

BOOK REVIEW

Ruth Bader Ginsburg*

WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ.

By Barbara Babcock.[†] Stanford, CA: Stanford University Press. 2011. xv + 392 pp. \$45.00.

Called “Portia of the Pacific,” Clara Shortridge Foltz, who lived from 1849 until 1934, was the first woman admitted to the practice of law in California, and achieved many other “firsts” in her long professional career. Famous as she was in her day, her name was little known when Barbara Babcock set out, in the early 1980s, to bring Clara Foltz, and the times in which she lived, vividly to life. *Woman Lawyer: The Trials of Clara Foltz*¹ is the culmination of Babcock’s quarter-century endeavor to restore Foltz to her rightful place in the history of women’s struggles to achieve full citizenship stature.² It is a work of remarkable range and depth, a fitting tribute to a woman of unbreakable spirit

* Associate Justice, United States Supreme Court.

† Judge John Crown Professor of Law, Emerita, Stanford Law School.

1. An online supplement to the book includes indexes, extensive bibliographic notes, and a wealth of papers concerning Foltz and other early women lawyers. The supplement is available at *Indexes and Bibliographic Notes*, WOMEN’S LEGAL HIST., http://wlh-wiki.law.stanford.edu/index.php/Main_Page (last updated May 31, 2012). Several photographs of Foltz appear in the book, including the portrait installed at the entrance to the Clara Shortridge Foltz Criminal Justice Center, the central criminal courts building in Los Angeles.

2. For Babcock’s prior writings on Foltz, see Barbara Babcock, *Alma Mater: Clara Foltz and Hastings College of the Law*, 21 HASTINGS WOMEN’S L.J. 99 (2010); Barbara Allen Babcock, *Inventing the Public Defender*, 43 AM. CRIM. L. REV. 1267 (2006); Barbara Allen Babcock, *Foreword: A Real Revolution*, 49 U. KAN. L. REV. 719 (2001); Barbara Allen Babcock, *Women Defenders in the West*, 1 NEV. L.J. 1 (2001); Barbara Allen Babcock, *A Place in the Palladium: Women’s Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1166-69 (1993); Barbara Allen Babcock, *Commentary, Western Women Lawyers*, 45 STAN. L. REV. 2179 (1993); Barbara Allen Babcock, *Clara Shortridge Foltz: Constitution-Maker*, 66 IND. L.J. 849 (1991); Barbara Allen Babcock, *Reconstructing the Person: The Case of Clara Shortridge Foltz*, 12 BIOGRAPHY 5 (1989); Barbara Allen Babcock, *Clara Shortridge Foltz: “First Woman,”* 30 ARIZ. L. REV. 673 (1988), *reprinted with new introduction in* 28 VAL. U. L. REV. 1231 (1994); Barbara Allen Babcock, *Feminist Lawyers*, 50 STAN. L. REV. 1689 (1998) (book review); and Barbara Allen Babcock, *Clara Shortridge Foltz: The Visionary Defender*, EXPERIENCE, Summer 2007, at 6. While writing about Foltz, Babcock founded a website on women’s legal history: *Barbara Babcock*, WOMEN’S LEGAL HIST., <http://wlh.law.stanford.edu/barbara-babcock> (last visited Jan. 26, 2013).

who, time and again, refused to give way to despair or to take “no” for an answer to her pleadings.

In 1878, at the start of the new year, fewer than fifty women practiced law in the United States. Women could not vote in California or in the country generally, and California law allowed only “white male citizen[s]” to apply for admission to the bar.³ In the course of that year, Clara Shortridge Foltz, a twenty-nine-year-old mother of five children, the eldest age twelve, relentlessly lobbied for legislation opening the practice of law to “any citizen or person” in California.⁴ That mission accomplished, Foltz became, well before the year’s end, the first woman admitted to the California bar. *Woman Lawyer* relates in enlightening detail the trials and travels of Clara Foltz as she fought to gain recognition in a profession fiercely resistant to relinquishing its masculine cast.

Babcock tells the story of Foltz’s life in two parts. The first four chapters are chronological. They proceed from Foltz’s early days and her successful quest to become a lawyer, through her efforts to earn a living in law practice while simultaneously promoting women’s rights and criminal process reform, to her attempts to establish herself in New York, Colorado, and finally back in California, where she was eventually named the state’s first woman deputy district attorney. The book’s last three chapters are thematic, concentrating first on Foltz as a public thinker, then on her work to achieve political equality for women, and finally, on her invention of the office of Public Defender. Necessarily, this bifurcated arrangement involves some twice-told incidents. But the presentation helps the reader to appreciate in full measure Foltz’s large contributions to the causes and movements she strived to advance.

Babcock faced a formidable challenge in constructing an account of Foltz’s life: most of Foltz’s papers—her case files, scrapbooks, personal letters, and appointment books—did not survive, nor did pictures and souvenirs she kept as treasured possessions.⁵ The loss or destruction of these uniquely valuable materials is a fate shared by other pioneering women of Foltz’s time and their modern biographers. At the turn of the century, few libraries collected women’s papers, and family members apparently discarded correspondence, diaries, and documents that might have been illuminating.⁶ Limited largely to public records, contemporaneous media coverage, and Foltz’s published commentary, Babcock assembles an impressive amount of information about Foltz’s work and days, the places and societies in which she moved, her allies, and her adversaries. Yet despite Babcock’s long and careful research, more than occa-

3. BARBARA BABCOCK, *WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ* 8 (2011) [hereinafter *BABCOCK, WOMAN LAWYER*].

4. *Id.* at 22.

5. *See id.* at x.

6. *See, e.g.*, JILL NORGRÉN, *BELVA LOCKWOOD: THE WOMAN WHO WOULD BE PRESIDENT*, at xv (2007).

sionally, she can only speculate about Foltz's reasons for acting as she did and her role in movements and events described in the book.

Laudably, Babcock persevered in getting to know Clara Foltz intimately. With the understanding of a good friend, Babcock tells the story of a brilliant, courageous, and extravagantly ambitious pioneer in law and women's rights. Deserted by her husband and left to support five children mainly on her own, Foltz decided to enter law practice to earn a living. As remarkable as this choice was for a woman in the last decades of the 1800s, even more astonishing is Foltz's perseverance in the face of daunting obstacles. Prime among them: to become a practicing lawyer, Foltz needed to change the law to permit women to apply for bar admission.⁷ To this end, Foltz drafted the "Woman Lawyer's Bill" and, with suffragists at her side, tirelessly promoted its passage.⁸ Initially defeated, the bill passed on reconsideration, thirty-seven votes to thirty-five,⁹ clearing the way for Foltz to seek admission to the bar.

Obtaining legal education and training was a hurdle Foltz surmounted before she sought the Legislature's permission to practice. To learn the law in years when there was no law school in California to credential aspiring attorneys, Foltz sought to apprentice in the law office of Francis Spencer, a leading San Jose lawyer. Spencer responded:

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.

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.¹⁰

Spencer's counsel hardly dampened Foltz's ambition. Turned down by the bar leader, she instead studied law in the "more modest" offices of her father and his partner.¹¹ Foltz's mother, then and through other trying times, provided the childcare Foltz needed to stay above water.

Foltz found no warm embrace by fellow novices in the law. Seeking to participate in the moot courts held by the local club for aspiring attorneys, Foltz experienced "sneers and jeers."¹² One male attendee compared women "to educated animals, such as dogs, cats, horses and monkeys, which can be trained to perform certain acts that they could never conceive or execute on their own."¹³ Although Foltz's self-confidence and unruffled demeanor in the face of these

7. BABCOCK, *WOMAN LAWYER*, *supra* note 3, at 21.

8. *Id.* at 22-30.

9. *Id.* at 28-29.

10. *Id.* at 18-19.

11. *Id.* at 19.

12. *Id.* at 19-20 (internal quotation mark omitted).

13. *Id.* at 20 (internal quotation marks omitted).

slights brought several members around to her side, she resolved “[n]ever again [to] invade the presence of the [m]oot court.”¹⁴

Despite these impediments and a child-filled home over which she presided as sole parent, Foltz acquired the requisite legal knowledge and skill. In September 1878, she appeared before a three-member panel for her bar examination. The panel questioned her “for three hours, twice as long as was customary.”¹⁵ She readily passed the exam, likely aided by the oratorical experience she had gained on the lecture circuit in the mid-1870s as an ardent advocate of suffrage for women.¹⁶ On September 5, 1878, opening a door long closed to women, Foltz gained admission to the California bar.¹⁷

Though allowed to practice, Foltz—whose formal education ended before she turned fifteen—yearned to be learned in the law. So minded, in 1879, she sought to attend Hastings College of Law, newly opened in San Francisco, the first law school in the West. But the men in the class balked. When Foltz took a seat in the back of the lecture hall, they mimicked her every sound. A bad cold forced Foltz to cough, whereupon “every young man in the class was seized with a violent fit of coughing.”¹⁸ Foltz described the scene: “You would have thought the whooping cough was a raging epidemic among the little fellows. If I turned a leaf in my notebook, every student in the class did likewise. If I moved my chair—hitch went every chair in the room.”¹⁹ Brave and good-humored as she was in public, that night, Foltz “stole into the room where [her] little ones slept and cried [herself] to sleep.”²⁰

When Foltz attempted to sit in again, she was barred from the lecture hall. Joined by Laura Gordon, a suffragist ally and later colleague at the bar, Foltz lobbied the school’s directors for admission. Their pleas were unavailing. Dean Hastings told Foltz and Gordon that “their presence, particularly their rustling skirts,” bothered the young men.²¹ The two women then turned to the courts and prevailed there: the California Supreme Court, upon hearing Foltz’s argument, ordered the admission of women to the law school at once. Foltz relished the victory, but it came too late to benefit her personally. Hard-pressed financially, she could not afford the luxury of further time subtracted from her labors to earn a living for her family.

The undisguised prejudice that hampered Foltz’s efforts to become a lawyer persisted in her years at the bar. Characterizing an 1881 trial in which counsel opposing Foltz was her colleague Laura Gordon, a press headline read:

14. *Id.* at 21 (internal quotation mark omitted).

15. *Id.* at 31.

16. *See id.* at 15-17.

17. *Id.* at 31.

18. *Id.* at 43.

19. *Id.* (internal quotation mark omitted).

20. *Id.* (internal quotation marks omitted).

21. *Id.* at 44.

“Two Females Will Be Allowed to Wag Their Tongues to Their Hearts’ Content.”²² A witness Foltz was cross-examining in an 1895 trial provoked a “roar of laughter” from the gallery when he exclaimed, “I don’t believe any woman should be an attorney at law.”²³ The prosecutor in an arson case in which Foltz was appointed to represent the defendant “bellowed” in closing argument: Foltz “is a woman,” and therefore “cannot be expected to reason: God Almighty decreed her limitations.”²⁴ He cautioned the jurors, all of them male, to employ the “reasoning faculties” Foltz lacked to reject the defense and return a guilty verdict.²⁵ In a trial Foltz attended with other members of the Portia Club she founded, the judge gave a press interview “excoriating females as clients and court spectators.”²⁶ Women clients, the judge opined, are “suspicious, unreliable, unreasonable, and ungrateful,” while women spectators, hearing testimony unfit for their ears, are “vulgar-minded.”²⁷ A leading member of the New York corporate bar, James Coolidge Carter, suggested a statutory ban on women lawyers because “woman is too full of personality,” “[e]verything is personal with her.”²⁸

Foltz forcefully countered these attacks, simultaneously defending in open court her right to practice and championing her clients’ cause. She also conveyed such demonstrations of bias to a larger audience, sometimes with a touch of humor. For example, she hosted a public roast of the judge who denigrated women as clients and court spectators.²⁹ Nonetheless, due in no small part to the prejudice against women lawyers that infected the bar and bench, Foltz was rarely able to sustain herself and her family by concentrating exclusively on law practice. Over the years, she turned to a variety of other ventures—not all of them successful—to supplement her income, including political stumping, public speaking, lobbying, real estate speculation, newspaper publishing, even gold mining.

Throughout her life as a lawyer, Foltz trained her advocacy on twin causes: women’s right to practice law and their right to vote. Describing her efforts on both fronts, the book emphasizes their commonalities. Foltz encountered similar arguments from opponents of both causes: women should not be enfranchised because they would vote for “the best-looking politician,” and women should not be heard in court because they “would seduce male juries into acquitting the guilty and rewarding the undeserving.”³⁰ Women could not serve as jurors (and thus counter the seduction of male jurors by women lawyers) be-

22. *Id.* at 77 (internal quotation marks omitted).

23. *Id.* at 166 (internal quotation mark omitted).

24. *Id.* at 291 (internal quotation mark omitted).

25. *Id.*

26. *Id.* at 160.

27. *Id.* at 160-61 (internal quotation marks omitted).

28. *Id.* at 189 (internal quotation marks omitted).

29. *Id.* at 160-62.

30. *Id.* at 25.

cause in most places only voters were eligible for jury service.³¹ Moreover, opponents argued, if women did serve as jurors, they would side with “the handsomest lawyer.”³² Most ominous, “[l]ike voting, practicing law involved [women’s] unambiguous passage [from the domestic sphere] into the noisy and competitive public sphere.”³³

Suffragists turned these arguments to their advantage, encouraging law study by women as “good preparation for exercising the franchise and participating in government.”³⁴ Progress on the two fronts, however, did not move in tandem. Although Foltz became a lawyer in 1878 and women were admitted to practice before the U.S. Supreme Court in 1879, Foltz could not cast a vote in California until 1912 and women did not gain nationwide suffrage until 1920. Yet Foltz personally exercised both rights in her lifetime, a triumphant vindication of her persistent pleading.

* * *

It is hard to imagine a more suitable biographer for Clara Foltz than Barbara Babcock. Foltz and Babcock, both daughters of lawyer fathers,³⁵ achieved important firsts for women in the law—Foltz, the first woman lawyer in California; Babcock, the first woman faculty member at Stanford Law School.³⁶ Both entered the legal profession as curiosities. When asked how she tolerated being the lone woman on Stanford’s law faculty for five years, Babcock answered: “[T]hat’s what I’d been doing for years, and I was inured to it.”³⁷ Both were groundbreaking teachers—Foltz as founder of women’s clubs dedicated to educating women about the law;³⁸ Babcock as one of the first teachers of a course on Women and the Law,³⁹ which she added to her constant specialties, civil and criminal procedure. And both were tireless advocates for women’s rights—Foltz as a leading suffragist; Babcock as a prominent participant in the second-wave feminist movement that blossomed in the 1970s.

31. *Id.* at 232.

32. *Id.* at 25.

33. *Id.* at 222.

34. *Id.* at 153.

35. *Id.* at 4; Diane Rogers, *Winning Ways*, STANFORD MAG., Mar.-Apr. 2003, at 47, 49, available at http://alumni.stanford.edu/get/page/magazine/article/?article_id=36998.

36. Rogers, *supra* note 35, at 48.

37. *Id.* at 50.

38. BABCOCK, WOMAN LAWYER, *supra* note 3, at 152-56, 214.

39. See Rogers, *supra* note 35, at 50. Babcock also coauthored leading casebooks on civil procedure and on sex discrimination. See BARBARA ALLEN BABCOCK, TONI M. MASSARO & NORMAN W. SPAULDING, CIVIL PROCEDURE: CASES AND PROBLEMS (4th ed. 2009); BARBARA ALLEN BABCOCK, ANN E. FREEDMAN, SUSAN DELLER ROSS, WENDY WEBSTER WILLIAMS, RHONDA COPELON, DEBORAH L. RHODE & NADINE TAUB, SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY (2d ed. 1996).

Babcock and Foltz share another passion: the right of indigent criminal defendants to be represented by able counsel. To gain experience and a reputation for diligent performance, Foltz took on clients who could not afford the rates charged by male lawyers and some who could not afford to pay at all. Exposed to the plight of indigent defendants facing criminal charges and to prosecutorial overzealousness, Foltz advanced the idea of a public defender equal in stature to the public prosecutor. She first described the office she envisioned in a speech at the Chicago World's Fair in 1893. Well into the new century, Foltz promoted her idea in public speeches, law journal articles,⁴⁰ and draft legislation. Her efforts bore fruit in 1913, when Los Angeles established a public defender office.⁴¹ The Los Angeles office became "an inspiration to the nationwide public defender movement," and similar offices were established across the country.⁴²

Criminal defense was the field 1963 law graduate Babcock chose to pursue. That very year, the idea Foltz launched seven decades earlier gained the U.S. Supreme Court's imprimatur: in *Gideon v. Wainwright*,⁴³ the Court held that the government was responsible for the just presentation of both sides of a criminal case. In 1968, years before she knew Foltz's name, Babcock was installed as first director of the Public Defender Service of the District of Columbia,⁴⁴ the agency established to implement *Gideon*'s mandate.

Although women of Babcock's generation aspiring to careers in the law were not barred at the gate as Foltz was, discrimination had hardly vanished from the scene. When Babcock entered Yale Law School in 1960, few women were in her class.⁴⁵ Teachers cautioned: "[T]here's a burden on you because you're taking a man's place."⁴⁶ Some male classmates grumbled that women "were taking the place of a man and that they weren't going to make any significant contributions to the legal profession."⁴⁷

Foltz's request to apprentice in a leading law office was denied; Babcock's applications for judicial clerkships following graduation from law school were

40. See, e.g., Clara Foltz, *Public Defenders*, 31 AM. L. REV. 393 (1897).

41. Nearly a century later, the Criminal Courts Building in Los Angeles was renamed the Clara Shortridge Foltz Criminal Justice Center. The dedication ceremony included a fitting tribute by another pioneer, Justice Sandra Day O'Connor. See Sandra Day O'Connor, Assoc. Justice, U.S. Supreme Court, Dedication of Clara Shortridge Foltz Criminal Justice Center (Feb. 8, 2002).

42. BABCOCK, *WOMAN LAWYER*, *supra* note 3, at 318.

43. 372 U.S. 335, 344 (1963).

44. Rogers, *supra* note 35, at 50.

45. When she graduated in 1963, only eleven of her 179 classmates were women. *Id.* at 49.

46. *Id.*

47. Christopher Heredia, *How Stanford Law Professor Blazed Trails*, S.F. CHRON., Aug. 13, 2004, at F1, available at <http://www.sfgate.com/bayarea/article/PEOPLE-How-Stanford-law-professor-blazed-trails-2701815.php>.

“met with one rejection after another.”⁴⁸ Male judges in those not-so-ancient days were reluctant to hire female clerks, “lest it put a crimp on their ability to work in shirtsleeves and tell dirty jokes.”⁴⁹ Babcock eventually had the good fortune to secure a clerkship with a highly regarded senior judge of the D.C. Circuit. But she and her female classmates found no welcome mat in a law-firm world still “doubtful about [women’s] staying power and [their] intellectual drive.”⁵⁰ “Civil litigation was considered too demanding and criminal practice too demeaning for women. No one even mentioned the possibility of corporate practice.”⁵¹

Perhaps most notably, Foltz and Babcock share an optimism about women’s future in the law. Foltz hoped for a day when male lawyers would meet their sisters-in-law “on even ground, upon the merits of law and fact.”⁵² Babcock wrote in 2007 that “[s]oon too in legal time (though not in my lifetime), we will reach nirvana when the sex of the person who wrote the brief, ran the agency, argued the case or taught the class is no longer a matter of notice or comment.”⁵³ By rescuing Clara Foltz’s story from relative obscurity, Babcock has provided a powerful reminder of women’s strength in the face of adversity, their will to overcome difficulties, and, together with *sympathique* brothers-in-law, to work toward a system of justice accessible and fair to all. *Woman Lawyer* should engage feminists of my era and my children’s generation, and history buffs of any age; most of all, the book should amaze and inspire young women and public defenders just embarking on their lives in the law.

48. *Id.*

49. *Id.*

50. Barbara Babcock, *First Women: Barbara Babcock*, Ms. JD (Feb. 6, 2007), <http://ms-jd.org/first-women-barbara-babcock>.

51. *Id.*

52. BABCOCK, *WOMAN LAWYER*, *supra* note 3, at 292.

53. Babcock, *supra* note 50.