on the sides of conservatism on the one hand and radicalism on the other? . . . [I]n California . . . they believe that more converts can be made by

satisfy one group, and many delegates either dropped away from suffrage activities after the convention or formed separate societies. Divisions based directly on those at the national level, and indirectly on similar political and tactical differences, continued to plague the California suffragists until well into the 1890s. And, as in all political movements, especially radical ones, personality conflicts added to, and sometimes obscured, philosophical disagreements.

Despite dissension from the outset, the first suffrage convention was a great success, well-attended and respectfully reported in the press.¹⁶ One of the most active conventioners was Laura deForce Gordon. Born in Pennsylvania in 1838, Gordon was eleven years older than Foltz and was married to a doctor, whom she divorced in 1877.¹⁷ As a young woman, Gordon had lectured on Spiritualism, but turned to women's rights after her post-war move west. By the close of the decade her story was so joined with Clara Foltz's that their achievements were truly mutual. It was Laura Gordon who, on February 19, 1868, made the first suffrage speech in California. Prophetically, one newspaper reported: "She is a pleasing speaker, but her doctrines don't suit these orthodox times just yet."¹⁸

In the same year as Gordon's first suffrage speech, Anthony and Stanton started publishing their women's rights newspaper, fearsomely entitled *The Revolution*. The early California suffragists eagerly read and circulated the paper, and one of them, Emily Pitts (later Stevens), was inspired to initiate a Northern California suffrage organ, the *Pioneer*.¹⁹ In turn, Abigail Scott Duniway, visiting San Francisco from Oregon, was inspired by Pitts' example to launch the major suffrage publication of the Pacific Coast, the *New Northwest*.²⁰

Like Clara Foltz, Duniway was "disappointed in marriage, in education . . . in everything." Although she was fifteen years older than Foltz, their

both parties by separation than by union" H.M. Tracey Cutler, *Letter from California, WOMAN'S J.*, (circa 1874) at 371. See also *infra* note 40.

16. "[L]ong before . . . the evening session, the hall in every part, platform, floor and gallery, was crowded, and large numbers were unable to gain entrance." 3 HWS, *supra* note 6, at 753 (quoting "The San Francisco dailies").

17. 2 NOTABLE AMERICAN WOMEN, *supra* note 4, at 68 (Gordon entry); *Obituary, WOMAN'S TRIB.*, May 26, 1907, at 2-3. Gordon's activities are frequently reported in 3-4 HWS, *supra* note 6.

18. Davis, *supra* note 12, at 203.

19. 3 HWS, *supra* note 6, at 752.

20. RUTH B. MOYNIHAN, *REBEL FOR RIGHTS: ABIGAIL SCOTT DUNIWAY* 85 (1983).

histories have many parallels.²¹ Both were raised on mid-western farms and had fathers who were well-read and interested in politics. Both married romantically at an early age to men who could not support them, and tried to live within woman's sphere before they turned to "path-breaking," (the title of Duniway's autobiography). Duniway involved her six children in her women's rights work, just as Foltz enlisted her three daughters and two sons. In temperament, they shared traits of obstinacy, forthrightness, physical and moral courage, and, particularly in their later years, vanity.²²

When Duniway's husband lost the family ranch by generously but foolishly co-signing a friend's note, she opened a school to support their family. Later she started a millinery shop which deepened her appreciation of women's situation through contacts both with her customers and the women who sewed for her on contract. On regular buying trips for the store, Duniway met with the northern California suffragists and gathered information and ideas.²³

On one of her San Francisco trips Duniway was prompted to start a suffrage newspaper in Oregon. On another in 1871, she talked to Laura Gordon, who for four years had been stumping California, Nevada, and Washington for the suffrage cause.²⁴ On the same 1871 trip, Duniway met

21. Duniway is well recorded in history, most recently by MOYNIHAN, *id.* Her activities are covered in suffrage histories, and her career and thought can be followed through the pages of her newspaper, *New Northwest*, published from 1871 to 1887, and her autobiography, ABIGAIL S. DUNIWAY, *PATH BREAKING: AN AUTOBIOGRAPHICAL HISTORY OF THE EQUAL SUFFRAGE MOVEMENT IN PACIFIC COAST STATES* (1914). See generally HELEN K. SMITH, *THE PRESUMPTUOUS DREAMER: A SOCIOLOGICAL HISTORY OF THE LIFE AND TIMES OF ABIGAIL SCOTT DUNIWAY* (1974).

22. The most important difference in temperament was that Duniway was subject to rages while Foltz was, at least outwardly, extraordinarily even. On the public platform, their message was much the same, but their styles were dissimilar. Abigail Duniway was down-home and anecdotal, substituting "force for excessive polish." MOYNIHAN, *supra* note 20, at 95. Clara Foltz was dramatic, elevated and abstract and delivered her lectures from written texts. The two women even had a hero in common: Colonel Edward Baker. Duniway wrote an epic poem about him and Foltz had a lecture about him in her portfolio.

23. Duniway's store

brought her into contact with numerous other women, and she discovered that many of her customers endured as much subjection as the poor widows and other housewives to whom she gave out her sewing Women throughout the Willamette Valley began coming to Mrs. Duniway as a benefactor and woman's advocate, simply because of the nature of her work. She made trips to San Francisco for the latest fabrics and styles, and accumulated ideas too.

Id. at 80-81.

24. Moynihan records that "Gordon . . . told Duniway that 'Eastern invaders' were attempting to undermine her leadership," and says Gordon was referring to the "National" and "American" association split. Moreover, says Moynihan, the word "Easterners," "often implied women of New England religion and gentility who had been trying to impose their refined, cold-water life-style on the West throughout the nineteenth century." *Id.* at 86.

Stanton and Anthony who were in California to stir converts for their National Association, and for suffrage generally.²⁵ Duniway persuaded Anthony to come to Oregon and join her speaking for suffrage there and in the Washington territory.

Duniway was established in her new vocation as suffrage leader, lecturer and publisher in January 1872, when Clara Foltz arrived in Oregon. With two small children and an infant, she followed her husband and found him in Portland, "clerking at starvation wages." Immediately she "went to making dresses and keeping boarders."²⁶

Clara Foltz had an uncanny, or perhaps canny, ability in any new place to find those who could help her. Very soon after her arrival, she met Duniway, perhaps by sewing for money through Duniway's shop. However they first met, Foltz was soon writing for *New Northwest*, and the friendship of the two women remained firm long after Foltz left Oregon.

There is little information about Foltz's time in Oregon, although after she became famous, two men had occasion to reflect on those years in her life. One, a newspaper editor, wrote that he first knew her "as a dressmaker . . . working her life out to support herself and her little family."²⁷ The other, a correspondent in a Sacramento paper, reminisced that Foltz had arrived in Oregon "in search of her husband. She was . . . very self-possessed, besides being rather attractive She has no timidity or shrinking delicacy . . . and is a ready talker, sharp and quick-witted."²⁸ In Oregon also, another admiring

25. They were more successful at arousing interest in suffrage than in gaining adherents for their association. Anthony, in particular, was not well-received by the public on this trip because she became embroiled in the great "Laura Fair affair." Laura Fair was the disappointed mistress of a well-known lawyer, A.J. Crittenden, who allegedly promised to marry her. When he reneged, she killed him. The more radical suffragists, notably Emily Pitts of the *Pioneer*, attended the trial, unusual in itself for women to do, and befriended Fair, arguing that it was unjust for a woman to be judged in an all-male system. In one of her early lectures in California, Anthony said: "if all men had protected all women . . . you would have no Laura Fair in your jail tonight." Her reference to Fair caused the worst press notices of her suffrage career. IDA H. HARPER, *THE LIFE AND WORK OF SUSAN B. ANTHONY* 391-92 (1898), KENNETH CHURCH LAMOTT, *WHO KILLED MR. CRITTENDEN?* 142, 284 (1963).

26. Cummins, *supra* note 7. Foltz arrived in Oregon after what she later described as "a fortnight's detention in the snow blockage (a serious detention to us, but one upon which the pioneers of Oregon would smile)." *NEW NORTHWEST*, Sept. 17, 1875, at 3.

27. Letter from Wells Drury to Governor Markham of California (Apr. 10, 1891) (on file in the archives of the California Secretary of State, Sacramento) (recommending Foltz's appointment as a Notary Public).

28. *Letter from Oregon*, *RECORD-UNION* (Sacramento), Feb. 25, 1879, at 1. The anonymous correspondent wrote about Foltz at the time of the Hastings suit when her fame as California's first woman lawyer was spreading. Of Jeremiah Foltz in early Oregon days, the correspondent noted that when Clara arrived he was clerking at a store, was unpopular, and "not of much force and whatever

man, an attorney, presented the young mother with the complete commentaries of Kent, urging her to study them because she "would make a good lawyer."²⁹

In 1875, the Foltz family moved to California and Clara wrote to Duniway of her regret at "tearing myself away from the many friends whom I had learned to love so dearly"³⁰ Also decamping for California was the Shortridge family, Clara's parents and four brothers who had followed her to Oregon.

CLARA FOLTZ IN SAN JOSE 1875-1878

In this three year period, Clara Foltz moved from Oregon with four children, bore another, connected with the most influential people in San Jose, entered the public lecturing field, and embarked on law study.³¹ It was, moreover, a turbulent time in her fifteen-year marriage, soon to end.³²

In one of her first letters from San Jose, Foltz described San Jose as "an Eden of loveliness" and informed *New Northwest* readers that she had attended a suffrage meeting "at the elegant home of the president, Mrs. S.L. Knox . . . a widow of commanding personal appearance, an abundance of bank stock, and a wealth of . . . common sense."³³

Again with alacrity, Foltz attached herself to an older woman suffragist, this time one who could give financial as well as spiritual aid. When they first met, Sarah was the widow of William Knox, a successful businessman, who as a state senator had "secured the passage of a bill, drafted by himself, giving to

became of him I cannot tell." *Id.*

29. SHUCK, *supra* note 4, at 828. Shuck was the biographer of 19th century Californians and wrote several volumes collecting largely laudatory, though often revealing, articles.

30. NEW NORTHWEST, Sept. 17, 1875, at 2. The letter does not mention the reason for the move. Foltz noted that when she last wrote, "I did not dream of changing my place of residence so soon." *Id.*

Several years later, Foltz told Duniway that the arrival of the *New Northwest* "reminded me in every line of the lovely Oregon home that for a few fleeting years was mine, and of the friends that there labor for the advancement of human rights." She continued by assuring Duniway that she promoted "our paper" as the best "published on the Pacific Coast, not even excepting the Mercury of this city." NEW NORTHWEST, June 15, 1877, at 2.

31. One of Foltz's other activities during this period was as a temperance worker, work she also did in Oregon. By the time she arrived in San Jose, however, she viewed suffrage as "the great issue on which all other reforms depend." *Letter from San Jose*, NEW NORTHWEST, Sept. 17, 1875, at 2. While she used anti-liquor arguments to promote the ballot and argued that women lawyers would be more sober and industrious than men, temperance was not one of her main concerns at this time.

32. See *infra* notes 48, 113. I tell the story of Foltz's divorce in BABCOCK, *Reconstructing the Person*, *supra* note 4.

33. NEW NORTHWEST, Sept. 17, 1875, at 2.

married women the right to dispose of their own separate property by will."³⁴ In 1879, she was re-married to an architect, also wealthy and also "fully in sympathy with all of her progressive views."³⁵ She subsequently honored both her husbands by signing herself Knox-Goodrich.

Sarah Knox-Goodrich comes to us through her writing and contemporary descriptions as maternal, sweet, and very tough. Duniway, not usually long on praise, said of her: "Gentlemen admire her, as they always do bright women who have courage to want to be free, and ladies like her in spite of themselves because of her goodness of heart."³⁶

Knox's regular correspondence with suffrage publications and the San Jose papers shows her rhetorical talents.³⁷ Often she spoke with a western accent, invoking the "pioneer mothers of a common country . . . who had transformed the howling wilderness into a garden of beauty . . ."³⁸ or noting that women could fight if necessary because "we can fire a gun and hit a mark about as well as the average man."³⁹

Shortly before Clara Foltz arrived in San Jose, Knox had spearheaded the first legislative victory for organized women in California: a bill making women eligible for educational offices, such as school boards. She and other leaders of the Santa Clara suffrage society journeyed to Sacramento, "remaining there for weeks, urging the measure."⁴⁰ This proved an important lesson in

34. 3 HWS, *supra* note 6, at 765-66.

35. *Id.*

36. NEW NORTHWEST, Apr. 6, 1877, at 2.

37. Knox-Goodrich was a frequent contributor to the *Women's Journal*, the *San Jose Mercury*, and the *New Northwest*, as well as transient women's rights publications like Marietta Stow's *Women's Herald of Industry*. Her letters are thoughtful and persuasive. When Laura Gordon, in 1881, was gathering material for *The History of Women Suffrage*, Knox-Goodrich sent her an undated clipping from the *San Jose Mercury* in 1874, of which she was particularly proud. It makes a convincing case for suffrage, concluding by citing John Stuart Mill. Letter from Sarah Knox-Goodrich to Laura Gordon (1881), Gordon papers (on file at Bancroft Library, University of California) [hereinafter Gordon papers].

In her 1877 annual protest against "taxation without representation," Knox-Goodrich employed an argument that became a mainstay in both the battles for suffrage and for women lawyers: "Special laws, or laws specially defined for one particular body of people on account of race, color or sex or occupation are *class legislation* which bears the seeds of death within itself." *Annual Protest of Mrs. Knox*, WOMAN'S J., May 5, 1877, at 141 (quoting from the *San Jose Mercury*) (emphasis added).

38. J.P. MUNRO-FRASER, HISTORY OF SANTA CLARA COUNTY 768 (1881).

39. WOMAN'S J., May 5, 1877, at 141.

40. *The California Law*, WOMAN'S J., Apr. 18, 1874, at 128. The Santa Clara Suffrage Association was separate from either of the rival states societies. See *supra* note 15. The passage of this bill is evidence for DuBois's thesis that the division into separate societies was not necessarily harmful to the suffrage cause. *Id.* Sarah Knox was reported in the *Woman's Journal* in the early

method for Foltz.

Sarah Knox-Goodrich had the wealth and social standing that Clara Foltz and many of the other early suffrage activists lacked. These assets enabled her to offer herself as a model in ways that were bold for a nineteenth century woman, such as lobbying the legislature, and appearing at the polls to try to vote in every election after 1869. Of her role, the *History of Woman Suffrage* observed: "she has nerved the weak and encouraged the timid by her example of unflinching devotion."⁴¹

Always open to the influence of mentors, Clara Foltz readily followed Sarah Knox to the polls⁴² and rejoiced in the conversation of suffrage celebrities like Mary Livermore and Lillie Deveraux Blake at the home of her friend.⁴³ Foltz wrote of Knox as her "earliest appreciative friend" in San Jose, who "believed in me and never ceased to proclaim me as the 'coming woman'."⁴⁴ In 1876, she named her last-born after the only child of her benefactor: Virginia Knox.

Generally, the suffrage scene Clara Foltz found in San Jose was supportive and relatively conflict-free. In 1872, the *Woman's Journal* noted that there were about 200 members in the San Jose suffrage association, including "some of the most intelligent business men" and "educated and refined happy wives and mothers."⁴⁵ Among the male suffragists was J.J. Owen, editor of the leading

1870s as being one of the group that sided with the Stone-American society, and split off from the original suffrage organizers. See, e.g., CALIFORNIA CORRESPONDENCE, Feb. 11, 1871, at 48. However, she seems to have given her time and money without discrimination to whoever had a suffrage project going at the moment. Like her mentor, Clara Foltz apparently did not engage the division between the national societies as it played out in California, although she greatly admired Anthony.

41. 3 HWS, *supra* note 6, at 765. An essayist in 1888 described her role in this way: "For years Mrs. Goodrich has devoted her time, her money, and her social influence to the cause of equal rights for women." H.S. FOOTE, PEN PICTURES FROM "THE GARDEN OF THE WORLD" 226 (1888).

42. See WOMAN'S J., May 5, 1877, at 141 (quoting the *San Jose Mercury* which reported: "The following ladies offered their votes last Monday, which votes were of course rejected, whereupon they submitted to the election board" several protests. Six women are then quoted, leading with Sarah Knox, and concluding with Clara Foltz. Foltz's protest reads in part: "As a mother and tax-paying citizen . . . I protest in the name of the so-called Republican government, against the right of another to represent me in any case whatever.").

43. *Struggles*, *supra* note 1, May 1916. Much of Foltz's education came from listening to better-advantaged people: "I learned from them whatever I heard, and never forgot." *Id.*

44. *Id.*

45. WOMAN'S J., Dec. 7, 1872, at 387. This story also reported that the suffragists have "tastefully fitted up a pleasant reading room for ladies with music, books and papers, free at all times to those who wish to drop in and rest in body and mind. The lady members and all others who will meet here at stated periods for mutual benefit . . . While coarse-minded men and small-minded women have bestowed almost every kind of odious epithets upon them, they deserve the

San Jose newspaper, the *Mercury*. He admired Foltz from the beginning and reported her activities approvingly.⁴⁶

The suffragists, Foltz and Knox particularly, shared a spirit of fun and sense of occasion. Conventions and meetings included beautiful food, dancing, dramatic and musical renditions. For years California suffragists told of the Centennial Fourth of July celebration when Sarah Knox and others she inspired decorated their houses and paraded with placards ranging from "No Taxation without Representation" to the more humble "The Class Entitled to Respectful Consideration." In the center of Knox's carriage sat "a little daughter of Mrs. Clara Foltz . . . dressed in red, white and blue . . . carrying a white banner with silver fringe, . . . and in letters large enough to be seen at some distance, the one word 'Hope'."⁴⁷

Clara Foltz needed hope in 1876 because she had little income from her husband and no savings. In California, as in Oregon and Iowa, Jeremiah Foltz could not support his growing family. The seventies were hard times for many working people, but worse for the Foltzes because Jeremiah made frequent trips back to Portland, apparently to see another woman.⁴⁸

highest credit for being the first in this place to provide [such a] room."

San Jose was linked by a short rail ride to Santa Clara where there was also a small, but active, band of workers.

46. Foltz met Owen on her first drive through the city and described him as "a gentlemen in fact, a writer of much ability, and a strong Woman Suffragist." *NEW NORTHWEST*, June 15, 1877, at 2.

"The San Jose *Mercury* was our friend from the first, and its fearless and able editor, J.J. Owen, [was] president of the State woman suffrage society . . . in 1878." 3 HWS, *supra* note 6, at 755.

47. 3 HWS, *supra* note 6, at 766. The 4th of July story has many sources, but this is the account submitted by Knox-Goodrich herself. As she remembered the event:

Our carriage was the center of attention. . . . Hundreds of people stood and read the mottoes on the house, making their comments, both grave and gay: "Good for Mrs. Knox"; "She is right"; "If I were in her place I would never pay a tax"; "I guess one of the strong-minded lives here."

Id.

Knox-Goodrich told also of how she asked to march behind the Negroes and in front of the Chinese to demonstrate the place of women. The organizers of the parade, however, insisted that the women march in the front ranks.

The motto, "The Class Entitled to Respectful Consideration," was probably a sarcastic reference to the Republican national platform of 1872 which responded to the demand for a suffrage plank with this phrasing. *THE CONCISE HISTORY OF WOMAN SUFFRAGE 275-76* (Mari Jo Buhle & Paul Buhle eds., 1978).

48. Cummins, *supra* note 7, and the *Post* story, *supra* note 7, reported that Jeremiah married in Portland two weeks after Clara divorced him in the summer of 1879. In February, 1878, Clara Foltz traveled to Portland to see her husband, and in early 1879 he was back in San Jose in an apparent effort to repair the marriage. But in March, 1879, according to the divorce papers, he left San Jose, announcing his intention to remove himself permanently to Oregon. Babcock,

In the past, Clara helped support her children through traditional women's work, but taking in boarders and sewing proved inadequate. Now she resolved to try lecturing for money, a decision that moved her into a public sphere she never left.⁴⁹ Foltz took "Impartial Suffrage" for her subject and filled a San Jose hall. The *Mercury* reported that the "lecture was a well written production, and was well delivered, frequently calling out protracted applause."⁵⁰ Visiting in California soon after Clara started her new career, Abigail Duniway wrote: "Our old friend from Salem . . . has given several lectures . . . before good audiences . . . [and is] highly praised, many saying they have never been excelled . . . in San Jose."⁵¹

Her maiden lecture showed the pragmatism that characterized Foltz's style of argument, as well as her other efforts. "Whatever works" could have been her creed.⁵² First, she argued for suffrage because women were men's equals: "Did God fail in his last crowning work when he made woman, that she is not the equal of man? Genius, talent, hard labor know no sex." With no sense of inconsistency, she shifted to praising women, with frequent examples, as the "better half." "Women have been the great reformatory power in every age. If woman's influence is purifying in all other relations what sophistry to exclude her from the polls, the sacred shrine of liberty."

Reconstructing the Person, *supra* note 4. See *infra* notes 79, 113 and accompanying text.

49. After she became a lawyer, the *San Jose Weekly Mercury*, reporting on her accomplishments over great odds, added that Foltz had "been obliged to take to the lecture field as a means of piecing out her meager income." Sept. 12, 1878, at 3.

Lecturing for money had potential to provide a decent income. Emily Pitts-Stevens, angered that she was not more in demand as a speaker on women's rights, listed the going rates of a number of women in the *Pioneer*. A sample from the list of 10:

— Addie Ballou treats of the "Common Conflict which Makes Moral and Religious Revolution Inevitable" for \$50-\$100.

Miss Phebe Cozzins has two lectures, "The Political and Legal Disabilities of Women" and "The Bible and Women's Sphere." Terms \$100 with modifications.

— Miss Lillian Edgerton takes the man side of the woman question for \$100-\$150.

— Laura Keene, fine arts, music, drama and song. Terms \$150-\$200.

quoted in Davis, *supra* note 12, at 202.

50. In *A New Field*, NEW NORTHWEST, Feb. 22, 1877, at 2 (quoting the *San Jose Mercury*). The story added that Foltz would soon deliver a second lecture on "Woman and Her Work." *Id.*

51. *Editorial Correspondence*, NEW NORTHWEST, Apr. 6, 1877, at 2. Foltz lectured in Saratoga, Santa Cruz, Mayfield, Gilroy, and Oakland in the early months of her new career. The *Mercury* reported uniformly gilt-edged reviews. Typical were these lines reprinted from an Oakland paper: "[A]ll with one accord, considered [it] the most brilliant speech ever delivered by a lady orator in this city." SAN JOSE WEEKLY MERCURY, Dec. 6, 1877, at 3.

52. The description and quotations that follow in the text are once removed from the speech as she gave it, since they come from newspaper summaries of this lecture. The fullest accounts of the *Impartial Suffrage* lecture, which became one of Foltz's standard stump speeches, are in the SAN JOSE WEEKLY MERCURY, Mar. 15, 1877, at 3-4 and the NEW NORTHWEST, Feb. 22, 1878, at 2.

As most movement speakers did, Foltz drew on the Seneca Falls Declaration⁵³ by referring to taxation without representation. She also quoted Blackstone on the supremacy of "natural law" and argued that legislation disenfranchising any class was void as a violation of natural rights. From personal experience, she exclaimed: "It is said that men support women, and women's sphere is the home. We claim that nine-tenths of women support themselves."⁵⁴

This percentage may have been high, but Clara Foltz well knew one case of a woman who had to support herself and five children. She soon sought to extend her resources beyond lecturing by reading law. Duniway drily observed that "if she lives, she will prove to the world that a woman can do some things as well as others."⁵⁵ With her usual sense for the direct route, Foltz originally tried to study with a very prestigious lawyer, Francis Spencer. The son of an eminent physician, Spencer had been financially blessed from the start and he had earned a statewide reputation by winning a number of celebrated cases.⁵⁶

Foltz envisioned "beginning my student work in his big fine offices," and wrote seeking the privilege: "I waited patiently . . . My mother shook her head with a sigh as day after day, I ran to meet the letter carrier." Almost forty years later, Foltz printed Spencer's reply in her autobiographical column—another document in the record of women's disappointment:

My dear young Friend:—

Excuse my delay in answering your letter asking permission to enter my law office as a student. My high regard for your parents, and for you, who seem to have no right understanding of what you say you want to undertake, forbid encouraging you in so foolish a pursuit—wherein you would invite nothing but ridicule if not contempt.

53. See *supra* note 11.

54. Although the fit is uncertain, she managed to close her speech with a stirring dramatic rendition of "Barbara Frietchie," by John Greenleaf Whittier, a civil war poem well-known in my childhood. It tells the story of Barbara Frietchie who flew the stars and stripes when the confederate army passed through Frederick, Maryland, and has this memorable refrain:

Shoot if you must, this old gray head,
But spare your country's flag, she said.

55. NEW NORTHWEST, May 4, 1877, at 2.

56. FOOTE, *supra* note 41, at 86-88 records that Spencer was noted especially "for the care with which he prepared his cases for trial. No point was too insignificant to be thoroughly investigated, and the law and authorities thoroughly collated." In 1880, he became a judge in the court system that was reorganized under the 1879 constitution. E. SAWYER, HISTORY OF SANTA CLARA COUNTY 83 (1922). Essentially, the superior courts were replaced by district courts, handling the same jurisdiction.

A woman's place is at home, unless it is as a teacher. If you would like a position in our public schools I will be glad to recommend you, for I think you are well qualified.

Very respectfully,
Francis Spencer⁵⁷

Instead of joining Francis Spencer, she studied in the more modest offices of C.C. Stephens, an early male feminist, with whom her father occasionally practiced law.⁵⁸

Neither institutional training nor a formal statewide examination was required to join the Bar; the only prerequisites were that an applicant be a twenty-one year old white male citizen of good moral character, and possess the necessary "learning and ability."⁵⁹ Clara Foltz was not worried about acquiring learning, and her ability was as great as her ambition, but she had to do something about the limitation of law practice to white males.

She drafted what became known as "The Woman Lawyer's Bill,"⁶⁰ simply substituting "person" for "white male" in the Code provision, and chose the most influential man in town to introduce it. Barney Murphy was a wealthy banker, a graduate of Santa Clara College, "short, but exceedingly good

57. All textual quotes about joining Francis Spencer are from *Struggles*, *supra* note 1, June 1916. As to his letter, did she keep it for forty years or was it emblazoned on her brain?

58. Elias Shortridge had been a lawyer in Illinois and Iowa, but had left the profession shortly before the Civil War to become a Cambellite minister in Mt. Pleasant, Iowa. When the Shortridge family moved to San Jose, Elias apparently returned briefly to the law, as well as offering some public lectures. *SAN JOSE WEEKLY MERCURY*, Jan. 3, 1878, at 3. In 1880, however, he left, with his friend C.C. Stephens for Tucson, Arizona, apparently in hopes of striking silver. In 1890, Elias Shortridge returned to San Jose, terminally ill, and died among his family. "A good man laid peacefully to rest." *Obituary*, *SAN JOSE MERCURY*, Nov. 9, 1890, at 5.

C.C. Stephens had proven credentials as a feminist. In 1871, he had published a tract on the "Legal Disabilities of Women in California," among which was their exclusion from "the learned pathways of the law." Stephens concluded the tract, published under the auspices of the Pacific Coast Woman Suffrage Association (a branch of the American Association), by a call to the legislature for "the abrogation of these evils." *WOMAN'S J.*, Aug. 5, 1871, at 247.

That she did not turn first to C.C. Stephens, a natural ally, is another mark of Foltz's pragmatism; her entrance into the profession would have been smoother with the backing of the famous Francis Spencer.

59. *CAL. STAT.*, ch. 1, § 275, at 64 (passed in 1851).

60. The popular title of the Bill was not uniform, but I will use Foltz's nomenclature, "The Woman Lawyer's Bill." Other renderings were "The Woman's Lawyer Bill," "The Women Lawyer's Bill," "The Women's Lawyer Bill," "The Women Lawyers' Bill," or with the abandonment of the pesky apostrophe, "The Women Lawyers Bill."

looking."⁶¹ In 1869-70, when only twenty-nine, he had been elected to the State Assembly and managed, with some difficulty, to situate the state normal school at San Jose, an achievement that sealed his popularity.⁶² Foltz wrote that he was "beloved by everybody because of his big warm Irish heart."⁶³

When Foltz arrived in town, Murphy was the Mayor and they first became allies through their successful efforts in 1876 to establish a paid fire department.⁶⁴ In 1877, he was newly elected to the state Senate, set to convene in Sacramento in early December. Foltz planned to be there; from the opening day to the close of the session on April 1, 1878, her life's concern was the Woman Lawyer's Bill.⁶⁵

The Bill's passage entailed great energy as well as physical hardships: "night journeys to Sacramento in the caboose of a cattle train, without a dollar in her pocket and a little bag of biscuits and boiled eggs for her refreshment."⁶⁶ Once in Sacramento, she "liv[ed] on next to nothing, in order to stay . . . and get her bill through, eking out in every possible manner, cooking her food on a tiny alcohol lamp, while her friends cared for her little ones temporarily."⁶⁷

61. PEN PORTRAITS, *Autobiographies of State Officers, Legislators, Prominent Business and Professional Men of the Capital of the State of California, also of Newspaper Proprietors, Editors and Members of the Corps Repertorial* 33 (R.R. Parkinson 1878) [hereinafter PEN PORTRAITS].

Barney's brother, P.W. Murphy, was also a Senator, from the Counties of Ventura, Santa Barbara and San Luis Obispo. He was "one of the greatest cattle owners in the State . . . and a very wealthy man." *Id.* So the Woman Lawyer's Bill started with at least two votes in the Senate.

62. FOOTE, *supra* note 41, at 614.

63. *Struggles*, *supra* note 1, Aug. 1916.

64. Describing what she called "her first public effort," Foltz wrote: "Everything moved slowly, too slowly for my impetuous spirit. There were so many things to be done—for my children, my husband, my neighbors and for the whole city. I became deeply interested in securing for San Jose a paid fire department instead of the inefficient volunteer system by which all the houses in town might burn up while the boys were getting out of bed and into their clothes." *Struggles*, *supra* note 1, May 1916.

65. Foltz may have taken a lesson from an earlier unsuccessful attempt to pass a woman lawyer's bill striking out the words "white" and "male" that passed the California Assembly (the lower house) in early 1872. WOMAN'S J., Jan. 27, 1872, at 28. Nellie Tator, a Santa Cruz woman, studied for the bar, and passed the examination, but then "discovered that the law would not admit women to that learned profession." 3 HWS, *supra* note 6, at 757. Tator drafted a bill but did not appear in Sacramento herself to push the legislation. Tator's efforts were part of a campaign by early Santa Cruz suffragists. GEORGIANA: FEMINIST REFORMER OF THE WEST 45 (C. Swift & J. Steen ed., 1987) (discussing Tator).

66. 13 WEST COAST MAGAZINE, *supra* note 9, at 42.

67. Cummins, *supra* note 7.

CLARA FOLTZ IN SACRAMENTO 1878

On December 3, the Twenty-Second Session of the California Legislature opened in Sacramento.⁶⁸ It was the last legislature before the Constitutional Convention, set for the following September. Establishing procedures for the convention consumed much of the time, but the session was also noteworthy for the introduction of over fifteen hundred bills, more than in any previous legislature.⁶⁹ Adding to the general confusion was an unusual number of new members, who had “scarcely become inured to the legislative harness.”⁷⁰

Two weeks after the Senate convened, Barney Murphy introduced the Woman Lawyer’s Bill. The *Sacramento Bee* offered lukewarm support, adding to its endorsement that women “are not successful in their professions [because] all women hope to marry and be supported by their husbands.”⁷¹ Two women whose husbands did not support them were present at the twenty-second session, however, and were planning to take advantage of legal permission to become lawyers as soon as possible: Clara Foltz and Laura deForce Gordon.

Gordon attended as a press representative for her own paper, the *Oakland Daily Democrat*.⁷² The only familiar female figure in this bearded, booted assemblage, she had not only covered previous legislative sessions for the press,

68. The legislature was bicameral: the Senate with 40 members elected to four-year terms, one-half chosen every two years; the Assembly with 80 members elected to two-year terms. There were a total of 82 Democrats, 35 Republicans and three Independents in the legislature. Party affiliation does not seem to have been important in the deliberations on the Woman Lawyer’s Bill. *But see infra* note 87. *See also infra* note 111.

69. SACRAMENTO UNION, Apr. 8, 1878, at 2. In an editorial on the close of legislature, the writer notes the numbers of bills introduced and says: “A great deal of intemperate abuse has been heaped on the legislature this winter and much of it has been undeserved.” *Id.*

70. PEN PORTRAITS, *supra* note 61, at 84.

71. SACRAMENTO DAILY BEE, Dec. 19, 1877, at 2. The Bill was introduced on Monday, December 17.

72. PEN PORTRAITS, *supra* note 61, at 105. The entry reveals this picture of Gordon: Represents the *Sacramento Bee* and the *Oakland Democrat* on the floor of the Senate and Assembly. The fair dame is 36 years of age, comely in appearance, and is one of the most energetic of the newspaper correspondents. She attends faithfully to her duties, and enjoys the respect of all the male correspondents. . . . Mrs. Gordon is an active worker in the interest of women, and has been often selected to represent the interest of California in their conventions. She was invited to the platform in the National Liberal Convention held in Cincinnati in 1872, and has also delivered lectures before the Legislature of Nevada in 1871, in reference to the constitutional proposition to allow women to vote. Also before the Legislature of California in 1870 upon the same proposition

Recently divorced, Gordon was living on a farm in Lodi (near Stockton) with an extended family of her aged parents, her brother, and Gertie deForce Cluff, her sister who was also a journalist, as well as Gertie’s husband and children. Gordon papers, *supra* note 37; *supra* note 17.

but had lobbied for suffrage when the movement was just starting in California. After spending the early seventies stumping for suffrage throughout the West, as well as attending several national conventions, Gordon had become in late 1873 the publisher and editor of the *Stockton Weekly Leader*, which she made a daily, and moved to Oakland. By 1878, she was discouraged with the newspaper business and planned to study law because she believed it would offer a better living, a freer schedule and a more impressive platform from which to urge women's rights.

Foltz and Gordon joined in what Foltz called their "desperate struggle" to obtain passage of the Woman Lawyer's Bill.⁷³ This language was not one of Foltz's frequent exaggerations; she *was* desperate. Without the Bill, she could not become a lawyer, and the profession offered the best hope for supporting her children. Her desperation echoes still in words written long after the event: "I coaxed, I entreated, I would have reasoned had they been reasonable men . . . I had to beg—not for a living, but to be allowed to earn a living."⁷⁴

Contemporaneous accounts do not record exactly what the women did and when. But a newspaper columnist wrote that the 1878 legislative session was heavily marked by the activity of lobbyists:

. . . circulating through the halls and chambers, whispering in corners, closeted in alcoves, consulting in knots, buzzing in groups, bending over legislators at their desks, buttonholing, counselling, advising, plotting, working every plan, pulling every wire, bringing to bear every influence⁷⁵

Although Clara Foltz had no previous experience as a lobbyist, she was gifted at it. One legislator commented admiringly:

I never knew before how much pluck and energy there was in a woman—how they could urge their claims, plead for the privilege of making the battle of life—for such our friend Mrs. Foltz did, gently

73. *Letter from Mrs. Foltz*, NEW NORTHWEST, Apr. 19, 1878, at 2.

74. *Struggles*, *supra* note 1, Aug. 1916. In the same passage Foltz wrote:

I almost went down on my knees before them, asking for the pitiful privilege of an equal chance with men to earn an honest living in a noble profession! Think of it! They make laws against vagrancy, they urged laws against tramps, they complained loudly of prevalent idleness—and yet, I had to beg—not for a living but to be allowed to earn a living

75. SACRAMENTO RECORD-UNION, Mar. 30, 1878, at 2. The writer sums up at great length the lobbying activities in the session, naming names and causes, though he does not mention the women or their Bill. He claims that no legislature was ever more subject to lobbying than the one just concluded. *Id.*

and eloquently.⁷⁶

The two women were not alone in their efforts. The State Suffrage Society sent Sarah Knox-Goodrich, among others, "to visit Sacramento during the session and use their influence to secure the passage of the 'Woman's Lawyer Bill' . . . and to petition for suffrage."⁷⁷ The women also had help in collecting hundreds of signatures on petitions.⁷⁸

Some of the arguments Foltz and Gordon encountered were the same ones raised against suffrage. Voting or practicing law would move women into the public sphere, "unsexing" them, and thus making them unfit for domestic life. In 1878, the argument presupposed that women would somehow be forced to exercise these rights, absorbing all their time and energy and thus destroying the home. Patiently, Clara Foltz explained to Captain M. or Colonel S. that *his* wife, so handsomely provided for, would not have to be a lawyer.

Her own situation, with her husband unable to support the family, and on the brink of desertion, made this standard argument particularly galling to Clara Foltz. It was painful for Laura Gordon, too, the main breadwinner for her family now that her twenty-year marriage had ended.⁷⁹

Many of the objections were, of course, specific to the women's desire to be lawyers. A frequently expressed concern, for instance, was that women lawyers would sway juries to acquit the guilty and award the undeserving.⁸⁰ The only solution would be to place women on juries: "upon such a panel [the woman lawyer's] seductive and persuasive arts would be wasted." Some

76. *A Victory in California*, WOMAN'S J., Apr. 20, 1878, at 124 (quoting letter from an unnamed California legislator).

77. 3 HWS, *supra* note 6, at 757.

78. *See infra* notes 84-86.

79. Both women grieved over the loss of their husbands by divorce. Gordon wrote to a friend in 1877 that divorce was "the saddest of all earthly experiences . . . what anguish the heart can endure by loss of those nearer and dearer than life." Letter from Gordon to Laura (Feb. 16, 1877) (in St. Louis, no last name), Gordon papers, *supra* note 37.

A suffrage friend wrote to Laura Gordon about Clara Foltz in 1879, soon after Jeremiah left her:

I am a little troubled about our beloved Clara. Others will love her, whose love will not blight. It is so pitiful that in the lives of women, over-developed for generations in the affectional nature—until as a sex we are abnormally sensitive to the emotions, and we become as a harp over which the thought of others sweeps and too often to our pain. Well be it if our gentle, magnetic friend is poised against it all.

Letter from Josephine Woolcott to Laura Gordon (Apr. 19, 1879), Gordon papers, *supra* note 37.

80. "Impressionable male jurors" would "return a verdict of acquittal without leaving the box," and "the law and the facts would be simply ignored." SACRAMENTO UNION, Jan. 11, 1878, at 2 (editorial reflecting the debate).

opponents considered it a telling argument that if women became lawyers, they would next become jurors, perhaps even judges.⁸¹ Others painted the picture of a woman lawyer undone by the necessity of cross-examining on some indelicate subject.⁸²

Over the opposition, the Bill passed the Senate in mid-January with a "decided" vote of 23-11 including all but two of the lawyers. According to one Sacramento paper, the lawyers voted "with a degree of liberality which does credit alike to head and heart."⁸³ All of the prominent lawyers of San Jose signed a supportive petition which Foltz carried to Sacramento.⁸⁴ "[N]early every Member of the Bar of Sacramento" requested that the Bill pass.⁸⁵ And the lawyers of Stockton, near Laura Gordon's home, also petitioned for passage.⁸⁶

In the Assembly, however, the chief opponents were lawyers, and the Bill's prospects were more precarious than in the Senate.⁸⁷ Yet ultimately it was a

81. SACRAMENTO UNION, Feb. 26, 1878, at 1 (Mr. Anderson in opposition).

82. *See, e.g.*, SACRAMENTO UNION, Feb. 26, 1878, at 1 (Mr. Waters). Byron Waters is described in PEN PORTRAITS, *supra* note 61, at 81, as a practicing attorney about 28 years old, who came to California from his native Georgia in 1867. This was his first term in the legislature yet he reappears as a delegate to the constitutional convention in unrelieved opposition to woman suffrage.

83. SACRAMENTO DAILY BEE, Jan. 17, 1878, at 3.

Both the *Bee* and the *Union*, the leading Sacramento papers, supported the Woman Lawyer's Bill, though without enthusiasm or elaborate coverage. Both papers devote far more space during the legislative session to women's fashion and a masquerade ball given by Sacramento socialites than to the Woman Lawyer's Bill. For instance, on January 17, the *Bee* gives a short notice on page 3 to the Bill's Senate passage, while devoting an entire column on page 1 to fashion. *For the Women* contains many paragraphs similar to this: "The present taste leads to wearing rich lace along with velvet, the broad collar and cuffs outside the close sleeve of the finest lace the wearer can obtain, being considered more distinguished than any amount of other trimming."

84. Reported in a letter from Sarah Knox, *Woman's Rights in California*, WOMAN'S J., Apr. 13, 1878, at 116. We don't know whether Francis Spencer signed the petition.

85. SACRAMENTO DAILY BEE, Mar. 29, 1878, at 2.

86. SACRAMENTO UNION, Mar. 29, 1878, at 1. Assemblyman Myers of Stockton presented the petition.

87. Reporting the "long debate" on the Bill, the *San Francisco Bulletin* remarked that "the ladies have been less successful in the Assembly," although the "Senate is supposed to be the most conservative branch." SAN FRANCISCO BULLETIN, Feb. 26, 1878, at 3. The Judiciary Committee of the Assembly reported the Bill out without a recommendation. Byron Waters and W.F. Anderson, leading opponents in the debate, were both on the committee, with Anderson, in his first term, the chair. Anderson, age 51, was a practicing attorney from San Francisco, who took "a prominent part in the discussion of all legal questions." PEN PORTRAITS, *supra* note 61, at 29.

Anderson, Waters, and Dewitt, also an outspoken opponent of the Bill, were all Democrats, while Grove Johnson, W.B. May, McComas, and other proponents in the Assembly were Republicans. However, there is no evidence that party affiliation played a part in the positions taken. Clara Foltz was a Republican, Laura Gordon a Democrat. The Murphy brothers were Democrats, as was Sargent of San Joaquin, a proponent in the Assembly. None of the rhetoric has

lawyer, Grove L. Johnson, who saved the Bill.⁸⁸ None of the characters in this story is more engaging, or more improbable as a champion of women's rights, than the Assemblyman from Sacramento. The 1877-78 legislature was Grove Johnson's first term, but he was not one to sit on the back benches or slowly ascend the seniority ladder. In a "scholarly and elaborate" first address, he opposed a gag law directed at the radical Workingmen's party. The *Sacramento Bee* termed it "the most eloquent [speech] ever heard in the chamber . . ."⁸⁹

In 1880, Grove L., as he was known, ran successfully for the state senate. In the mid-nineties, he was a U.S. congressman, and in 1901 returned to the state assembly where he served for a decade.⁹⁰ By the time he became a congressman, he was taking directions, and perhaps more, from the Southern Pacific Railroad; his maiden speech for the Workingmen was in the definite past. Grove's son, Hiram Johnson, the Progressive Governor of California from 1911 to 1916, later broke the power of the railroads over the state. The son split from the father over Grove's allegiance to the railroad during his congressional term. The break was so bitter that Hiram and his brother Albert campaigned against their father's candidate in local elections, and Grove L. did not support his son for Governor.⁹¹

But in 1878, Grove L. had not yet made his railroad connection, and his politics were as personal as his force.⁹² Through his advocacy of the Woman Lawyer's Bill, Grove L. and Clara formed a bond that survived her later support of the Progressive Party founded by his estranged son. The source of their

party reference or tone. *But see infra* note 111.

88. "The fight was long and fierce, [and] would have been lost beyond recall, . . . but for the timely and able assistance of Hon. Grove L. Johnson." *Struggles, supra* note 1, Aug. 1916.

89. PEN PORTRAITS, *supra* note 61, at 66-67 (quoting the *Bee*). This biographical entry also says that Grove Johnson, in his first term, "had become the most conspicuous member of the Assembly, having earned for himself the appellation of 'champion of the rights of workingmen.'" *Id.* See also I.B. CROSS, FRANK RONEY, IRISH REBEL AND LABOR LEADER 283 (1931) (reporting Johnson's aid to the workingmen).

90. McKee, *The Background and Early Career of Hiram Walker Johnson, 1866-1910*, 19 PAC. HIST. REV. 17 (1950) (discussing Grove Johnson's career).

91. GEORGE E. MOWRY, THE CALIFORNIA PROGRESSIVES 112 (1951); SPENCER C. OLIN, CALIFORNIA'S PRODIGAL SON: HIRAM JOHNSON AND THE PROGRESSIVES, 1911-1917 (1968). In an extension of the oedipal struggle, Hiram Johnson was always lukewarm about woman suffrage, which was one of his father's causes. See *infra* note 93. For Hiram Johnson's attitude toward suffrage, the only Progressive reform he failed to support, see, e.g., Letter to Meyer Lissner (Nov. 6, 1911) (Hiram Johnson papers, Bancroft Library, University of California) ("The more I think of the situation with regard to woman suffrage, the more I think [it] . . . will ultimately destroy us.").

92. In addition to support for the workingmen, Johnson in his first term advocated pressing the United States Congress for free coinage of silver, and sought anti-railroad land reform. Claiming that a large part of the state was owned by a few who did not cultivate it, he called for a redistribution of land and a uniform taxation rate. SACRAMENTO BEE, Dec. 5, 1877, at 2.

alliance is uncertain; perhaps it was simply the result of friendship and sympathy. They shared the same intense work ethic, the same seemingly boundless physical energy, and even the same number of children, of the same ages and sexes.⁹³

Contemporary descriptions of Johnson convey a startling fierceness:

His mental powers are nearly always at white heat, and I wonder that his intense mind has not long since shattered his body . . . [Always] . . . Johnson's mind is on the leap, like a greyhound after a hare . . . He is terrible in sudden repartee, and it is hardly safe to provoke him.⁹⁴

His grandson wrote that "he was known to be particularly belligerent and ferocious."⁹⁵

A short man, he was always dressed in striped "diplomat" pants, a frock coat, fine leather boots to the knee and a broad brimmed black hat. In his lapel was "an exquisite nosegay" watered from a small vial specially sewed into his coat.⁹⁶ But the power of his intellect and oratory made Grove L. more than a fierce little dandy. An omnivorous reader with a photographic memory, he

93. Even after he became one of the railroad's men, Grove L. continued to press for women's rights and introduced suffrage bills in every legislative term he served. *Obituary*, SAN FRANCISCO CHRONICLE, Feb. 2, 1926, at 1.

The source of his commitment is unclear. He was a school teacher and superintendent of schools in Syracuse, New York before coming to California. Perhaps that background formed his ideas about the capacities of women. His wife was from an aristocratic New York family that provided extensive private tutoring for its daughters. She and Grove together supplemented their children's education with formal home classes; the girls received the same training as the boys. Ann de Monfredy Johnson participated in only a minor way in the suffrage struggle, however, and her main recorded activity outside the home was in the Daughters of the American Revolution. McKee, *supra* note 90, at 10.

In later life, Grove Johnson worked for penal reform, which was also one of Foltz's concerns. *Obituary*, *supra*. Concern about women and about prisoners did not conflict with his championship of the Southern Pacific's interests, of course.

94. "His industry is appalling, and he is never idle for a single moment." MOHAN ET AL., PEN PORTRAITS OF OUR REPRESENTATIVE MEN 35 (1880).

This volume is not to be confused with PEN PORTRAITS previously cited *supra* at note 61. The title "Pen Portraits" was a common one for biographical collections in the 19th century. Parkinson's PEN PORTRAITS says: "Mr. Johnson . . . has an indomitable perseverance and energy, calculated to carry him to the very pinnacle of his towering ambition." PEN PORTRAITS, *supra* note 61, at 67.

95. HIRAM WALKER JOHNSON, JR., BIOGRAPHY OF HIRAM WALKER JOHNSON (draft) (Hiram Johnson Collection, Bancroft Library, University of California).

96. *Id.* Grove L. was slight, only five feet six inches, weighing between 110-120 pounds throughout his life. He never wore a necktie because his luxuriant fair beard made it unnecessary. His grandson further related that "[e]very day of his life he shampooed his hair and even in the days of limited facilities he never failed to have his daily bath." *Id.*

delivered speeches rich with biblical and classical allusions, in a distinctive anguished voice, that fell like physical assaults on his opponents.

Johnson entered the Assembly in late February determined to pass the Woman Lawyer's Bill. Mr. May of San Francisco opened the support, calling for the abolition of "all class distinctions."⁹⁷ Then, Mr. Anderson of San Francisco, Chair of the Judiciary Committee which had reported the Bill without a recommendation, moved its indefinite postponement. At this point, Grove L. entered the debate, mildly stating that he saw no reason why women should not have a chance to make a living at practicing law.⁹⁸

Immediately came the answer: three Assemblymen launched into the standard argument, the more powerful for its familiarity, that women lawyers would move out of the ordained female sphere. Speaking as a "friend of the fair sex," one man protested that the feminine domestic sphere was "infinitely" the "more important." Mr. May rose again, implying that the opponents wanted to keep women in the sphere of "hewers of wood and drawers of water."⁹⁹

Joining issue, Johnson demanded of the opponents "what law of God or man had given them the right to fix the sphere of women." God alone had ordained women's sphere and men like these had "no right to circumscribe

97. The description of the debate in the text is drawn from the *Sacramento Union* account of February 26, 1878. Other papers reported the debate generally and noted that it was long and rancorous. The front page of the *Union*, however, carried a summary of the previous day's legislative proceedings, with a summary of the major speeches. From this information, I extrapolated the tone and tenor, as well as the content of the debate.

98. In his opening remarks, Grove Johnson cited the case of "Mrs. Frost before the Supreme Court" as an example of women being able to handle legal arguments. An opponent responded that a highly unusual woman like Mrs. Frost didn't prove anything.

In February, 1877, Jeanette B. Frost appeared as a litigant in her own case. The case was a suit in ejectment . . . [Mrs. Frost, as plaintiff won below] and the defendant took an appeal. . . . Mrs. Frost makes affidavit that she is attorney for herself. . . . After arguments by [attorneys] for appellants, the fair plaintiff addressed the Court by inquiring what all the authorities cited by counsel and their talk amounted to. She then proceeded to a keen analysis of the arguments of opposing counsel, and interlarded her address with not a few most exquisite touches of sarcasm, worthy of an old and able practitioner at the bar. . . .

SAN FRANCISCO CHRONICLE, Feb. 16, 1877, at 1. Mrs. Frost lost on appeal. *Frost v. Meetz*, 52 Cal. 664 (Sup. Ct. 1878).

99. W.B. May was a 52 year old art dealer from San Francisco, a Republican serving his first term in the legislature. He was trained as a doctor, though he never practiced. He cited the success of women in the medical profession as one reason for his support for the Bill. PEN PORTRAITS, *supra* note 61, at 69. *History of Women Suffrage* gives May equal billing with Johnson for the reconsideration and eventual passage of the Bill in the Assembly. 3 HWS, *supra* note 6, at 758.

it."¹⁰⁰ He closed by challenging opponents to name "a single instance of a woman attempting any position in life where she did not acquit herself well."¹⁰¹ No one responded, but the Assembly, by a majority of three, voted down the Woman Lawyer's Bill.¹⁰² Making use of the Assembly rules, Grove Johnson switched his vote from yea to nay so that he could move reconsideration of the Bill.¹⁰³ The next day, with only a month left before adjournment, the reconsideration was postponed.

Clara Foltz had not been present during the February Assembly debate. Soon after the Bill's easy Senate passage, she left for a six week tour of Oregon, where she met with her suffrage friends and displayed her new role as lecturer to "large, critical and delighted" audiences.¹⁰⁴ Although her return to Oregon as a public person was doubtless satisfying, she had a heavier reason for the trip, which probably accounts for her leaving during the pendency of the Bill that meant her livelihood. Her husband's visits to Portland to see the eventual

100. Compare this passage from the "Declaration of Sentiments at Seneca Falls": "[Man] has usurped the prerogative of Jehovah himself, claiming it as his right to assign for [woman] a sphere of action, when that belongs to her conscience and to her God." 1 HWS, *supra* note 6, at 71.

101. SACRAMENTO UNION, Feb. 26, 1878, at 1. The question was a rhetorician's classic trap: opponents would appear ungallant if they answered and weak if they failed to respond.

102. SAN FRANCISCO CHRONICLE, Mar. 1, 1878, at 2. "[T]wo speakers pronouncing the innovation as radical and undemocratic in the extreme . . . had its effect on the final vote, inducing several to change their minds."

103. *Struggles*, *supra* note 1, Aug. 1916. Foltz's account reads:

The ayes and nays were called for and the bill was lost. It was here that my friend, Grove L. Johnson, good Republican that he was and is, changed his vote from aye to nay, and moved a reconsideration of the vote by which the bill was lost. The following morning, after but little discussion, the bill was put upon its final vote and passed by one majority.

This paragraph was written 40 years after the events and includes a number of inaccuracies. The succeeding debate did not take place the morning after, for instance, and the final vote was 35 to 37. See *infra* notes 107-08 and accompanying text.

The Rule of the Assembly that was invoked was Standing Rule 60, which allows a member in the majority to call for a reconsideration on the following day. Schwartz et al., *supra* note 4, at 549 n.35. But the SACRAMENTO UNION, Feb. 26, 1878, at 1 says that in an evening session of the Assembly, Mr. Murphy of Del Norte called for a reconsideration. This fits because Murphy was an opponent and was noted as an accomplished parliamentarian. PEN PORTRAITS, *supra* note 61, at 69. Perhaps he called for a reconsideration at the behest of Johnson as a favor or in return for Grove's vote on some other matter. This would reconcile the various accounts, including that of Oscar Shuck, who says that Grove Johnson moved for reconsideration. SHUCK, *supra* note 4, at 829. Shuck's version was undoubtedly based on information supplied by Foltz, but much nearer the event than her account in *Struggles*.

Any of three versions is possible: Foltz's memory may have been confused because of Johnson's major role in the Bill's passage; Murphy may have been responding to a request by Johnson; or the newspaper account may be wrong and Foltz right, that it was Johnson who moved the reconsideration.

104. The report added: "As an elocutionist and logician, this lady has no superiors, East or West." NEW NORTHWEST, Feb. 22, 1878, at 2, col. 1.

second Mrs. Foltz had become both frequent and extended.¹⁰⁵ But while Clara Foltz attended her failing marriage, her Bill nearly expired.

The Bill's reconsideration was finally set for the last of March, two days before the end of the session. Having returned from Oregon in mid-month, Foltz rose to the penultimate struggle. She went on the floor of the Assembly to illustrate the compatibility of woman's role as lawyer and as mother. As she described it:

[O]ne Captain M., member from San Francisco, declared in stentorian tones, "This bill to give women the right to practice law is fostered by the Woodhulls and the Claflins, women without husbands, who have no little children clinging to their skirts and—" his speech was cut short by old father McComas of Santa Clara County, who rapped the assemblyman for his false charges, and turning to me, *where I sat near the Speaker's chair with my two little boys standing near* [Foltz's sons were then 9 and 7], he pronounced such a eulogy upon me and upon all women who sought to qualify themselves for useful careers as made my heart ache with gratitude.¹⁰⁶

Grove Johnson took command of the reconsideration, set for March 29, a Friday.¹⁰⁷ The last session would be on Saturday, and all bills had to be signed into law by midnight April 1. For the concluding scramble, the Assembly had agreed that each member in alphabetical order could take up one bill and dispose

105. See *supra* note 48. The *San Jose Mercury* reported on March 14, 1878 that "Mrs. Clara M. Foltz and her daughter Trella W., returned Thursday evening from a six weeks' trip to Oregon whither they went to visit their husband and father at Portland, and Mrs. Foltz to attend the Oregon State Woman Suffrage Convention which assembled in Albany recently." *SAN JOSE MERCURY*, Mar. 14, 1878, at 3.

106. *Struggles, supra* note 1, Aug. 1916 (emphasis added). Rush McComas described himself as an "agriculturist" and a life-time hard-worker. Married with eight living children, he was naturally empathetic with Clara Foltz's situation. This description comes from a compilation about the Delegates to the Constitutional Convention of 1879, of which McComas was a member from Santa Clara, elected on the non-partisan ticket. WALDRON & VIVIAN, *BIOGRAPHICAL SKETCHES OF THE DELEGATES TO THE CONVENTION TO FRAME A CONSTITUTION FOR THE STATE OF CALIFORNIA* (1878).

The reference to the "Woodhulls and the Claflins" was synonymous with saying that the Bill would promote free love. Victoria Woodhull and her sister, Tennessee Claflin, were notorious "heretics" in late 19th century society. They published a weekly paper that promoted "short skirts, free love, legalized prostitution, tax, housing and dietary reform." In 1870 and 1871, Stanton and Anthony took them into the suffrage fold, but soon realized that they were unstable allies. 3 *NOTABLE AMERICAN WOMEN, supra* note 4, at 652-55 (Woodhull entry); J. JOHNSON, *MRS. SATAN: THE INCREDIBLE SAGA OF VICTORIA C. WOODHULL* (1967).

107. Johnson's orchestration of the reconsideration is best described in the *DAILY ALTA* for March 30, 1878, although I have also used for this reconstruction the *SACRAMENTO UNION*, Mar. 30, 1878, and the *SACRAMENTO BEE*, Mar. 29, 1878, at 2.

of it. It was already late Friday afternoon when the "J's" were reached and Grove L. brought up the Woman Lawyer's Bill. He opened with a fulsome argument and took more time presenting supporting petitions, one signed by hundreds of men and women, and another by virtually the entire Sacramento Bar, including the judges. When he finished speaking the applause was so great that the Speaker had to rap the house to order. No one spoke in opposition. The final count was 37 Ayes to 35 Noes; a crucial five votes were swayed.¹⁰⁸

One last obstacle lay before Clara Foltz; she could not be a lawyer unless the Governor signed the Bill. She joined the last-minute melee of legislators and lobbyists fighting for his attention, and actually managed an audience.¹⁰⁹ Foltz wrote to her Oregon friends that when she asked him to sign the Bill, he "smiled complacently and replied: 'Very well, madam, when the bill comes in I will examine it.'"¹¹⁰ On the last possible day, in the waning hours of the session, Governor Irwin signed the Woman Lawyer's Bill.

Forty years after the events, Foltz wove a more exciting tale about the meeting with the Governor in which some of the details do not jibe with contemporary accounts, including her own.¹¹¹ Yet her re-telling gives the best

108. SACRAMENTO BEE, Mar. 29, 1878, at 2.

109. Governor Irwin was one in the long line of undistinguished high officials in 19th century California. Apparently, however, he was fairly honest and very genial. One contemporary characterized him as "an uncompromising Democrat, but . . . entirely free from that strong animosity that sometimes characterizes men of his party." PEN PORTRAITS, *supra* note 61, at 7.

110. Foltz added: "I confess my heart grew somewhat faint as I stood before my governor, whom the men had seen fit to say to rule over me, and who had no reason whatever to respect my earnest request . . ." *Letter from Mrs. Foltz*, NEW NORTHWEST, Apr. 19, 1878 (dated March 31, 1878).

111. *Struggles*, *supra* note 1, Aug. & Sept. 1916. From Foltz's long story, I have made a short play using her words.

The *History of Woman Suffrage* gives this account of the campaign to obtain the Governor's signature:

The session was within three days of its close, and so bitter was the opposition to the bill that an effort was made to prevent its engrossment in time to be presented for the governor's signature. The women and their allies, who were on the watch for tricks, defeated the scheme of their enemies and had the bill duly presented to Governor Irwin, but not till the last day of the session. Then the suspense became painful . . . Mrs. Gordon, an editor of a Democratic journal, asserted her claims to some recognition from that party and strongly urged that a Democratic governor should sign the bill. Aided by a personal appeal from Senator Niles Searles to his excellency, her efforts were crowned with success; the governor's message sent to the Senate, when the hands of the clock pointed to fifteen minutes of twelve, midnight . . . announced that Senate Bill number 66 . . . had received his approval.

3 HWS, *supra* note 6, at 758.

The WOMAN'S JOURNAL, Apr. 20, 1878, at 124 said that Senator Barney Murphy also arranged to see Governor Irwin on the Bill's behalf, and also spoke to him as a fellow Democrat. Generally, as to all the events from 1877 to 1879, the *History of Woman Suffrage* credits Laura

sense of these events for the young woman. I reconstruct the typical Foltzian melodrama from her words.

The Scene: "The closing day of the session . . . midnight, lacking three minutes Outside the doors of the Executive Chambers," and inside where "the chandeliers shone fiercely, the oil paintings . . . seemed to frown . . ."

Minor Players: "a husky politician" (also known as "great big ignoramus"); the Assistant Sergeant at arms, "a fine large Negro"; a doorkeeper: "Governor Irwin surrounded by the Attorney General and many prominent members of the Senate and the Assembly."

The Heroine: Thirty year old mother of five, notable for her "unconquerable soul."

The Play:

Husky politician (emerging from Executive Chambers): "That Woman Lawyer's Bill dead and buried."

Heroine: "Is it, very well then. Only the good are raised from the dead."

Speedily and gracefully, Heroine slips by two guards, and confronts Governor Irwin surrounded by other minor characters. Silence as minor characters take no notice of heroine.

Heroine: ("Trembling") "Governor, won't you please sign the Woman Lawyer's Bill?"

Governor: (Gazing first at heroine then at large stack of unsigned bills) "What is the number of that Bill?"

Heroine: "Senate Bill 277."

Governor: (lifts up bill after bill in huge stack of discarded ones, aided by a clerk, the bill is fished out and laid all but dead before him) "This bill to entitle women to practice law is wise and just and I take great pleasure in signing it."

"AND RIGHT THEN THE CLOCK STRUCK TWELVE"

Clara Foltz would use the Woman Lawyer's Bill and two others signed at the legislature's close to make the coming year her most glorious. On March 26, 1878, Governor Irwin signed the legislation creating Hastings College of the

Gordon with a greater role, or perhaps covers her activity more fully, than it does that of Clara Foltz. This part of the history is based on facts supplied by Elizabeth Schenck, a close friend of Gordon's. *Id.* at 750; see *supra* note 15. Gordon herself was originally designated to write this section, but Anthony and Stanton decided that Ellen Sargent should be the author. Letter from Matilda Gage to Laura Gordon (Oct. 29, 1880), Gordon papers, *supra* note 37. Apparently, Mrs. Sargent passed the work to Mrs. Schenck. In that same year, Sarah Knox-Goodrich sent clippings about her own role to Laura Gordon, with a complaint that Clara Foltz was not participating more in writing the history. Letter from Sarah Knox-Goodrich to Laura Gordon, Gordon papers, *supra* note 37.

Law, to be affiliated with the University of California.¹¹² Then on March 30, the much-debated bill establishing the Constitutional Convention became law.

CLARA FOLTZ JOINS THE BAR APRIL-DECEMBER 1878

Returning to San Jose, Clara Foltz accelerated her preparation for the Bar, driven now by financial necessity as much as by ambition or a cause. Jeremiah had been in Portland most of the year, and Clara feared final desertion. In the San Jose city directory for 1878, she is listed as a widow.¹¹³ Friends and family members offered to take her children while she established her career, though no one was able to maintain all five. She considered it one of her life's major accomplishments that she kept her family together during this period.¹¹⁴

The press agreed with her and the stories uniformly related that she "attended to her family" and "did her own housework" while she studied for the Bar.¹¹⁵ A Chicago paper took a moralistic tone advising "young men who moan and groan because they have not the means to acquire an education" that "it is not money they need—it is pluck and energy of a woman like Mrs. Foltz."¹¹⁶ The *New York World* made this learned comparison with Foltz's situation:

Perhaps the very possession of the children may do for her what Erskine's offspring did for him Erskine turned to the law as Mrs. Foltz went—because he was in straitened circumstances. . . . During his first case . . . he obtained renown for a fierce onslaught upon Lord Sandwich "How had you courage to attack so great a man?" inquired one of Erskine's friends. Replied he: "I felt my little children tugging at my stuff robe and whispering, 'Now is the

112. An Act to Create Hastings College of the Law, in the University of the State of California, CAL. STAT. 1878, ch. 351, §§ 1-15, at 533.

113. Jeremiah returned to San Jose in March, 1879, but left again announcing his intention to "remove himself permanently to Portland." Clara filed for divorce in July, 1879 and the final decree was entered in November. Within two weeks, Jeremiah married again. *Foltz v. Foltz* (1879), proceedings for divorce with pleadings, interlocutory orders and final decree (Archives, Superior Court, San Jose, Ca).

114. See, e.g., N.Y. TIMES, Jan. 17, 1896, at 9. After relating that Foltz was left a "widow with five children," the interview quotes her: "My friends offered to take my children and care for them, but I was determined that we should never have the family broken up."

115. See, e.g., N.Y. TIMES, Sept. 27, 1878, at 4: "She has pursued her studies under difficulties that would have discouraged most men, having no property to speak of and five small children to provide her. Most of the time she has done her own housework, and has occasionally delivered lectures to eke out her subsistence." The story refers to Foltz as a "widow of San Jose." N.Y. WORLD, quoted in WOMAN'S J., Sept. 28, 1878, at 312: "[A]ll her neighbors testify that during her novitiate with Blackstone, Kent and the California Code and while in attendance as a lobbyist upon the Legislature, neither home nor children were at all neglected."

116. CHICAGO INTER-OCEAN, quoted in SAN JOSE WEEKLY MERCURY, Oct. 3, 1878, at 1.

time to get us bread.”¹¹⁷

Clara Foltz herself wrote that her five children, “by their very dependence spur me onward in my profession.”¹¹⁸

How did Foltz combine the roles of law novice and single mother of five? First, her mother was with her. Perhaps the only advantage Clara gained from marrying at fifteen was that Talitha Shortridge was only fifty in 1878, young enough to be a real help with small children. “My precious mother!,” Foltz wrote, in gratitude for “her uniform faith . . . , her great patience, her ready soothing words” and noted that she “was a wonderful housekeeper [who] relieved me of many duties.”¹¹⁹ Foltz claimed, moreover, that her children were “the most beautiful and healthy babies ever born; those indeed were ‘Better Babies.’ In fact, from that day to this I have never seen babies like them.”¹²⁰ As they grew, the children remained, at least in memory, “robust and well-behaved.”¹²¹

But the main answer presumably lies in Clara Foltz herself. Her mind was quick and retentive. Physically, she was strong and energetic, able to study long hours with little sleep. Finally, she had a special affinity for the law. She said at the outset of her career: “[I]f I knew I should never be permitted to practice law I should still make the law my study till I had mastered it. I do so love it.”¹²²

Nevertheless, Clara Foltz felt the conflict between career and motherhood. Early in her public life, she wrote about unease at separating from her baby, Virginia, for the first time in order to lecture in Gilroy.¹²³ In an 1885 case, her testimony shows her emotionally torn because she had to leave her children

117. N.Y. WORLD, *supra* note 115.

118. *Letter from San Jose*, NEW NORTHWEST, Sept. 4, 1879. Foltz was a lawyer for a year when she wrote these words.

119. *Struggles*, *supra* note 1, Oct. 1916.

120. *Id.*, Apr. 1916.

121. *Id.*, May 1916.

122. *Woman at the Bar, The First Female Lawyer of the Pacific Coast*, SAN FRANCISCO CHRONICLE, Jan. 30, 1879, at 3 [hereinafter CHRONICLE]. This is a story of many columns written by a sympathetic male reporter, who interviewed Foltz at a critical point at the beginning of her career. The context of the quote is:

I declare I don't know how I should get along with all the trouble I have if it wasn't for this vein of fun there is in my nature. You see my children are here with me, and I have to do the housework and attend to them and my business and studies.

123. “I had left the little ones in the care of a dear good mother, and there was no occasion for being uneasy, but as this was the first time I had ever been away from them, I was extremely anxious to return, having been gone a day and a night from ‘my baby’.” *Letter from California*, NEW NORTHWEST, Apr. 19, 1877, at 2.

while travelling on a client's behalf.¹²⁴ Years after they were grown, she wrote of time's treachery that "converted my little lads and lassies into men and women, making the good times I had promised them forever impossible of enjoyment" and adding, "I hav[e] lost more for myself that I have gained for all women. All the pleasure of my young motherhood I sacrificed for woman's cause" ¹²⁵

Against the advice of her family, who feared that she was not fully prepared, she decided to apply for admission to the bar at the court's first sitting in September. The judge of the Twentieth District Court, which sat in San Jose, appointed a committee of three lawyers to administer an oral bar examination. The committee included, as was the custom, her official mentor, C.C. Stephens, along with two others—D.W. Herrington, a prominent San Jose lawyer, and Francis Spencer, the man who had refused to accept her as a student and advised that she "would invite ridicule, if not contempt" by studying law.¹²⁶

The examination was not *pro forma*: it lasted 3 hours, and Foltz said a few months later that several young men who had begun studying at the same time as she had not yet passed.¹²⁷ Clara Foltz passed with the committee's unanimous certification.¹²⁸ The next day, September 5, 1878, she became California's first woman lawyer.

Her story was ideal human interest press copy: plucky little mother of five gathers fruit of legislative victory. A typical approving description of Foltz soon after she became a lawyer reads: "There is nothing of the strongminded woman about her. Her bearing is that of a brave, cheerful, enthusiastic little woman, modest, dignified and self-reliant."¹²⁹ Clara and her mother laughed over the publicity because as a girl, she often wondered "whether my name would go down on the page of history for some personal achievement."¹³⁰

124. Transcript on Appeal, *Foltz v. Cogswell*, 86 Cal. 542, 25 P. 60 (1890) (San Francisco Superior Court, on file in Archives, California Secretary of State, Sacramento). Foltz sued a client for her fee and was awarded over \$5000 by a jury. The frequent trips which took her away from her children were, ironically enough, to Sacramento to seek special legislation for her client.

125. *Struggles*, *supra* note 1, Mar. 1918.

126. See *supra* text accompanying notes 56-57. D.W. Herrington was a delegate to the 1879 Constitutional Convention.

127. CHRONICLE, *supra* note 122.

128. As reported by the local press: "The Committee . . . of our first lawyers . . . subjected her to a thorough test of her legal knowledge . . . and unanimously certified to her entire fitness for advancement." SAN JOSE WEEKLY MERCURY, Sept. 12, 1878, at 3. She later wrote that the "committee passed me with highly colored compliments." *Struggles*, *supra* note 1, Oct. 1916.

129. CHRONICLE, *supra* note 122.

130. *Id.*

Some of the press notices claimed she was the third woman lawyer in the United States, others that she was the fifth. In fact, she was probably one of a few dozen, but there is no complete consistent chronology of the first American women lawyers even today.¹³¹ In 1887, Lelia Robinson, a lawyer,¹³² attempted a biographical survey of women at the bar. Not at all satisfied that her work was complete, she complained: "the newspapers publish and republish little floating items about women lawyers along with those of the latest sea-serpent, the popular idea . . . be[ing] that one is about as real as the other."¹³³ Robinson's article, as well as squibs in contemporary magazines and newspapers, show that a number of women joined the bar with a small flurry of publicity and then fell from public view as they practiced in the local, largely unchronicled, fashion of most lawyers.¹³⁴

131. In 1879, the *San Jose Mercury* had this short item: "The women lawyers of the United States are Mrs. Lockwood, of Washington; Mrs. Myra Bradwell, editor of the *Chicago Legal News*; Miss Phoebe Cozzens, of Missouri, Mrs. Foster, of Iowa; and Mrs. Foltz, of San Francisco." *SAN JOSE MERCURY*, Feb. 23, at 2.

"In 1880, the national census, according to one writer, registered 64,042 male lawyers and 75 female lawyers." Kathleen E. Lazarou, *'Fettered Portias': Obstacles Facing Nineteenth-Century Women Lawyers*, 64 *WOMEN LAW. J.*, 21, 28 (1978). For this statement, Lazarou cites Louis Frank, *The Woman Lawyer*, *CHI. LAW TIMES* 111 (M. Greene trans., July 1889).

Lazarou draws on the main sources collecting the histories of early women lawyers, complaining in a note that there is "a lack of scholarly literature" on the subject. Materials that she used, and which I found helpful, are: Ada M. Bittenbender (herself an early lawyer), *Woman in Law*, *CHI. LAW TIMES* 11, 301-02 (1888); *WOMAN'S WORK IN AMERICA* (Annie Nathan Meyer ed., 1891); INEZ HAYNES IRWIN, *ANGELS AND AMAZONS: A HUNDRED YEARS OF AMERICAN WOMEN* (1933).

See also *Admission of Women to the Bar*, *CHI. LAW TIMES* 76 (Nov. 1886); D. KELLY WEISBERG, *Barred from the Bar: Women and Legal Education in the United States, 1870-1890*, 2 *WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE* 231 (D. Kelly Weisberg ed., 1982).

132. Lelia Robinson graduated from Boston University's law department in 1881 and was refused admission to the bar by the Massachusetts Supreme Court. Robinson's Case, 131 *Mass.* 376 (1881). In 1882, the state legislature passed a Bill permitting women to practice and Robinson joined the bar, after examination, the same year.

133. Lelia Robinson, *Women Lawyers in the United States*, 2 *THE GREEN BAG* 10 (1890). She wrote to 100 women, obtaining the names through articles she collected and through law school records.

134. Any accurate count of the numbers is finally frustrated by women changing their names upon marriage and graduating from law schools or taking examinations and seemingly disappearing, probably because they practiced briefly or not at all.

There is general agreement that the first woman to become a lawyer through study and examination was Arabella Mansfield of Iowa in 1869. She studied law with her husband and they took the examination together. A sympathetic judge appointed a committee to examine, and construed the words "white male" in the Code section on admission of lawyers to include women. He did this by a fantastic extension of the general rule of construction that women were included in male gender words. Haselmayer, *Belle A. Mansfield*, 55 *WOMEN LAWYERS J.* 46 (1969).

There was no written opinion in the case, though other women in court battles, notably Lavinia Goodell, *infra* notes 162-63, cited to Mansfield's case. Mansfield was a college professor, a field in which she was also a pioneer, but neither she nor her husband ever really practiced, and little

Aided by first-woman publicity and her influential friends, Foltz had clients almost immediately. One was a "high-spirited German girl, [who] had been discharged without cause" from her job as a servant. Her employers seized her trunk containing all her worldly possessions to pay for dishes that Foltz maintained were broken in "the ordinary course of things." Foltz sued to recover the trunk and for damages for its detention. J.J. Owen and Sarah Knox-Goodrich signed a bond so that the girl could have her goods pending the outcome of the case. Foltz won, after the suit was hotly contested in the Justice Court.¹³⁵

Soon after, she represented "a young English woman," deserted by her husband. Alone in a strange town, the woman fell sick; her desolation was complete when the doctor seized her baggage for his fee. Foltz sued, again in the Justice Court, to recover the woman's personal effects. Again, she won, "severely handling" the doctor and the officer who had confiscated the luggage.¹³⁶ That these cases for unprotected women would be Foltz's first is striking because in Oregon, only a few years before, a sheriff had taken her sewing machine to pay Jeremiah's debts. No lawyer was there to argue that the machine, which she used to support her children, was legally exempt from seizure.¹³⁷

By the end of October, Foltz had her first case, a contested divorce, in the more prestigious District Court. One paper reported that "the bar was thronged with its best talent, all intently watching her": that she was "calm and dignified," and that she seemed "not in the least out of place."¹³⁸ Paying clients with property matters soon came, and Foltz noted with particular enthusiasm "proceedings to set aside a fraudulent survey" in which her old nemesis, Frank E. Spencer, was her opponent: "It is an intricate and important case, but I feel master of it . . . and am satisfied I am going to win it."¹³⁹

notice of her legal career was taken at that time or later. See 2 NOTABLE AMERICAN WOMEN, *supra* note 4, at 492-93 (Mansfield entry).

A striking aspect of Mansfield's career for present purposes is that she was from Mt. Pleasant, Iowa and studied at Howe's Academy, where Foltz also grew up and studied. Mansfield was three years older than Foltz and I have found no indication to date that they knew each other.

135. *Struggles*, *supra* note 1, Feb. 1917.

136. CHRONICLE, *supra* note 122.

137. In early accounts, Foltz cited this incident in her own life as one of the reasons she became a lawyer. See, e.g., Post, *supra* note 7.

138. *Her First Case*, SAN FRANCISCO CHRONICLE, Oct. 31, 1878, at 4.

139. CHRONICLE, *supra* note 122. She also had criminal cases early on. The SAN JOSE MERCURY, Nov. 28, 1878, at 4 reported: "Mrs. Arabella Fitzgerald, who was indicted at the late session of the Grand Jury for grand larceny, has retained Mrs. Clara S. Foltz to defend her. We learn that she claims to be in possession of sufficient documentary evidence to acquit the defendant."

Despite these early successes, Foltz felt insecure because her three years of schooling at an Iowa seminary was less than standard for the profession. Many California attorneys had law degrees from institutions in the states from which they migrated. Most of them had a college education. Foltz thought that the first woman lawyer in the state should attend its first law school, Hastings College of the Law, established by the same legislature that had passed the Woman Lawyer's Bill. She applied to the first class, but did not appear personally because she was otherwise occupied in the fall of 1878.¹⁴⁰

At the beginning of the second semester of instruction, however, Clara Foltz was at the door demanding entrance. She told an inquiring reporter: "I came here intending to qualify myself further My friends offered to pay my rent . . . for a few months and then I could better go on with my practice."¹⁴¹ Laura Gordon who was still reading law, on her path to becoming California's second woman lawyer, joined her.

Foltz moved to San Francisco with her three older children, intending to be a student, but as it turned out, to be a litigant. Through her court battle to gain admission to law study, Clara Foltz became a major public figure. If she had not tried to attend law school, she might have remained a locally accepted, successful practitioner. As it happened, she entered the history of women's professional progress as the "Portia of the Pacific."¹⁴²

THE HASTINGS CASE AND THE CONSTITUTIONAL CLAUSES 1879

On January 9, 1879, Clara Foltz registered at Hastings, paid the ten dollar fee, and attended the term's opening lectures. Laura Gordon joined her on the second day, but at the end of the third, Foltz received from the Registrar a letter, dated January 10, informing her that the Directors had "resolved not to admit women to the Law School."¹⁴³

140. The Board of Directors tabled her application in October, 1878. T. BARNES, HASTINGS COLLEGE OF THE LAW: THE FIRST CENTURY 46-47 (1978).

141. CHRONICLE, *supra* note 122. She added: "I think the position of a lawyer a very responsible one, and that no one ought to undertake its practice, involving the interests and welfare of people, without an ample knowledge of its principles." *Id.*

It was not unusual for a lawyer already admitted to seek formal training. Many of the early Hastings applicants were "young members of the Bar." C. SLACK, *Hastings College of the Law*, 1 THE GREEN BAG 519 (1889).

142. AN ILLUSTRATED HISTORY OF SOUTHERN CALIFORNIA 85 (1890) ("known as the 'Portia of the Pacific'"); N.Y. TIMES, July 11, 1897, at 4 ("known as the modern Portia, the latter being one of her favorite heroines"); Polos, *supra* note 4, at 185.

143. "Dear Madam: I am instructed to inform you that at a meeting of the Directors, it was resolved not to admit women to the Law School. Yours respectfully." CHRONICLE, *supra* note 122; BARNES, *supra* note 140, at 47.

Her three days as a Hastings student became part of Clara Foltz's anecdotal lore, which she used in her popular lecture on "Lawyers":

The first day I had a bad cold and was forced to cough. To my astonishment every young man in the class was seized with a violent fit of coughing. You would have thought the whooping cough was a raging epidemic among the little fellows. If I turned a leaf in my note book, every student in the class did likewise. If I moved my chair—hitch went every chair in the room¹⁴⁴

Foltz could later dismiss the young men as "an inferior lot, for . . . I have never . . . heard tell of one of them [since]."¹⁴⁵ But their disruption was bitter at the time in light of Judge Hastings' expressed fear that the women would distract the male students by their rustling garments.¹⁴⁶ That night, she "crept into the room where my little ones slept . . . and cried myself to sleep." Of this time in her life, she revealed: "I often refreshed myself by a good cry, which a woman could enjoy without getting out of her 'sphere'"¹⁴⁷

Foltz felt excluded, watching as "the students hurried up the steps arm in arm, their faces aglow with enthusiasm—all the world opened its arms to them, law schools and colleges were built and endowed for men."¹⁴⁸ She had the same experience a year earlier in San Jose, when her attendance at a "law club" for aspiring practitioners occasioned a debate over the capacity of women for the profession. One fellow law student argued that "Women are smart in some things, but . . . it is the smartness of the educated dog or monkey, without the originality to conceive and execute for themselves"¹⁴⁹ Then, too, she had been on the outside "away back in a corner, thinking, thinking how all the world was open to men, how every opportunity for service to the State, for personal achievement was theirs"¹⁵⁰

144. *Struggles*, *supra* note 1, Nov. 1915. Foltz told the same story, almost word for word, in her lecture entitled "Lawyers." *WOMEN'S HERALD OF INDUSTRY*, Apr. 1884, at 1.

145. *Id.*

146. *CHRONICLE*, *supra* note 122. Judge Hastings remained worried about "the separation of the sexes in the lecture room" even after the women won admission. "The friction of studious silk with contemplative broadcloth was not be thought of." *Interview with Judge Hastings*, *SAN FRANCISCO CHRONICLE*, Mar. 6, 1879, at 3. The *Chronicle* reporter had fun with Hastings' queasiness, suggesting for the isolation of the women "a gilt-edged, golden-railed balcony . . . a pagoda with minarets . . . or a simple Oregon pine platform." *Id.*

147. *Struggles*, *supra* note 1, Nov. 1915.

148. *Id.*

149. *A Break in the Legal Club*, *SAN JOSE WEEKLY MERCURY*, Jan. 3, 1878, at 3.

150. *Struggles*, *supra* note 1, Dec. 1916. The Legal Club incident in San Jose was very important to Foltz. She spent nearly two columns on it, as much space as she gave to the Woman Lawyer's Bill, and much more than to the California Constitution. The bitterness of the dispute, the crudeness of the debate's terms, and her unproved abilities as a lawyer all seem to have rendered

When she received the Registrar's rejection notice, Foltz, good lawyer that she already was, tried to negotiate a solution. She and Gordon went to see the Founder-Dean, Clinton Hastings, as well as several members of the Board. While negotiating, the women resolved to continue attending classes, but ". . . all the students drew up around the entrance and stared us so out of countenance that we retreated."¹⁵¹

After this confrontation, Foltz made one last effort at persuasion. She spoke with Professor John Norton Pomeroy, the renowned legal scholar whom Hastings had brought from the East to design the curriculum and teach at the new law school.¹⁵² Undeterred by the Professor's eminence, Foltz told him that "the best legal minds" said the women had a "right to attend the college." He replied: "You have no rights in the matter at all. If we have a mind to let you come you can, but you have no right to."¹⁵³

The Foltz-Gordon team turned to litigation reluctantly because courts had consistently refused women access to the legal profession during the previous few years. Three well-known adverse cases were particularly troublesome. Myra Bradwell's in Illinois; Lavinia Goodell's in Wisconsin; and Belva Lockwood's in Washington, D.C.¹⁵⁴ Like Clara Foltz, these women successfully began law careers and the court cases arose when each attempted a further professional step that was routine for a man.

Myra Bradwell, most celebrated of early women lawyers, started a weekly newspaper, the *Chicago Legal News* in 1868.¹⁵⁵ A "brilliant success" from the

her particularly vulnerable at the moment. She was eventually admitted to the Legal Club, but never attended another meeting.

151. CHRONICLE, *supra* note 122.

152. "By any contemporary reckoning, John Norton Pomeroy . . . was one of ten top law teachers in nineteenth century America." BARNES, *supra* note 140, at 89. Barnes devotes a chapter to placing Pomeroy and his methods and publications among the legal greats. *Id.* at 88-130.

153. Foltz asked him if it was a private institution, and he said, "Oh, no, it was public, but we had no right to attend unless they had a mind to let us." CHRONICLE, *supra* note 122.

154. KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT* 14-38 (1986) tells the stories of Bradwell, Goodell, and Lockwood.

155. It was literally her paper; her name alone appears in large capital letters on the front page of each volume. She was "in charge of the content, makeup, production and financial operation." 1 NOTABLE AMERICAN WOMEN, *supra* note 4, at 223-25 (Bradwell entry). It was also hers because she editorialized and commented in an inimitable style, and printed every scrap of information about the progress of women in attaining property rights and in battling for suffrage and professional recognition.

Bradwell herself was responsible for many of the gains of women in Illinois. For instance, she and others, including Elizabeth Cady Stanton, lobbied through a bill giving married women the right to their own earnings in 1869. They also secured passage of legislation assuring women an interest in their husbands' estates. School board suffrage for women and a bill allowing women to be notaries public were also among her accomplishments. *Id.*; CHI. LEGAL NEWS, Feb. 24, 1894

first issue, the *News* quickly became the most important legal publication west of the Alleghenies.¹⁵⁶ Even before she inaugurated the paper, Bradwell was studying law with her husband, a judge. In 1869, she easily passed the bar examination. But the Illinois Supreme Court denied her admission, mainly on the ground that as a married woman without sole legal authority to contract, she might disavow agreements that she alone had made for, and with, her clients.¹⁵⁷

Bradwell took her case up to the United States Supreme Court, relying on the newly ratified fourteenth amendment, which proscribed state abridgement of the "privileges and immunities" of national citizenship. Occupational choice, she plausibly urged, was such a privilege. Her point was virtually the same as that made by certain Louisiana butchers who were also relying on the privileges and immunities clause in their attack on the state's slaughterhouse monopoly.¹⁵⁸ The butchers argued that it was a privilege of all citizens to pursue their professions, immune from unreasonable government regulation.

Argued a week apart, the cases were decided on consecutive days. The Court held that occupational choice was not a constitutional privilege of federal

(commemorating her achievements).

156. 1 NOTABLE AMERICAN WOMEN, *supra* note 4, at 224.

157. *In re Bradwell*, 55 Ill. 535 (1870). The Illinois court also relied on the fact that admission of women to the bar was "never contemplated by the legislature." *Id.* at 539.

Bradwell argued that the Illinois Married Women's Property Acts gave women authority to enter contracts, at least to the extent necessary to practice law. *Id.* at 536-37. The argument based on married women's common law disabilities was, moreover, inapplicable to Myra Bradwell. The Illinois legislature had given her a special charter so that she could do the necessary contracting and other business transactions for the *Legal News*, and a printing company. See BABCOCK ET AL., *supra* note 11, at 6.

158. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873). For a discussion of the intricate interrelation of *Bradwell* and the *Slaughterhouse Cases*, see BABCOCK ET AL., *supra* note 11, at 4-9; Frances Olsen, *From False Paternalism to False Equality*, 84 MICH. L. REV. 1518, 1525-29 (1986).

Matthew Carpenter, an acclaimed advocate of the day, argued both cases, on opposite sides of the issue. He argued *for* Myra Bradwell and *against* the butchers. His entire argument is reprinted in 2 HWS, *supra* note 6, at 615-22 (1882).

Women attempting to vote were claiming that suffrage was another of the privileges of citizenship under the fourteenth amendment. In order, he said, to "quiet the fears of the timid and conservative," *id.* at 618, Carpenter took pains in his *Bradwell* argument to distinguish suffrage as a "political right" from the citizen's privilege of pursuing a profession.

It would have greatly reduced Bradwell's chances if the Court believed that woman suffrage would follow from a favorable interpretation of the privileges and immunities clause. A few years later, when faced directly with the issue of whether suffrage was a "privilege of citizenship" under the fourteenth amendment, the Court held against Virginia Minor. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875).

citizenship.¹⁵⁹ The majority in *Bradwell* did little more than cite the *Slaughterhouse Cases* and the holding technically meant only that women were not federally protected against state refusal to admit them to practice. Of course the opinion imported to the public that the Supreme Court found women unsuited for the practice of law.

This popular interpretation fed on a concurring opinion by Justice Bradley. Having vigorously dissented in *Slaughterhouse*, he distinguished *Bradwell*'s case because "the divine ordinance" and "the nature of things" decreed "a wide difference in the spheres and destinies of man and woman." He found the "domestic sphere" the proper one for women and added:

The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.¹⁶⁰

Such language, also used by the Illinois court in *Bradwell*'s case, did not apply to Lavinia Goodell of Janesville,¹⁶¹ Wisconsin, an unmarried woman. Easily admitted to the bar at the trial court level, she successfully practiced law for a year before applying to the Wisconsin Supreme Court in order to argue a case before it. A State Assistant Attorney General appeared with her to read her

159. The *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873). The Court held that the privileges and immunities guaranteed by the fourteenth amendment were only those rights created by the existence of the federal government, its national character, Constitution or laws. Since the right to occupational choice predated the federal constitution, it was within each state's power to regulate. By the terms of the *Slaughterhouse* opinion, the federal privileges of citizenship did not amount to much. For example, the Court mentioned free access to ports, and the right to petition the government at its seat.

160. *Bradwell*, 83 U.S. (16 Wall.) at 141. Justice Swayne and Justice Field from California joined Justice Bradley's music of the spheres. The case was decided 14 months after argument. The delay was probably occasioned by the difficulty of this case together with *Slaughterhouse*. Three years passed between the time *Bradwell*'s case was decided and her application to the bar. While her case was pending, the Illinois legislature enabled women to be lawyers in the state, but Myra *Bradwell*, probably too busy with her paper to bother, did not apply again. In 1872, the Illinois Bar Association made her an honorary member, and she served for four terms as vice-president. In 1890, the Illinois Supreme Court acted on her original application and made her a member of the bar. CHI. LEGAL NEWS, May 12, 1894.

161. This little Wisconsin town spawned women lawyers. Kate Kane, who later practiced criminal law somewhat flamboyantly in Chicago, was admitted there in 1878. Angie J. King was admitted to the bar in Janesville in 1879 and practiced with Lavinia Goodell. "Two sisters . . . named Spaulding" graduated from Wisconsin Law School around 1886 and set up practice in Janesville. Robinson, *supra* note 133, at 25.

petition for admission.¹⁶²

Chief Judge Ryan denied Goodell's application in a long opinion that made Justice Bradley in Bradwell's case sound progressive. On the rights of unmarried women, he said: "it is *public policy to provide for the sex, not for its superfluous members*; and not to tempt women . . . by opening to them duties . . . unfit for female character."¹⁶³ In Goodell's case as in Bradwell's, the legislature responded to the court's recalcitrance by passing a law allowing women to practice in all the state's courts. Over Judge Ryan's dissent, the Wisconsin Supreme Court admitted her.¹⁶⁴

Remedial legislation also followed the third case standing as a barrier to Clara Foltz when she went to the courts. Belva Lockwood was a woman of remarkable persistence. When denied entrance in 1869 to law school at the Columbian College (later George Washington) because "her presence would distract the young men," she tried unsuccessfully to attend Georgetown and Howard. Finally the newly formed National University Law School admitted her, and she completed the course in 1873. But the school would not disgorge her degree. She wrote to the ex-officio President, Ulysses S. Grant, at the White House: "If you are the President [of the school] . . . I demand my diploma. If you are not its President, then I ask that you take your name from

162. The appearance of the state officer with Goodell was a mark of the regard in which the bar held her. He enforced her petition with "vigor and polish." WISCONSIN STATE J., *reprinted in WOMAN'S JOURNAL*, Jan. 1, 1876, at 8.

Her petition, printed in the CHI. LEGAL NEWS (Bradwell's paper), Jan. 1, 1876, at 116, is a fine piece of legal work. Of particular interest is her argument that since the University of Wisconsin was open to women in all departments, it would be ridiculous to train women for law and not allow them to practice it in the state's highest court. In her case, Foltz argued the mirror image—that it was absurd to allow women to practice, but not to study, law.

163. *In re Goodell*, 39 Wis. 232, 247 (1876) (emphasis added). See *infra* text at note 195 for further discussion of this case.

One commentator prints part of Judge Ryan's opinion, stating that the issue is the same as in Mrs. Lockwood's case in the Court of Claims, see *infra* note 166 and accompanying text, and adding:

If all the barriers in the way of women entering the legal profession were thrown down, as we have no doubt they soon will be, . . . *the certain failure which must attend them in this profession will inevitably drive them to seek employment more suitable to their tastes and conditions.*

Women As Lawyers—Mrs. Goodell's Case, 3 CENTRAL L.J. 186 (Mar. 24, 1876) (emphasis added).

164. According to a widely reprinted sketch of Goodell in *Lippencott's* magazine, she drafted the bill admitting women and "a petition for its passage was signed by the circuit judge and every member of the bar in the county." *Wisconsin's Female Lawyer*, SAN FRANCISCO CHRONICLE, Mar. 23, 1870, at 6. Goodell practiced until her untimely death at the age of 41 in 1880, which inspired the *Chicago Journal* to inquire "whether women are able to endure the hard usage and severe mental application" of a legal career. Robinson, *supra* note 133, at 24.

its papers, and not hold out to the world to be what you are not."¹⁶⁵ The President did not reply, but a few days later she received the degree and immediately joined the bar.

Like Clara Foltz, Lockwood had clients practically at once. Her career went smoothly until 1874, when she took an important case against the government, requiring her to appear in the Court of Claims. Refusing her admission, the court held that women's "legal position is interwoven with the very fabric of society," and "immemorial usages . . . forbid such a far-reaching change."¹⁶⁶

Lockwood next sought to join the bar of the United States Supreme Court, thinking she would then bring a case there against the Court of Claims, but again she was refused.¹⁶⁷ Finally, in a fight spanning several sessions, she obtained legislation from Congress opening the federal courts to women lawyers.¹⁶⁸ In March, 1879, she used "her bill" to become the first woman member of the Supreme Court Bar.¹⁶⁹

165. Belva Lockwood, *My Efforts to Become a Lawyer*, LIPPINCOTTS MONTHLY MAG. (Feb. 1888), reprinted in 1 WOMEN IN AMERICAN LAW 259 (M.S. Wortman ed., 1985).

166. *In re Belva A. Lockwood* (United States Court of Claims, May 11, 1874), reprinted in 21 CENTRAL L.J. 253 (May 1874). The law review commentator states that he is in general agreement with the result, as is "the great mass of the legal profession, though there are some enlightened lawyers who think otherwise." *Id.* at 256. Judge Nott of the Court of Claims also opined that the custom of male attorneys only was so firmly embedded that he doubted whether even the legislature could validly overturn the exclusion. In Goodell's case, Judge Ryan made the same observation about the powerlessness of the legislature. The law review commentator correctly noted: "we may be pardoned for suggesting that it is generally supposed among lawyers that the enacting of a measure by the legislature is the highest evidence that it is in accordance with public policy." *Id.* at 257.

167. Her petition was denied without opinion. *Right of Woman to Office*, 17 AM. L. REV. 670 (1883) discusses *Lockwood*, *Bradwell*, and *Goodell* and cites the Supreme Court refusal. *Id.* at 678 n.3. Written by a woman, the article opines that none of these cases will be precedent for much longer.

Almost twenty years after she became a member of the Supreme Court Bar, as well as the bars of several states, Lockwood applied to the Virginia Bar and was refused admission. When she sought leave to mandamus the Virginia court, the United States Supreme Court held, citing *Bradwell*, that the states had complete discretion to construe their bar admission statutes. *In re Lockwood*, 154 U.S. 116 (1893).

168. Act of Feb. 15, 1879, ch. 81, 20 Stat. 292. The main proponent of the bill was the pro-suffrage Senator from California, Aaron Sargent, whose wife, Ellen Clark Sargent, was an early suffrage leader in the state. 3 HWS, *supra* note 6, at 108-10. In urging the federal measure, Sargent pointed to the Woman Lawyer's Bill in California. *Id.* at 109.

169. Lockwood's Supreme Court admission was coincidental with the Hastings decision in the trial court, and the court cited it in ruling in Foltz's favor. *See infra* note 206. The Court of Claims also admitted Lockwood in 1879 as its first woman lawyer.

Lockwood had a long and successful legal career and was active in the suffrage and peace movements. *See* 2 NOTABLE AMERICAN WOMEN, *supra* note 4, at 413 (Lockwood entry). MARY

When she lobbied for her bill and when she sued Hastings, Clara Foltz in California was fully aware of the cases of these three women. Their example may have convinced her to obtain legislation before seeking bar admission, despite the inconvenience of traveling to Sacramento. Going to the legislature first was risky because failure there would have weakened a court case. Yet, legislatures had proved more receptive than courts to women's claims in nineteenth century America. As it happened, the Woman Lawyer's Bill was central to the success of Foltz's suit against Hastings.

Foltz's first move in court met a negative response. When she presented her bar admission certificate, Judge Morrison of San Francisco refused to honor it. She requested that he appoint a committee to examine her for admission, which he could hardly refuse.¹⁷⁰ Thus, in late January she underwent a second bar examination, like the one she passed earlier in San Jose. Foltz's hometown newspaper commented that this procedure was "not particularly gallant to the lady, nor indicative of much respect for a sister Court."¹⁷¹

As soon as she passed the examination, Foltz gave full attention to her petition for a writ of mandamus against the Hastings directors. At the same time, Gordon brought an original action in the California Supreme Court.¹⁷² These were hectic days in which the women prepared documents of a sort neither had ever seen before. The press attention was constant. Foltz later remembered this aspect of the affair with pleasure: "My name was on every

VIRGINIA FOX, *LADY FOR THE DEFENSE* (1975). One heartening aspect of Lockwood's career occurred in 1880 when she moved the admission to the Supreme Court Bar of its first black lawyer, Samuel Lowery. M.B. STERN, WE, *THE WOMEN: CAREER FIRSTS OF NINETEENTH CENTURY WOMEN* 212 (1963).

Lockwood and Foltz met in 1882 when Lockwood ran on the Equal Rights ticket for President of the United States and Foltz aided her California campaign. But that is another story.

170. Two of the men Judge Morrison appointed were former California Supreme Court justices. One of them, W.W. Cope, was a member of the Board of Directors of Hastings and was a defendant in Foltz's case. Post, *supra* note 7. The overlapping of personnel in all sections of this story reflect what a small world the legal profession was in California in 1879.

171. SAN JOSE DAILY MERCURY, Jan. 29, 1879, at 2. The story also says that it was "a rigid examination of some three hours duration" and that the committee was unanimous in her favor. *Id.*

Judge Morrison placed every obstacle in the path of the women at the outset, and after they won, stayed the issuance of the writ until the appeal. On the other hand, he gave them a fair hearing and ruled firmly in their favor. See *infra* notes 206-08 and accompanying text. Foltz said of the judge: "Judge Morrison, though I do not think he believed in women lawyers, did believe I was right in the law" *Struggles*, *supra* note 1, Nov. 1916.

172. The Supreme Court rejected Gordon's petition because it should have been first made to the trial court. SAN FRANCISCO CHRONICLE, Feb. 13, 1879, at 4. Gordon then joined in Foltz's action. See *infra* note 175 and accompanying text. Although the newspapers took the rejection of Gordon's petition to indicate a mistake on her part, attempting to file directly in the Supreme Court was excellent strategy. Had the Court been willing to hear the case, the delay caused by a Hastings appeal would have been avoided. See *infra* notes 177, 208 and accompanying text.

tongue; the daily papers and the monthly magazines were filled with flattering mention of my exploits."¹⁷³

Foltz filed her petition on February 10, 1879. Several days before the hearing, set for February 15, Gordon wrote to her parents at Lodi about the status of their cases:

My darling Ma and Pa:

Little Trella [Clara's oldest child, 13] came home last night and brought me your good letter . . . [and] clothes. I never needed clean clothes so much You will see by the papers that my application for writ of mandamus has been denied by the Supreme Court, but Mrs. Foltz's application to the lower court was granted and the writ is returnable Friday a.m.

I want to be there with her, tho it is not at all probable they will come to trial. *They intend to make us all the trouble and delay possible* but I really believe we shall win in the end¹⁷⁴

As Gordon predicted, the Hastings lawyers engaged in delaying tactics; they moved for a continuance, which Judge Morrison granted along with the request that Gordon's case be consolidated with Foltz's.¹⁷⁵ Reporting on their first joint appearance in court, the newspapers carried the first of many fashion-page-style accounts of the impression they made:

Mrs. Foltz, with yellow hair, crimped and plaited, and Mrs. Laura deForce Gordon, with dark brown hair, in Coke-upon-Lyttleton curls down her back, sat at the bar table, and the former evinced her knowledge of Court practice by answering "Ready." However, an aged masculine attorney asked the Court that the hearing of the motion go over till next Friday¹⁷⁶

173. *Struggles*, *supra* note 1, Aug. 1916.

174. Letter from Laura Gordon to her parents (Feb. 12, 1879), Gordon papers, *supra* note 37 (emphasis added). The letter continues with further evidence of the closeness of the Foltz-Gordon team:

. . . I shall come up on Saturday and but for Mrs. Foltz's case in court Fri. would go to Sac tomorrow to come down from there, but she is anxious to have me stay.

I have taken rooms at this house [Commercial Hotel] but stay at Mrs. Foltz's office all day.

Id.

175. *The Lady Lawyers*, SAN FRANCISCO CHRONICLE, Feb. 15, 1879, at 2. Evidently disappointed at the lack of drama in the proceedings, this story played up Gordon's motion, reporting that she was allowed to "come in as a kind of coparcenter [sic] in the accruing benefits of the proceeding, and unite with Mrs. Foltz in arguing the legal and moral propriety of the process." *Id.*

176. *Id.*

On the next Friday, February 21, Hastings counsel again sought a postponement. "The lady opposed the delay but neither her argument nor her tears availed": the Judge gave the distinguished gentlemen the weekend, until Monday, February 24.¹⁷⁷ Clara Foltz did cry in court—tears of frustration, and perhaps rage. Delay was devouring her study time; six weeks of the semester had already passed. Soon it would be too late to catch up in the coursework.

Yet even as the passage of time undermined any personal advantage Foltz could gain from victory, the women's suit had important consequences in the Constitutional Convention, meeting in Sacramento. In response to developments in the case, the convention delegates added to the new proposed constitution two provisions on women's employment and education. The story of their passage set against the background of California history in the 1870s requires a more complete discussion than is possible here, but a brief account is in order. These unprecedented constitutional clauses were not least among the laurels Clara Foltz and Laura Gordon gained in their joint efforts to become California's first women law students and lawyers.

The first continuance of the Foltz case showed that Hastings meant to fight the women's suit. Immediately after this court proceeding, the Convention adopted without amendment or debate a section providing:

No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation or profession.¹⁷⁸

This was the very first provision in any American constitutional guaranteeing women equal rights in the public arena.¹⁷⁹

Though it lacked legal force before ratification, the constitutional clause nevertheless added weight to the Foltz-Gordon argument about the absurdity of

177. SAN FRANCISCO CALL, Feb. 22, 1879, at 2.

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

The continuance in the Hastings suit was February 15, a Friday. The clause was introduced on Monday, February 17 by the Convention sitting as a Committee of the Whole, and passed in the Convention itself on February 20. DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION 1395, 1424 (1879) [hereinafter DEBATES].

179. The Married Women's Property Acts, which in various forms gave women some measure of control over their property and earnings, were statutory, though many states consolidated and incorporated them in their constitutions. See John D. Johnston, *Sex and Property, The Common Law Tradition, The Law School Curriculum and Developments Toward Equality*, 47 N.Y.U. L. REV. 1034, 1062-70 (1972); BABCOCK ET AL., *supra* note 11, at 592-99. Even when these acts were incorporated in constitutions, however, they could be seen as giving women rights compatible with their traditional sphere. A masterful treatment of the significance of the acts is NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH CENTURY NEW YORK* (1982).

allowing women to practice law but not to learn it. Its passage demonstrated that the opening of careers to women was not a sport of the 1878 legislature. Once ratified, it secured the right to practice law against "the caprice of future legislatures,"¹⁸⁰ which might repeal the Woman Lawyer's Bill.

The Convention acted again to support the women immediately after their case against Hastings was argued, and before it was decided. In another first for the constitution of any American jurisdiction, the delegates adopted a provision that:

No person should be debarred admission to any of the collegiate departments of the university on account of sex.¹⁸¹

When the clause was offered, one member objected to it as unnecessary since both sexes were already taught at the University. But the clause's sponsor responded that "recent history" showed its "necessity."¹⁸² The Convention adopted that clause immediately by a vote of 103 Ayes to 20 Noes.¹⁸³

The "recent history" of which the delegate spoke was the highly publicized argument in the Hastings case on February 24, 1879. Many newspapers carried front page stories the next day, covering in extraordinary detail the arguments

180. 3 HWS, *supra* note 6, at 759-60. This account of the clauses passage reads:

Remembering the hard struggle by which the right to practice law had been secured to women and the danger of leaving it to the caprice of future legislatures, Mrs. Gordon drafted a clause which protects women in all lawful vocations, and by persistent effort succeeded in getting it inserted in the new constitution.

Id.

As shown *supra* note 111, Gordon was a main contributor to this volume, and her role is naturally more prominent. Foltz later said that she had "proposed" the clause, which is not necessarily inconsistent with the above account. *Struggles*, *supra* note 1, Mar. 1917. At any rate, the two women worked together so closely in this period that it is unnecessary to apportion credit.

181. CAL. CONST. art. IX, § 9 (1879).

182. DEBATES, *supra* note 178, at 1476 (Feb. 26, 1879). The proponent of the education access bill was Joseph Ayers, a liberal member of the convention from Los Angeles.

On the connection between the passage of the clause and the Hastings suit: "The agitation of the question of the admission of women to the Law College, which began during the session of the convention, led that body to incorporate [the education clause]." 3 HWS, *supra* note 6, at 759.

183. The Ayes included J.P. Hoge, the first named defendant in the women's suit as the Director of the Hastings Board. He was also the President of the Convention. One explanation for his favorable vote is that he fell into the lawyer's trap of seeing only his own argument, and thus felt that the Hastings law department would not be covered by the clause. It is even possible that he thought the women right, but this would mean that he had changed his mind since the unanimous vote of the Hastings Board excluding them. BARNES, *supra* note 140, at 147.

Approving the Convention action, the *Chronicle* noted that "those who have charge of the law school at the University may be ungenerous and narrow enough in their views to wish to limit the sphere of women, but a majority of the members of the Constitutional Convention are not." SAN FRANCISCO CHRONICLE, Feb. 27, 1879, at 2.

and the scene.¹⁸⁴ The room was filled with lawyers who "were much interested and amused at THE NOVEL SPECTACLE of women arguing at the bar of justice."¹⁸⁵ Many women supporters also attended, described variously as "prominent adherents of the woman suffrage movement" and as "the aggressive female sex." The audience was supportive in more than presence. 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."¹⁸⁶

When the subject was women, much of the story was, as always, about dress and hair. Thus is preserved Clara Foltz's wonderful attire:

[She wore] a business suit of black silk, trimmed with velvet. A scarf or band of black lace was passed around her neck and crossed in front, over which peeped a standing collar of white linen of the Piccadilly pattern. Her wrists were ornamented with fringes of black silk, *partially concealing hands not lacking in bone and muscle*, and with bands of black velvet fastened with golden butterflies. At her throat was a modest gold brooch. Her profuse hair was done in braids, which fell backward from the crown of her head like an Alpine glacier lit by the setting sun.¹⁸⁷

Two of Hastings Board of Directors, Thomas B. Bishop and Delos Lake, represented the school; their clothing was not reported. These giants of the San

184. SAN FRANCISCO CHRONICLE; SAN FRANCISCO CALL; DAILY ALTA, Feb. 25, 1879, at 1. All following quotations and descriptions concerning the Hastings argument are from these sources unless otherwise noted.

185. CHRONICLE, *id.*

186. CALL, *supra* note 184.

187. CHRONICLE, *supra* note 184 (emphasis supplied). Laura Gordon was not as elaborately described, perhaps because she was not so elaborately dressed. "[She wore] a stylish black silk dress, with some suggestions of masculinity in the make, white linen cuffs, simple gold jewelry, a straw hat with saucy feather and velvet surrounds, and curls enough to supply half the thin-haired ladies of San Francisco with respectable switches." *Id.*

Foltz's dress is often mentioned in stories about her, *see, e.g.*, N.Y. TIMES, Jan. 17, 1896, at 9 ("Her costumes are fashionable and without a trace of mannish affectation.").

The wearing apparel that most interested the press when women first came into the court was their hats and what they would do with them. The *Call* noted that "in speaking the ladies laid off their cloaks and hats." CALL, *supra* note 184. When Foltz was admitted to the New York Bar in 1896, every account mentioned speculation about whether she would remove her hat before the court. She did and she checked it in the cloak room. In 1876, a writer styling himself "E. Quality," wrote the *Chicago Legal News* that he was in favor of women in the courts, but urged as a matter of "courtroom etiquette" that the "lady lawyers [should] remove their hats, and address the court with head uncovered, as the gentlemen members of the bar are compelled to do." CHI. LEGAL NEWS, Mar. 25, 1896, at 216.

Francisco Bar were both very rich and quite famous in the state.¹⁸⁸

Responding to the drama of the situation, one reporter enlivened his account of Foltz's opening argument: "she spread out a dozen or more ponderous volumes, raised her lithe figure to its full proportions, swept an eagle eye about the Courtroom, bestowed one earnest glance on the shrinking Judge, and then plunged head foremost into her argument."¹⁸⁹

Dividing her straightforward presentation into three parts, Foltz first argued that she met all the requirements for admission to Hastings; she then argued that Hastings was part of the University of California, which welcomed women students.¹⁹⁰ Finally, she urged that given the recent passage of the Woman Lawyer's Bill, it would be an "anomaly to enact that women might practice in all the law courts of the state, and yet in the same session establish a law school from which they were excluded."¹⁹¹

Foltz continued by responding to the main argument in the Hastings papers that the University's policies did not govern the college of law and that affiliation was for degree-granting only. Opposing counsel claimed in their brief

188. It would be difficult to exaggerate the establishment credentials of the women's opponents. Both men were former judges and were referred to as "Judge" in court and newspapers. Moreover, both were founders of the San Francisco Bar Association. See KENNETH M. JOHNSON, *THE BAR ASSOCIATION OF SAN FRANCISCO: THE FIRST HUNDRED YEARS, 1872/1972* (1972) (repeated references to both); BARNES, *supra* note 140, at 19. Johnson recounts that Bishop was among the top six lawyers listed as "the best at the bar" by "a great number" of fellow attorneys polled in 1899. JOHNSON, *supra*, at 151. Lake is described as "brilliant," "profound," possessed of a "singularly fine presence, a rich voice and a great command of language," as well as a "keen wit." A. PHELPS, *CONTEMPORARY BIOGRAPHY OF CALIFORNIA'S REPRESENTATIVE MEN* (1881).

At counsel table also for Hastings, but not participating in the argument was a former California Supreme Court Justice, W.W. Cope, who was on the committee appointed to examine Foltz for admission to the San Francisco court.

189. CHRONICLE, *supra* note 184.

190. An Act to Create and Organize the University of California, CAL. STAT. 1868, ch. 244, § 8, at 250-51. The founding statute did not explicitly establish coeducation but neither did it use the word "male." Women were admitted in 1870, "without significant controversy." VERNE A. STADTMAN, *THE UNIVERSITY OF CALIFORNIA, 1868-1968*, at 2 (1970). The University's President in his 1874 Statement of Progress reported that "when the University was organized, its doors were freely opened to all . . . [y]oung ladies . . . as well as young men." *Quoted in* V. OULETTE, DANIEL COIT GILMAN'S ADMINISTRATION OF THE UNIVERSITY OF CALIFORNIA (1951) (Stanford dissertation).

In a letter to the *Women's Journal* in November 1872, Mary Snow, an early suffrage worker, wrote that California opened its University to women and credits the persistent agitation of Professor E.S. Carr. WOMAN'S J., Nov. 9, 1872, at 356.

At the trial court, Hastings did not contest the general belief that the University was firmly established as co-educational. In the California Supreme Court, however, they belatedly questioned the practice. See *infra* note 214.

191. ALTA, *supra* note 184.

that the law school was the creature of a special trust established by Judge Hastings' loan to the state, upon which he was to receive interest. Only its own Board of Directors controlled the Hastings College of the Law.

Foltz answered that even if such a self-governing non-corporate trust was intended, allowing the institution to discriminate against women violated public policy, in part because (and Sarah Knox-Goodrich must have loved this) all inhabitants of the state, irrespective of sex, were taxed to pay the interest on Judge Hastings' donation. The female property owners of her own Santa Clara County paid taxes on two million dollars; those of Alameda County, Laura Gordon's business base, on four million dollars.

The law was on her side, especially since the 1878 Act creating Hastings gave no hint that the law school stood in a different relation to the University than any other department. There was little occasion for Foltz's wit or for eloquence in her opening remarks, but without exception, the news stories agreed that she did well, speaking with "force and polish."¹⁹²

Foltz spoke for a half hour and then "gracefully gave way to her opponents." To the surprise of Foltz and Gordon, since the point was not in the Hastings brief, counsel for defendants raised the argument that women should not be lawyers at all. Somewhat awkwardly, Bishop worked his remarks into a legal framework by urging that the Board had exercised its discretion in finding that law study was not proper for women, and then saying that courts may not interfere with discretionary acts.

Relying heavily on Judge Ryan's unrestrained opinion in Lavinia Goodell's case,¹⁹³ Bishop read these words in his own elocutionary style.¹⁹⁴

The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibilities, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife

[Law] has essentially and habitually to do with all that is selfish and extortionate, knavish and criminal, coarse and brutal, repulsive and obscene, in human life. 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,

192. *Id.*

193. *See supra* note 163 and accompanying text.

194. *See, e.g.*, the description of a Bishop speech in BARNES, *supra* note 140, at 19: "His speech of panegyrics and platitudes was painful . . . his rhetoric was flowery even for that day."

fornication, adultery, pregnancy, bastardy, legitimacy, prostitution, lascivious cohabitation, abortion, infanticide, obscene publication, libel and slander of sex, impotence, divorce—all the nameless catalogue of indecencies.

Reverence for all womanhood would suffer in the public spectacle of woman so engaged¹⁹⁵

The spectacle was Bishop himself, reading the whole of Judge Ryan's lengthy disquisition on what a mocking reporter labeled the "various difficulties, disabilities, inabilities, objections, troubles and impossibilities of a woman's practicing law."¹⁹⁶

Delos Lake continued in the same vein, first excusing what might appear to be a lack of gallantry, and complimenting Foltz on "her grace and beauty." He raised the argument previously invoked against the women in the legislature: "lady lawyers were dangerous to justice inasmuch as an impartial jury would be impossible when lovely woman pleaded the case of the criminal." Suavely, so he surely thought, he added that this very case proved his point since "the question involved was one of dry law . . . and yet . . . 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."¹⁹⁷

In answer to the women's main point that the same legislature created Hastings and enabled women to practice, Lake argued that the Hastings bill passed first. Thus, he said, there was no intent to include women in the law school.

Clara Foltz rose in rebuttal. In her opening remarks, she followed her idea of a male lawyer: careful and correct, but also technical and tedious. Her opponents had opened the door for passionate persuasion, and she gladly entered. First, she chided "learned and prolix" counsel for going "all through the social scale to get argument," when the issue was "a strict question of law." Then she addressed defendants' claim that, as she put it, "broader education would make woman less womanly" and thus "destroy our homes." In words that she was to repeat for half a century, she cried: "That is not the legitimate effect of knowledge of any kind. On the contrary, a knowledge of the law of

195. *In re Goodell*, 39 Wis. 232, 245-47 (1876). This is a very partial rendering of Judge Ryan's opinion, but not a distortion of its extremity. See *supra* text accompanying note 163.

196. CHRONICLE, *supra* note 184.

197. ALTA, *supra* note 184 (all quotations in this paragraph). Lake added that "he therefore felt it his duty to caution his Honor in deciding the question, as he was aware of His Honor's well-known gallantry." *Id.*

our land will make women better mothers, better wives, and better citizens."¹⁹⁸

Finally, Foltz treated the 1876 opinion in *Goodell* so disdainfully that one reporter thought it must be a very old case. The audience, he wrote, "quaked somewhat at the disregard which the fair advocate manifested for the musty old records of by-gone ages, and the sarcasm with which [she referred to] the opinion of some ancient wearer of the ermine."¹⁹⁹

Next, Laura Gordon, with the permission of the court to speak though she was not yet admitted to the bar, reiterated their basic arguments and "added some that were new and ingenious," notably, a correction of Lake's legislative history. Emphasizing that she had been in Sacramento, she said that the Woman Lawyer's Bill had been introduced *before* the Hastings bill, although the latter had passed first. In fact, she added, the Hastings legislation would not have succeeded without the backing of the women's supporters.²⁰⁰

She argued that "when Judge Hastings gave his money he could not fail to know" of the relationship of the law school to the co-educational university. In the summary of one observer: "she quoted glibly from the law books to show the intention of the lawgivers, the powers of the Regents, [and] the subjection of the branches [of the University] to the parent institution."²⁰¹

At the day's end, Delos Lake commented that if the "fair ladies" were to be lawyers, "he would rather have them as associates than as opponents."²⁰² Jovially, Judge Morrison suggested a partnership.

Clara Foltz acquitted herself brilliantly, yet she was disappointment by the opposition of the great men of the bar. Her idealism about proper professional

198. CALL, *supra* note 184, at n.12.

199. *Id.*

200. CHRONICLE, *supra* note 184. The same story reported the following exchange during Gordon's argument:

She read the name of Cain Mook Sow from the catalogue of the Law School, a Chinaman who had been admitted . . . while respectable women were excluded.

Mr Lake—But he was afterwards excluded.

Mrs. Gordon—He remained long enough to get his name on the books before he was bounced, anyway.

Such use of racist arguments was not uncommon among the suffragists, particularly those allied with the Stanton-Anthony "National Association," as Gordon was. See *supra* note 15 and accompanying text. While many women could see the relation of their cause to that of blacks, few could connect with the despised Chinese. This was particularly true in the 1870s when anti-Chinese feeling was at its height in the depressed California economy.

201. CHRONICLE, *supra* note 184.

202. *Id.*

conduct was undiminished years later when she wrote of the Hastings lawyers: “[T]hey strove to defeat the letter of the law and to overcome its intent and spirit by arguments unworthy of the profession they adorned.”²⁰³

Ten days after the argument, Judge Morrison issued an opinion with a writ directing the women’s admission. Its curt tone validated Foltz’s feeling that the opposition had neither law nor justice on its side. After discussing the University’s admission policies, and the 1878 legislation creating Hastings, the court stated:

When the Legislature designates who shall be admitted the Directors have no power to superadd the qualifications . . . when arbitrary regulations are made which are not for the good of the institution, the Court will not hold them to be valid.²⁰⁴

He made short work of the opinion in Goodell’s case:

[Judge Ryan] points out numerous reasons why women should not try cases in court. There are, perhaps, many things . . . which would disgust a woman, *but the Court has nothing to do with that. It is sufficient for the Court that the Legislature authorizes women to practice law. That Act was pending at the [same] time [as] . . . the Act to establish Hastings.*²⁰⁵

In addition to this strong citation of the Woman Lawyer’s Bill, Judge Morrison relied on the work of the Constitutional Convention, finding the “intention . . . to put women on the same footing . . . as men” and to give them “the same facilities to practice law that males possess.”²⁰⁶

In defeat, the Hastings Board remained ungracious, and Clara Foltz

203. *Struggles*, *supra* note 1, Aug. 1917.

204. The opinion was printed *verbatim* in many newspapers. This quotation is from the SAN FRANCISCO CHRONICLE, Mar. 6, 1879, at 3.

205. *Id.* (emphasis added).

206. In relying on the new constitutional clauses, Judge Morrison seemed puzzled as he observed: “The President of the Convention, J.P. Hoge, and one of the delegates, S.M. Wilson, are defendants in this action.” *Id.*

He mentioned another current event: “The telegraph informs us that Mrs. Lockwood has been admitted to the U.S. Supreme Court.” The day before his March 4 opinion, Belva Lockwood took advantage of the legislation she lobbied through, allowing women to practice in the federal courts. *See supra* note 169 and accompanying text.

The judge gave no space to the argument that women law students would be disruptive, dismissing it in the last sentence: “It is unnecessary to discuss the influence women would have over college students.” CHRONICLE, *supra* note 204.

thought, unethical. They decided almost immediately to appeal to the California Supreme Court, despite Judge Hastings' acknowledgement that the women, supported now by the court's cogent opinion, were correct on the law.²⁰⁷ Foltz's bitterness was unrelieved many years later as she wrote: "they knew that though I had much law I had little money, and they hoped . . . to wear out my courage or cool my ardor."²⁰⁸

The appeal turned Clara Foltz's personal victory to ashes. It would be months before the case could be briefed, argued and decided in the supreme court, and the Directors obtained a stay of the writ directing her admission until then. She had spent her "scholarship" from her friends and family to study in the city. After trying for a few weeks to establish a practice in San Francisco, she returned to San Jose where she had a network that assured her a living at her chosen profession.

Before her departure in early May, Foltz wrote to Laura Gordon, who was back in Lodi:

I am all packed up ready to leave for home and away from the scene of so much storm and conflict. I have been very happy in your society, my own sweet friend; and I have formed pleasant acquaintances that will be life long pleasure, but amid my sweet joy, I had mingled the bitter dregs of heartache.²⁰⁹

As the letter continues, she cherishes a moment of respite, and rises from it with her typical optimism:

I slept this morning until ten, then went to office, got my letter and papers and came back to Hotel and am enjoying a world of rest here in this quiet and pleasantly furnished room at the Russ. I think I will stay here until day after tomorrow. Then I go home to my nest of

207. Judge Hastings spoke to a reporter from the *San Francisco Chronicle* on the day the opinion came down: "He had first concluded to admit [the women], and then by advice of the Directors, . . . had withdrawn permission It was his opinion that under the law . . . ladies could be admitted . . . and that an appeal would not be sustained, and he should not think it best, though the Directors favored it." See Interview with Judge Hastings, *supra* note 146. See also BARNES, *supra* note 140, at 70. Barnes details the early rift between the Founder-Dean and the Board of Directors. It may be that Foltz was caught in the cross-fire with the Directors determined to oppose whatever Clinton Hastings proposed.

208. *Struggles*, *supra* note 1, Sept. 1916. Foltz added: "And here was presented the disgraceful spectacle of a board of directors of a law college, state officers sworn to obey the law, conspiring and colluding together to defeat its operation." *Id.*

209. Letter from Clara Foltz to Laura Gordon (May 6, no year given but internal evidence shows 1879), Gordon papers, *supra* note 37.

young ones and study for dear life. The future seems just brighter than ever before and I can believe that the good angels are shaping it all to suit themselves.²¹⁰

Back in San Jose, Foltz prepared her appellate argument, practiced law, lectured, worked for ratification of the new California Constitution, and with Laura Gordon and others, planned a great suffrage convention for the fall. She also prepared to join the bar of the state supreme court so that she could argue her own case when it was reached. "Worn and spent with the heavy cares of my growing children," she wrote of this strenuous period, "I . . . studied night and day amid the noise of my populous nursery."²¹¹

On December 6, 1879, Foltz passed her third rigorous bar examination, this time before the supreme court.²¹² Several weeks later, she argued *Foltz v. Hoge*. Afterwards, a justice who knew her from her San Jose days told her: "You are not only a good mother; you are a good lawyer. I have never heard a better argument, for a first argument, made by anyone."²¹³

In the supreme court, Judge Morrison's forceful opinion in her favor gave Foltz the advantage.²¹⁴ In late December, the high court issued its opinion, making short work of the Hastings case. The court implicitly relied on the Woman Lawyer's Bill pointing out that the school existed to train lawyers and that women were admitted to all courts "upon the same terms as men."²¹⁵

210. *Id.* Clara Foltz resting is an unfamiliar sight, and probably explained by an earlier sentence. "I came to the Russ Sunday afternoon quite unwell having taken a severe cold attended with headache."

211. *Struggles*, *supra* note 1, Aug. 1917.

212. At the examination, "she was one of a large class of applicants, many of whom were rejected." *Post*, *supra* note 7.

The manner adopted by the Court of examining applicants is by questions and answers, sometimes easy of reply, and oftener very hard [Some of the men exhibited a] nervous, self-doubting and disconcerted manner that does not augur well for their future ability to handle witnesses and to blandly ask for heavy fees.

Examination of Applicants by the Supreme Court, SAN FRANCISCO CHRONICLE, Dec. 6, 1879, at 2.

213. *Post*, *supra* note 7.

214. In its Supreme Court brief, Hastings' counsel tried a new argument that there was no statutory basis for allowing women in the University of California. Acknowledging that Political Code, § 17 (providing that "words used in the masculine gender comprehend as well the feminine") was generally construed as the basis of co-education, counsel argued that this construction was incorrect. Transcript on Appeal at 3, *Foltz v. Hoge*, 54 Cal. 28 (1879). However, the Supreme Court held that section 17, not only by custom, but as a matter of interpretation "would seem to entitle females to enter the University." *Id.* at 35.

215. *Id.* BARNES, *supra* note 140, at 55 says the reference was a "tacit tribute to the respondent."

The doors of California's only law school were finally opened to Clara Foltz,²¹⁶ but it was too late. The moment has passed when she might enjoy the pleasures of learning and reflection, protected from clients' demands and her own economic needs.²¹⁷ She was leaving for Sacramento in January to be a clerk, the modern equivalent of counsel, to the Assembly Judiciary Committee, the first woman to hold this lawyer's job.

But as Foltz herself often noted, her suit blazed a path for all women. The first woman to graduate from Hastings was Mary McHenry in 1882. She was chosen to give a graduation address and Clara Foltz wrote congratulating her:

[Y]ou scored one for your sex in carrying off the honor of an institutional that but recently scanted the idea of a woman aspiring to be a lawyer As a sort of mother of the institution [citing *Foltz v. Hoge*], I rejoice in your success . . . that at the first public graduating exercises of Hastings College of Law, a bright and beautiful young girl comes off with the honors of the class.²¹⁸

Through a career of fifty years filled with memorable cases and notable

216. The Hastings Board's response to the court's opinion was almost unbelievably petty: Judge Delos Lake . . . moved a resolution that no one admitted by the Supreme Court . . . as attorney . . . be admitted to the College except by a special order of the Board. . . . The resolution, a patent slap at Foltz . . . was passed unanimously by the six Directors present . . . [they] evidently had not yet read the court's opinion: in its conclusion, it had expressly provided for the admission of those already admitted to practice.

BARNES, *supra* note 140, at 55.

217. In the latter part of 1880, Foltz moved her practice back to San Francisco and attended occasional lectures at the school. In 1889, she applied to Hastings for a degree, which was denied because she had not completed the course. In 1925, she asked for an honorary degree, also denied on the ground that the school did not confer them. *Id.* at 57. In 1991, at the instigation of its women students, Hastings awarded Clara Foltz a J.D. degree posthumously.

Foltz continued to be sensitive about her lack of education, and over the years changed her three years of formal schooling to "private tutoring and two years at Hastings." *See, e.g.* BENCH AND BAR OF L.A. COUNTY (L.A. Daily Journal, pub. 1922).

218. Letter from Clara Foltz to Mary McHenry (Keith) (June 1, 1882) (Keith-Pond Collection, Bancroft Library, University of California).

McHenry practiced for about a year, and then she married William Keith, a famous and successful landscape artist. She became a great suffrage leader, donating her time and money to the cause over many years. Her papers in the Bancroft collection are full of accounts of suffrage activities, writings and speeches on the subject. She is frequently mentioned in 6 HWS, *supra* note 6, which covers the years 1900 to 1921. *See especially id.* at 35 (mentioning Keith's generous financial contributions). *See also* BARNES, *supra* note 140, at 57-61.

events, Foltz always returned to the Hastings lawsuit as her finest moment.²¹⁹ Of all victories, the first is the sweetest, but beyond this I think she found in its memory the best images of herself: brave, idealistic, hopeful.

CONCLUSION

Access to professions was one of the great early goals of the women's rights movement.²²⁰ Vocations such as teaching and even medicine saw a steady increase in the numbers of women from mid-century on, but the legal profession was second only to the ministry in its resistance. As the paradigmatic public profession, law had little connection with the domestic sphere, or with the ideal world of nurturance and tender feeling that nineteenth century women were supposed to inhabit.²²¹ Nothing could be more inconsistent with the social image of the true woman than the type of the good lawyer: bold, brilliant, aggressive, incisive, and ruthless in the interests of justice or of a client.

On the one hand, lawyers were the architects of government, the spokesmen of politics and philosophy—Tocqueville's American aristocracy. Law at its best was conceived as a scientific, highly technical skill. Paradoxically co-existing with these ideas was the picture of law as a dirty business, involving the rankest deeds and basest motivations, and lawyers as the amoral hired guns of wealth and power.

219. A year before her death, Foltz told an interviewer that the Hastings suit was "my first important case—the greatest in my more than half century before the bar." Zilfa Estcourt, *Ladies of the Law*, SAN FRANCISCO CHRONICLE, July 2, 1939, at 5. (The writer was describing the women lawyers attending the American Bar Association convention and recalled an interview with Foltz in 1933.)

220. At the Seneca Falls Convention, *supra* note 11, access to professions was the subject of a specific resolution:

Resolved: That the speedy success of our cause depends upon the zealous and untiring efforts of both men and women, for the overthrow of the monopoly of the pulpit, and for the securing to woman an equal participation with men in the various trades, professions, and commerce.

In the body of the Declaration of Sentiments is also the charge that "[Man] has monopolized nearly all the profitable employments He closes against her all the avenues to wealth and distinction As a teacher of theology, medicine or law, she is not known." 1 HWS, *supra* note 6, at 70-71, reprinted in AILEEN S. KRADITOR, UP FROM THE PEDESTAL 187-88 (1968).

221. Barbara Harris in BEYOND HER SPHERE: WOMEN AND THE PROFESSIONS IN AMERICAN HISTORY (1978) gives an excellent account of the ideological barriers to women in the "learned professions." She writes:

[P]racticing law was even more incompatible with nineteenth century ideas about women than was practicing medicine. Female doctors could claim that their careers were natural extensions of women's nurturant, healing role in the home and that they protected female modesty by ministering to members of their own sex. By contrast, women lawyers were clearly intruding on the public domain explicitly reserved to men.

In 1910 there were 1500 female lawyers, and almost 9000 female doctors. *Id.* at 110.

Whether women were found unfit for the law or the law unfit for women, the result in the early contested cases was denial of access to the profession. The opposition was bitter, broad and so deep that Clara Foltz "sometimes felt wholly discouraged, disheartened and altogether distraught."²²²

She overcame such feelings partly through her commitment to the women's movement.²²³ Its purposes were her inspiration, its adherents her allies. Yet the women's movement did not provide her, or she the movement, with a coherent, sustaining vision. Clara Foltz's focus was on the solution of immediate problems rather than on harmonizing her results, exploring root causes, or creating theories. She was, in short, a lawyer.

Practicing lawyers, like politicians, mainly deal with persuasion—what will sell, and with the possible—what will work. Thus, their arguments seldom descend from theory, but rather arise as the inventions of necessity. Foltz's call was to action, not reflection; she wrote partisan briefs, not philosophy.

What sustained Clara Foltz was not a lucid image of a better world in the future, but being "the first woman" in her present. As lonely as it is to be first, as much as it draws attack, it has one towering advantage. There is no standard for comparison, and thus no room for failure. Being first is success itself.

222. *Struggles*, *supra* note 1, Oct. 1916.

Of women's entry into the profession, Lawrence Friedman writes: "It is hard to understand, in this day and age, the horror and disgust evoked by these few brave, stubborn women." A HISTORY OF AMERICAN LAW 639 (2d ed. 1985).

223. Many of the famous first women were, like Foltz, active suffragists. By virtue of their efforts to join the profession, all of the first women lawyers were, in effect, members of the women's movement. Rejection of separate spheres was inherent in the project. The women's rights press, moreover, closely followed the progress of professional women and claimed all victories.

WEISBERG, *supra* note 131, at 248-49 argues that the women lawyers in the period from 1870 to 1890 were not suffragists, or ardent feminists. She arrives at this conclusion by "an examination of the biographical materials on the first women lawyers and a cross-tabulation of several sources on the suffrage movement." *Id.* at 248. But too little is known of either the early women lawyers or the local suffrage movements to make this claim. Lavinia Goodell, for instance, is not mentioned in standard sources as a suffragist, yet she wrote a strong letter of sisterly support for Belva Lockwood to a suffrage organ. WOMAN'S J., Apr. 24, 1875, at 130.

If the question is how much these early women were moved by ideology, the answer is probably unknowable. Most probably acted from a mixture of motives, with the need to earn a living playing a large part with many, as it did with Clara Foltz.

