
CLARA FOLTZ AND THE ROLE OF THE PUBLIC DEFENDER

CELEBRATING THE NEW BIOGRAPHY BY BARBARA BABCOCK:

Woman Lawyer: The Trials of Clara Foltz

PRESENTED BY THE WOMEN LAWYERS ASSOCIATION OF LOS ANGELES

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MUSIC CENTER OF LOS ANGELES COUNTY — FIFTH FLOOR BANQUET ROOMS



LEFT TO RIGHT: Carlton Gunn, Prof. Samantha Buckingham, Prof. Myrna Raeder, Prof. Barbara Babcock, Presiding Judge Lee Smalley Edmon, Public Defender Ronald L. Brown

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Opening Remarks

RONALD L. BROWN, MODERATOR
PUBLIC DEFENDER, COUNTY OF
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Ladies and gentlemen, my name is Ron Brown, and I have the honor and privilege to be the moderator of this special event tonight. I am the tenth Public Defender for the County of Los Angeles, the oldest and first Public Defender's Office in the country. This is going to be a wonderful evening, and before we get our event underway, I want to recognize a couple of people in the audience: Angela Haskins, president of the Women Lawyers Association of Los Angeles — thank you, Angela — and David McFadden, president of the California Supreme Court Historical Society, which sponsored this evening's reception — thank you very much.

You're going to hear me say the word "lucky" a lot tonight, because we're very, very lucky to have such an esteemed panel here, but also very lucky to have the Honorable Arthur L. Alarcón, senior circuit judge of the Ninth Circuit Court of Appeals. Even more important is the fact that Judge Alarcón spearheaded the name change of the Criminal Courts Building to the Clara Shortridge Foltz Criminal Justice Center, and we're going to hear about that. I'm going to ask His Honor to come up and say a few words, please.

Welcome

ARTHUR L. ALARCÓN
SENIOR CIRCUIT JUDGE, U.S. COURT OF
APPEALS FOR THE NINTH CIRCUIT

I'm delighted to have been asked to welcome you to this commemoration of Clara Shortridge Foltz and her role in creating the public defender system in the United States.

I must confess that I had not heard of Clara Shortridge Foltz until eleven years ago when I prepared a speech for the Los Angeles County Bar Association on its Annual Judges Day. In that speech, I paid tribute



to the contributions of Los Angeles County lawyers to our system of justice in protecting our constitutional freedoms to life, liberty, and property since I began law school in 1948. Since I was admitted to the bar, the advocacy of Los Angeles lawyers persuaded our courts to abolish covenants in deeds that restricted the sale of property solely to Caucasians, prevented California schools from segregating students in our public schools, several years before *Brown v. Board of Education*, and permitted Hispanics to swim in public swimming pools in San Bernardino County. (San Bernardino used to clean out the pool on Wednesdays, and that was the only day they let Hispanics and African Americans swim in the pool.) It's just within sixty years ago that this was going on here, and it

was California and Los Angeles County lawyers who brought all those changes.

The research for my speech gave me the idea that we should honor Los Angeles County lawyers whose advocacy since California became a state in 1850 successfully preserved for all of us the rights set forth in our Constitution.

This led me to compile a list of lawyers who should be honored.

In preparing a list of potential honorees, I contacted the Public Defender's Office and the District Attorney's Office and asked them to recommend persons whose contribution to the criminal justice system should be recognized and honored.

I was surprised to learn that the number one recommendation of both the Public Defender's Office and the District Attorney's Office was Clara Shortridge Foltz. As this was the first time I'd heard of Clara, I was told to contact Alan Simon, a retired public defender, to learn about her. Alan, in turn, referred me to Professor Barbara Babcock.

Thanks to the information Alan Simon and Professor Babcock supplied me, I learned that Clara Shortridge Foltz was the first female deputy district attorney in Los Angeles County. She was hired approximately one hundred years ago — about 1911, 1912. I also learned that Clara led the fight throughout the United States to create the public defender system.

With the support of the Women Lawyers Association of Los Angeles and the Los Angeles County Bar Association, we were able to persuade the Los Angeles Superior Court to honor Clara by changing the name of the Criminal Courts Building. On February 8, 2002, the Criminal Courts Building became the Clara Shortridge Foltz Criminal Justice Center. Justice Sandra Day O'Connor and Professor Babcock spoke at the dedication. The District Attorney and then–Public Defender also spoke, and each claimed Clara as their very own.

Clara Shortridge Foltz persuaded the California Legislature in 1879 to amend the law that restricted the practice of law to white males. Because of Clara, women and other minorities have been allowed to practice law in California. Many of us here tonight owe our right to practice law to Clara.

Like Clara, I became a Deputy District Attorney in the Los Angeles County District Attorney's Office — more than fifty years ago. Because of my admiration for all of her accomplishments, I often refer to her as Clara. It's not true, however, as Attorney Richard Hirsch claimed recently at a Criminal Justice Wall of Fame Ceremony at the Foltz Center, that I once dated Clara.

As a Los Angeles County Deputy District Attorney, I marveled at the professionalism and dedication of the deputy public defenders I faced in court on a daily basis. One of them was Noel Martin. I learned about



Presiding Judge Lee Smalley Edmon, President Angela Haskins of the Women Lawyers Association of Los Angeles, Senior Circuit Judge Arthur L. Alarcón, and CSCHS President David L. McFadden

appropriate courtroom demeanor, how to present evidence, and how to make offers of proof, as I opposed him on a daily basis as a 26-year-old prosecutor. As you look at the Criminal Justice Wall of Fame in Clara's building, you will see Noel Martin's name. As chairman of the Criminal Justice Wall of Fame Committee, I made sure that Deputy Public Defender Noel Martin was honored.

As a prosecutor, I marveled at the dedication and willingness of deputy public defenders to continue to serve even though they were assigned cases that very often resulted in convictions. As a prosecutor, I was used to winning most of my cases, but the public defenders I faced lost most of their cases because of the type of people they were assigned to represent. I recently found the following passage in an article by Carol A. Brook, a federal public defender for the Northern District of Illinois, that explains the type of person who is willing to serve as a public defender. She described the job of a public defender as follows:

So you want to be a public defender? Don't do it for the money, there isn't enough. Don't do it for prestige, you won't get any. Don't do it for the thrill of victory, victory rarely comes.

Do it for love. Do it for justice. Do it for self-respect. Do it for the satisfaction of knowing you are serving others, defending the Constitution, living your ideals.

The work is hard. The law is against you. The facts are against you. The judges are often against you. Sometimes even your clients are against you.

But, it is a great job — exhilarating, energizing, rewarding. You get to touch people's hearts and fight for what you believe in every day.

I look forward to hearing from Professor Babcock, Professor Raeder, Professor Buckingham, and Carlton F. Gunn, a deputy federal public defender in the Central District of California, discussing the evolution of the Public Defender System — created by Clara.

Thank you.

* * *

RONALD L. BROWN, MODERATOR:

Until about three months ago, I'd never met our next speaker. I had no idea how much I was missing. We have had a number of Presiding Judges of the L.A. County Superior Court, and they've all been outstanding, all been fantastic. Lee Smalley Edmon, the current Presiding Judge of L.A. County, is the first woman to hold that job. I think she's going to be the best of the bunch that we've had — not the best woman, but the best Presiding Judge we have had or will have. It's my privilege to ask her to come up and say a few words to you all.

Greetings

LEE SMALLEY EDMON

PRESIDING JUDGE, SUPERIOR COURT OF
CALIFORNIA, COUNTY OF LOS ANGELES



Ron, thank you so much. I am just going to add a few words of welcome to those of Judge Alarcón. I have been looking forward to this night for so long because I have been a huge Clara Foltz fan for quite some time. Now, I knew some of the Clara stories. She was a force of nature. The great thing, however, is that from Professor Babcock's book, I learned so many more. I think my favorite story about Clara is the night that she dashed into the governor's office in order to try to persuade him — and it happened to be the very last day that he could sign the bill — and she tried to persuade him to sign the Women Lawyers Act. And she dashed into the room, and she persuaded him to sign, and he pulled out the bill and he signed literally as the clock struck midnight.

There was always such high drama with Clara. But there were so many other things I didn't know that I learned from this book — about how she was a gifted orator, and actually quite highly paid from time to time, and she was a newspaper publisher. Sadly, I think the only thing she wasn't was a judge, and I would have loved to have had her on our Court. I will say that one of the proudest days for our Court was when the Criminal Courts Building was renamed the Clara Shortridge Foltz Criminal Justice Center, thanks to the efforts of Judge Alarcón and others.

So, I welcome this esteemed panel that will be focused tonight on Clara and the role of the public defender, and welcome to all of you. I hope you enjoy the evening as much as I know I'm going to. Thank you.

* * *

RONALD L. BROWN, MODERATOR:

Barbara Babcock, much like Clara Foltz, is a woman of firsts. She was the first director of the PDS, the Public Defender Service, in Washington, D.C. She was the first woman to serve on the regular faculty of Stanford Law School. She has written a book that I think will touch your lives, and it's made a difference for all of us. We can learn so much from what she will have to say this evening, and I beg you to listen carefully to her.

Clara Foltz and the Public Defender

BARBARA BABCOCK

PROFESSOR, STANFORD LAW SCHOOL



I want to thank everyone up here on the platform and in the audience for coming tonight to celebrate the life of Clara Foltz, the founder of the public defender movement. And I want to give special thanks at the very outset to the amazing Selma Moidel Smith, who never lets an obstacle stand in her way for long. She's very like Clara Foltz, very like Clara Foltz in that way.

It's wonderful to be in this room and think that you all know Clara, and the way you speak of her — it moves me. I see most things these days in relation to and through the eyes of Clara Foltz, and I really can't think of any group that could be assembled that would give her as much satisfaction and pleasure as this one. A whole audience coming out in Los Angeles in this terrible traffic after working hours to consider the challenge of public defense. And for myself it's a special pleasure to have

on this panel two of my former students, Carlton Gunn and Samantha Buckingham — and then to come to this city where Clara Foltz lived from 1906 until her death in 1934, where for the first time in her life, she went to the polls and instead of protesting, she voted; and where she saw the first public defender office not only in the state, but in the West, in the United States and probably in the world — established by a county charter that was passed with women's votes. In her words, Foltz would say that Los Angeles was "the cradle of public defense."

In this city also, the women lawyers joined by many male allies saw to the renaming of the main criminal courts as the Clara Shortridge Foltz Criminal Justice Center — in 2002 — inspiring me in the last years of finishing the book. I was very inspired by many e-mails I received, saying, "Justice was done today in the Clara Foltz courthouse!"

Clara Foltz, as you know, was the first woman lawyer in California. The first chapter of the book tells the story of how in 1878 she got the code section providing that only white men could be lawyers changed to include all persons of good character, making them eligible, and then she was the first to take advantage of the statute and join the bar — to a tremendous amount of nationwide publicity, dubbing her the "Portia of the Pacific." In 1879 she tried to attend the first law school in the state, but Hastings rejected her because she was a woman. Apparently, she said, the board of directors believed that women could practice, but should not learn the law. She successfully sued the school, and lobbied through a constitutional amendment that women could pursue any vocation or calling, and that the public schools in California would be open to both sexes. But in the end she did not have the time to finish the law course that she had opened to others.

The second chapter tells of her efforts to make a living, and it was mainly from these efforts that she invented, or created, or pioneered, or designed, the public defender — to which the last chapter in the book is dedicated.

The issue that I've been dealing with in writing this book is, how did an uneducated (she had only two years of formal schooling) single mother of five, practicing law in the Far West long before women had political equality, come up with this entirely new way to practice law, and how did she publicize it in the most influential public forums and the most prestigious law reviews of the day? It in itself is an amazing accomplishment.

It starts with her being the first woman lawyer — and the only one — and that the only people desperate enough to turn to a woman lawyer were poor people accused of crime, and women wanting divorces.

When she went to court she found a male bastion second only to the polling place, and the Western courts were known for being especially rough. They were replete

with spittoons — which were often missed. Weapons were carried, there were bawdy stories, and the lawyers and the jurors were often inebriated. Nice women did not go court, as lawyers or even as spectators.

When she went, she experienced firsthand the unfairness of the balance between prosecutors and defenders. In the nineteenth century, it was actually a structural unfairness, in that prosecutors in many places were paid for convictions. Even if they weren't paid for convictions, they were tipped by the complaining witnesses if they won. Added to that was what Clara Foltz called the "vanity of winning cases" that made them forget that they were ministers of public justice and owed a duty to all the people, including the accused.

Now, this idea of the prosecutor of public justice was not original with her, as the public defender was, but it was not a widely held idea or one that people really understood at the time. Samantha Buckingham will address some issues of prosecutorial misconduct in the modern age.

So Clara Foltz comes to court on behalf of these outsiders — people accused of crime — and she's a newcomer to the criminal courts. She saw the injustices ignored by the regular lawyers there. She said they were "deadened in feeling by constant contact." And it was not a great mental leap from Foltz's firsthand observations to the idea that the government was responsible for a fair presentation of both sides of the case.

At the same time she spoke of justice for the accused, however — which was her main object — her subtext was equal treatment for women lawyers in the courtroom. Too often she had found herself on trial, along with her clients. Prosecutors reacted harshly to what they saw as an unsporting advantage that she had with the all-male juries, who they assumed would do what a woman asked.

Even though they thought she had an unfair advantage, the prosecutors also experienced it as a peculiar humiliation to lose to a woman. Some prosecutors routinely attacked both Foltz and her client — him for his alleged crime and her for doing the dirty, unfeminine work of representing criminals.

While suffering these personal attacks as plain Mrs. Foltz, she imagined a titled government official — herself perhaps — of equal status with the prosecutor. A public defender would elevate the representation of the criminally accused so that all reputable lawyers, especially women, could do the work. Myrna Raeder will talk about the relation of the public defender to the women's movement today.

One of the most interesting things about this book that hasn't been known before is the relationship of feminism and public defense. The idea really sprang from her feminism, because she believed that women were the great reformatory power of the age — that's the



*Prof. Barbara Babcock (RIGHT)
and CSCHS Board Member Selma Moidel Smith*
PHOTO BY ROBERT LEVINS, DAILY JOURNAL



Barbara Babcock inscribing copies of Woman Lawyer



way she talked — and that when they had the vote they would purify politics, and when they became lawyers they would improve and change the profession. And the public defender idea was one of the reforms that came along with woman suffrage. It was joined with it in Clara Foltz's person, but also beyond that.

Now I just want to summarize for you what Clara Foltz actually did. She didn't just have the idea, but she presented it at the Congress of Jurisprudence and Law Reform at the 1893 World's Fair in Chicago. If we had been alive then, we would all have gone to the World's Fair. It was the biggest thing that happened in the last part of the nineteenth century, and this Congress of Jurisprudence and Law Reform had the biggest names in the country in terms of legal scholarship. Some of the most famous articles about constitutional law were presented there, but all of the speeches haven't been collected anywhere, so people don't realize that Clara Foltz, talking about the public defender, was on the same platform with these very famous "jurisprudes" — men — and she presented this idea that brought home to them what they didn't know, which was the actual condition in the criminal courts in the country. Then she published it in the *Chicago Legal News*, which was run by Myra Bradwell — a woman — and in the *Albany Law Journal*, which was one of the main law journals in the country.

Publishing this article that makes quite sophisticated arguments about public defense was one thing, but she also wrote a public defender statute and saw to its introduction in more than a dozen states. She herself took it to the premier state legislature, in Albany, New York, in the first session in 1897. In connection with the statute, she wrote two impressive law review articles. One was on prosecutors — that they were out of control and needed to be matched by public defenders — and one was published in the prestigious *American Law Review*, which was the most prestigious law review in the country, with Oliver Wendell Holmes and James Bradley Thayer and that sort of person. She was the third woman to write an article in that law review, but the first woman to write on a subject not directly related to gender. She presented a primer of the basic arguments for the office.

There are two things of interest to note about Clara Foltz's public defender. One is that she had the idea that the public defender should represent everyone who asks — not just the indigent defendant — and that any defendant could also have private counsel if he wanted to, along with the public defender. Her idea was that justice should be free to everyone. "Free Justice" was her slogan — that's what I will write in your book.

Innocent men, she believed, should not have to pay for their own defense even if they could, bankrupting themselves and ruining their families — that all were innocent in the eyes of the law. She had an individual rights-based view of the presumption of innocence, so

there was no distinction in her mind between the actually and presumably innocent. But her idea, which seems very striking today, was partly strategic, because she realized that real respect and equality for her defender wouldn't come if they only represented the poor and the outcasts.

Now the idea of public defense — that the state should pay for the defense of those it believes have violated its laws and statutes — that the state should provide the kind of intimate individual service involved in defending — is truly a radical idea. It is, if you will, a socialistic idea. It is incredibly idealistic even to think it is possible for such an institution to exist. And yet today public defenders are everywhere on the state and county level. The public defender is the main channel for the provision of defense services in this country. And yet, underneath it all, as we all know in this room, I suspect, is the fact that it's not widely, completely accepted or really understood as an institution. There's no other governmental institution that's even vaguely like the public defender, and Carlton Gunn will talk about the difficulties of public defense these days in the legislative process.

From her experiences as a jury lawyer — and remember, there were very few — when Clara Foltz joined the bar there were less than 200 women lawyers in the whole country, but there were only a handful of others who went to court (women wrote wills and advised other women in their offices, but to actually go to court as a jury lawyer in this extreme adversary circumstance was very unusual) — Foltz fashioned in her mind a powerful, resourceful figure to counter and correct the prosecutor, to balance the presentation of the evidence, and to make the proceedings orderly and just.

She set out what her defender would do. He would engage the law's presumption of innocence on a deep level — investigating for favorable evidence, summoning witnesses, seeking expert testimony, and preparing to cross-examine. She would also plea bargain, but only after preparing the case, so that there was more to offer than the defendant's right to trial. He would work with the prosecutor's office in designing fair procedures (for producing favorable evidence, for instance), he would support programs for rehabilitation and treatment of offenders, and would lobby on behalf of bills to make the right to counsel real for all the accused.

From the beginning of the idea of the public defender, all these elements of what it meant were there, and she wrote about them and discussed them and then she ended with her peroration, which was:

"Let the criminal courts be reorganized upon a basis of exact, equal and free justice; let our country be broad and generous enough to make the law a shield as well as a sword," Clara Foltz said at the World's Fair that this is what we should do, and in return, she promised "the

blessings which flow from constitutional obligations conscientiously kept and government duties sacredly performed.”

The promise holds true today.

* * *

RONALD L. BROWN, MODERATOR:

Myrna Raeder is a professor at Southwestern Law School, where she’s written extensively and advocated on a number of issues concerning women, domestic violence and women, children, juveniles, and innocence policy. Professor Raeder, in addition, is a past president of the National Association of Women Lawyers and past chair of the American Bar Association’s Criminal Justice Section. She received the Ernestine Stahlhut Award from the Women Lawyers Association of Los Angeles and the Margaret Brent Women Lawyers of Achievement Award from the American Bar Association’s Commission on Women in the Profession. You’ll also enjoy hearing from her.

Public Defense and the Women’s Movement

MYRNA RAEDER,
PROFESSOR, SOUTHWESTERN LAW SCHOOL



I’m delighted to be asked to share my thoughts about gender stereotypes regarding female defense counsel, both in Clara Foltz’s day and today, as well as how the

women’s reform movement impacted Foltz’s views about defense and whether the current agenda of the women’s movement affects women’s decisions to become defenders. First, I’d like to acknowledge Professor Babcock’s superb book and her article “Women Defenders in the West” as the source of most of my historic references. Any mistakes or opinions, however, are solely my own.

First, as to gender stereotype, I came across the following 1994 description of female criminal defense attorneys as

aggressive, flamboyant and hard-bittenly cynical. They are notable in a field of glib, fast-talking types for their verbal acuity and for their ability to think really fast on their feet. These, of course, are qualities that litigators, particularly in the criminal field, need to survive, never mind to prosper They are fighters who enjoy the courtroom as their battleground. As a result, while we can characterize these female lawyers as non-traditional, based in the first place on their choice of profession, their area of specialization intensifies their departure from the norm. Indeed as litigators, they tend to act in a more male manner than do even many of their non-litigating male colleagues. (Carole Shapiro, “Women Lawyers in Celluloid: Why Hollywood Skirts the Truth,” 25 U. Tol. L. Rev. 955 (1994)).

While this may sound like an extreme caricature, rather than typical defender — in fact, I’m curious, how many females in the room are defenders? [several hands raised] And of you, are some of you in private practice? [some] Okay, so we even have a few of those. Do you think of yourself as fitting that description? [laughter] — well, I think that it probably captures what the public and some defendants still think of as embodying the traits necessary for a female warrior defending mainly poor men — in today’s world, often of color — who are accused of horrific crimes.

Ironically, the stereotype actually fit Foltz’s persona. She was quite flamboyant, well dressed in the women’s fashions of the day, and a well-seasoned dramatic orator, as Professor Babcock alluded to, on both political and social issues — an ability she honed to supplement her meager income at the beginning of her legal career.

As Professor Babcock also mentioned, Clara Foltz did not come to criminal defense by choice — it was only the poor accused of crime who were desperate enough to hire women lawyers and only then because they cost less than their male counterparts, or in fact cost nothing at all. From what I have read, Foltz apparently rarely turned them away, regardless of whether they had any money. In addition, judges would routinely assign her pro bono defense cases, which while nonpaying, at least gave her experience needed to attract

better cases. Women accused of crime, known in the West by the picturesque name of “soiled doves,” also tended towards female defenders. Why couldn’t women get better paying employment? That, too — gender bias. Male beginning lawyers would associate with others who were more experienced and already had clients, but unlike her younger brother who immediately found such a spot, women were not sought after. Indeed, Foltz was rejected for an apprenticeship with the following disdainful note:

“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.”

This echoes the separate spheres rationale common in that era, that women were designed for home and family, not the outside world. Indeed, in denying Lavinia Goodell the right to join the Supreme Court bar of Wisconsin to appeal a criminal case, Chief Justice Ryan wrote in part:

It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man’s reverence for womanhood and faith in woman, on which hinge all the better affections and humanities of life, that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice; all the unclean issues, all the collateral questions of sodomy, incest, rape, seduction, fornication, adultery, pregnancy, bastardy, legitimacy, prostitution, lascivious cohabitation, abortion, infanticide, obscene publications, libel and slander of sex, impotence, divorce: all the nameless catalogue of indecencies (*In re Goodell*, 39 Wis. 232, 245-6 (1875)).

The litany of crimes, however, were all those directed at women, who did not have to practice law to be subjected to such indignities.

Thus, women’s better nature cautioned against their involvement in criminal law in the gendered view of the day. But, at the other end of the spectrum, women defenders were generally detested by male prosecutors, again as Professor Babcock has suggested, based on the opposite stereotype that female lawyers would seduce the all male jurors, resulting in unwarranted acquittals. (And why was this? It was because females were prohibited from sitting on juries). Women defenders were viewed as the jezebels who would use their feminine wiles to win because they lacked competence or trial skills. Yet, the thought of being beaten by a woman was particularly galling to male prosecutors, so that they would sometimes launch verbal attacks, as mentioned, against Foltz, rather than against her client or witnesses.

This double bind, which saw women defenders as both Madonnas and whores, meant that women had to withstand such assaults by prosecutors and rise to equally histrionic heights, which go well beyond what I’m sure the judges in this room, or any other judges, would permit today. Moreover, there was an incentive for women defenders to appear womanly to avoid being attacked as either unsexed or oversexed.

What is the current view of women defenders? Well, this one’s a bit tougher. Anecdotally, most criminal lawyers I talk to still believe that women in private criminal defense are not as high profile or flamboyant as the most successful male defenders, and that women are underrepresented, whether in general criminal practice or in white collar defense. In fact, while putting together my remarks, I came across a dramatic empirical gap figuring out how many women are private defense counsels, since, in contrast to the incredibly detailed statistics we have about women in law firms, and some general ones about women in government, I came up short finding any statistics on private female defense counsel, and only received some public defender statistics through happenstance. Maybe this is an implicit admission that we haven’t yet focused on equality for women as criminal lawyers, or maybe even that there is some kind of lack of encouragement for women to go into defense.

Contrary to expectations, however, female public defenders today appear to outnumber males in a number of places. For example, in Philadelphia women currently account for almost 75% of the 215 public defenders. Here in Los Angeles, women dramatically increased from 28% in 1993 to over 50% of the 700-plus staff by 2008 in the L.A. County office. And thanks to Carl Gunn, I can also tell you that the L.A. Federal Defenders employ 42 women out of 76 attorneys (63%), though it varies in that 52% of the trial unit and 64% of the habeas unit are women.

The difference in public versus private defense today may actually reflect a different gendered reality, that women trying to juggle their family lives are finding that a steady job with benefits in a government agency that is an equal opportunity employer is a better bet than trying to compete for predominantly male clients. In other words, women’s lib has not resulted in equalizing crime — the gender gap in overall crime statistics still exists, with women grossly underrepresented in violent crimes, and overrepresented in the pink ghetto of theft and low level frauds.

We can thank Foltz for providing the avenue for women to become public defenders. Some of these women will ultimately leave that office to become panel attorneys, individually appointed to defend indigents, swelling the ranks of private defenders, but even that transition is not to a purely private model. Similarly, unlike male prosecutors who often turn to private

criminal defense, including lucrative white-collar work, anecdotally, not as many female prosecutors appear to make that switch, which may imply that the gender bias still exists, as well as the feeling of some prosecutors who are female that they do not want to represent men accused of crimes against women, a topic I'll mention again as I turn now to the impact of the women's movement on Foltz.

What is truly remarkable about Foltz's many successes and firsts is that Foltz married at age 15. She had five children, a husband who abandoned her, who she eventually wound up divorcing, resulting in her having to raise and support the children on her own. Foltz always incorrectly claimed she was a widow, which might be attributed to gendered concerns about not being perceived as a good wife or mother, or more likely fear that her opponents would use this information to try to discredit her. Even in today's world, though, becoming a lawyer, leaving home for long periods of time to lecture and try cases, while supporting and caring for five children, is a daunting task. Without a husband to support her family, Foltz did what so many do today, she relied on her mother to help care for her children.

While in today's world, we have role models so that women can realistically perceive themselves as lawyers, Foltz was a first-generation female lawyer and did not have that luxury. However, as with many first women, her father was a lawyer. She also had the role models of women reformers who believed that women were capable of entering any profession. The historic Women's Convention at Seneca Falls took place in 1848, just before her birth in 1849, but by the time she had birthed her children and would face the world professionally some thirty years later, the movement was in full swing. Women's suffrage was the main goal but not the only one.

Throughout her career, in addition to conducting her legal practice, Foltz worked for suffrage and women's rights. She actively encouraged the participation of women in the legal profession. In 1893, she organized the Portia Law Club in San Francisco. She taught women the law at her offices in San Francisco and in Los Angeles, where she relocated in 1906. I'm sure that Selma Moidel Smith, who was really instrumental in putting together this panel, and a longtime member of the National Association of Women Lawyers — whose law student writing contest is named in her honor — will appreciate that Clara actually attended the first annual meeting of NAWL in 1923. The topics discussed at that meeting, which just followed the adoption of the Nineteenth Amendment in 1920 that finally gave women nationwide the right to vote, included the following: this is not a small agenda — equal rights, the search for world peace, the promulgation of uniform state laws, the inclusion of women on juries, taking the



CSCHS Treasurer Jennifer King and President David L. McFadden



Seth Hufstedler and Hon. Shirley Hufstedler (Morrison & Foerster) with Senior Circuit Judge Arthur L. Alarcón



Dennis A Fischer, Esq., and Hon. Charles Cervantes



*L.A. County Public Defender Ronald L. Brown,
CSCHS Board Member Selma Moidel Smith,
Senior Circuit Judge Arthur L. Alarcón*

judiciary out of politics, the lack of adequate representation of women on the bench, and the need to analyze laws of various kinds discriminating against women. (*75 Year History, National Association of Women Lawyers 1899-1974*, at 5-6 (1975)).

Because the women's agenda during Clara's prime days included placing women on juries and ensuring that they had the right to vote, the focus was on educating women to accept these responsibilities and providing support for women entering professional life. In that day, this included the suffragettes' going out and being spectators in court, cheering — literally cheering — women lawyers, and on occasion, less concern about guilt versus innocence than championing the women who were lawyers, as well as the female defendants who managed to gain acquittals.

However, because suffragettes rebelled at being subjected to gender bias, they had a great empathy towards those who had been treated unfairly by the system, which in the criminal realm meant more attention to defense — and, in Foltz's case, to eliminating cages (can you believe it? In some places they actually had cages for defendants in the courtroom), but also for making prisons more humane and for supporting parole. That strong women could do anything was a guiding principle of the movement and the camaraderie of other supportive women clearly impacted Clara and reinforced her desire to create a public defender system that would allow the poor an opportunity for decent representation.

However, by the 1970s, the feminist criminal agenda shifted toward what is known as the battered women's shelter movement, which focuses on domestic violence and sexual crimes against women and children. Feminists then aligned with prosecutors and victims' advocates in order to increase enforcement of crimes against women as well as to increase their penalties. Thus, the natural alliance in the criminal field today appears more weighted to prosecution, than defense.

In today's world, female defenders are more likely to be called upon to represent defendants accused of rape or domestic violence than in earlier times when such crimes were less likely to be reported or prosecuted at all. Of course, this does not mean that most women will refuse to become defenders — to the extent that the fight is against a system perceived to be unfair, empathy for defendants will still exist. Similarly white collar defense and drug cases do not raise the questions of discomfort that a woman might have in representing an accused rapist. But in today's world, like yesteryear, some jurors and the public still believe that a woman would only represent someone accused of crimes against women if he was truly innocent, or they would only destroy a female witness if she was actually lying — again stereotypical views, but one that actually might impact the jury's decision and concern a woman defender who has feminist views.

Yet, even Foltz won an acquittal for a defendant by eviscerating a former prostitute who was the main witness against her client. In other words, loyalty to feminist values is a luxury that women defenders cannot afford. Indeed, I found it interesting that many of the female federal defenders were in a habeas unit where the focus is on systemic failures, and innocence as well as procedural issues are paramount. In other words, that setting emphasizes that the essence of defense is putting the government to its burden and ensuring that every defendant obtains a fair trial, clearly worthy goals for all women defenders.

* * *

RONALD L. BROWN, MODERATOR:

Samantha Buckingham is a professor at Loyola Law School, where she teaches Criminal Procedure, Advanced Criminal Litigation Skills, and Race, Class, and Criminal Justice. At Loyola, she primarily teaches students who participate in a juvenile justice clinic through which she supervises students representing juvenile clients in our delinquency courts here in L.A. She also teaches at a school you may have heard of, the Harvard Trial Advocacy Workshop. So I'm looking forward to hearing from Professor Buckingham.

Prosecutorial Misconduct in the Modern Age

SAMANTHA BUCKINGHAM
PROFESSOR, LOYOLA LAW SCHOOL



Prosecutorial misconduct was a topic that upset Clara Foltz. She believed there was a need for strong and skilled advocacy by the defense to combat prosecutorial misconduct. One case in particular seemed to greatly influence Foltz's campaign against prosecutorial misconduct, *The People v. Wells*, a case in 1882. Foltz felt her client was innocent and that he was wrongfully charged. It was also a case where Foltz had waged a campaign to get him out of the cage — like the one Professor Raeder has just talked about. So without getting into the details of the facts of the case, which you'll have to get the book to read about, I want to share some of the tidbits that bothered Clara Foltz.

During the trial, Foltz made numerous objections to allowing the lead detective, a Detective Lees, to sit in the courtroom with the prosecutor. She was rightfully concerned that Lees would use what he heard to shape his testimony and to cure the problematic testimony of other witnesses. Foltz portrayed Lees as the driving force behind some of the prosecutor's improper questions. Interestingly, as I was reading this, I thought how, in Los Angeles today, it is common practice for the "IO" — the Investigating Officer — to remain in the courtroom throughout a trial and to sit with the prosecutor. For me, coming from practice in Washington, D.C., where I was a public defender for five years

before coming to Los Angeles and practicing here, this particular practice was something I found pretty shocking and horrifying, so I get where Foltz is coming from. And I find it interesting that a problem that bothered her so long ago is still something that's going on in Los Angeles courts today.

For Clara Foltz, the idea of the public defender was part of her notion that a public prosecutor needed to be kept in check. Indeed, many public defenders today feel it is their job and their role to keep the prosecution honest. Foltz noted that prosecutors tended to believe that all who were charged were guilty, instead of considering that the defendant before them may be innocent. Foltz saw that prosecutors were human. They were vulnerable to the pressures of power, prestige, and political ambition. They were vulnerable to how they were being portrayed in the press. All of Foltz's concerns are just as real today.

So let me give you a little backdrop to prosecutorial misconduct. Prosecutors have an incentive to win cases. They also have a mandate to be fair and just, which may not always mean winning. So these two guiding principles can at times be at odds in making the job of the prosecutor more difficult. Defense attorneys, I think, in this respect have it kind of easy because your job is only to zealously defend your client.

I want to talk to you about a few common ways that prosecutorial misconduct manifests itself today: improper charging or over-charging, improper questioning — and I mentioned that Foltz had lamented in this *Wells* trial that the prosecutor had asked some improper questions, and what she thought was that even though the judge had sustained her objections, she noted that the questions were already out there, that once a prosecutor has asked an improper question, it can't be removed from the minds of the jurors. In fact, in talking to jurors after the *Wells* trial, she found that the innuendo from improper questions that had been asked by the district attorney contributed to a conviction at the trial level in that case.

So, getting back to the forms of prosecutorial misconduct, another improper thing to do would be improper appeals to emotion and prejudice in either opening or closing statements. I'll give you an example from a case of mine when I was in Washington, D.C. In my very first trial, the prosecutor opened on my client, who was fourteen years old and accused of a robbery on the Metro, and said that she had a depraved soul. I think that's a pretty good example of what it means to appeal improperly to the emotion and prejudice, in this case, of a judge, not of a jury.

In closing arguments, prosecutorial misconduct can be misstating the burden of proof, shifting the burden from the prosecution to the defense, or commenting on the defendant's silence. Perhaps the most common and



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distressing form of prosecutorial misconduct is withholding of “Brady” evidence, that is, evidence in the possession of the government, be it the police, the prosecutor, or the prosecuting agency, that could exonerate a defendant or lead to other evidence that could exonerate the defendant or mitigate his role.

Last fall, as part of a very successful initiative, the Northern California Innocence Project, which is at Santa Clara Law School, released a report on prosecutorial misconduct in California. They initially did a study from 1997 to 2009 of cases involving prosecutorial misconduct. It is the most comprehensive look at prosecutorial misconduct in California and in the United States to date. They also recently released additional data that carries their study through 2010. There is some limitation to their study, and that is they’re looking back at records of cases on appeal and some cases at the trial level, but they’re missing a great deal of cases where they were resolved by a plea bargain, which is 90 to 95 percent of cases that come through the criminal justice system. So, let me tell you a little bit about just the

findings in 2010, which are from California state and federal court rulings where there were allegations of prosecutorial misconduct, as well as a limited number of trial court decisions. Just in 2010, there were 102 cases where courts found that prosecutors committed misconduct. Courts found 130 instances of misconduct in those 102 cases. So, many cases had multiple instances of misconduct within them. In 26 of these 102 cases, the finding resulted in the setting aside of the conviction or sentence, a mistrial or barring of evidence. In 76 of the cases, the courts nevertheless upheld the convictions, ruling that the misconduct did not alter the fundamental fairness of the trial. In 31 other cases, the courts refrained from making rulings on allegations of prosecutorial misconduct, instead holding that any error would not have undermined the fairness of the trial or that the issue was waived.

This is a summary — I’m going to give you some more statistics here — of the findings from 1997 through 2010: In that time period — and this is the part that is the most comprehensive study in all of the United States at this point on prosecutorial misconduct — there were more than 800 cases where the court had found that prosecutors had committed misconduct. That breaks down to a little more than one a week. In 202 cases, the finding resulted in setting aside of conviction or sentence or of mistrial or of barring of evidence. In 614 of those 800 cases, the court found that the misconduct did not affect the fairness of the trial. And in another 282 cases, the court did not make any finding of misconduct, saying that the error wouldn’t have changed the outcome or that the issue was waived. In the more than 800 cases of misconduct, 107 prosecutors were found to have committed misconduct more than once. One prosecutor was cited for misconduct six times. Prosecutors who committed misconduct in multiple cases accounted for nearly a third of all the cases involving misconduct, so a third of the 800 were prosecutors who committed misconduct in multiple cases. So we see that it’s a problem involving prosecutors — the same prosecutors — doing something over and over again. Only 151 of the 800 cases were cases where prosecutorial misconduct was reported to the California State Bar for investigation. And here I only have a statistic from 1997 to 2009: that the California Bar disciplined only one percent — one percent — of the prosecutors in cases where the court found misconduct, harmless or otherwise. It’s a pretty astonishing statistic.

The writers of the report have made some recommendations for reform, which I’ll also share with you. First, they said there needs to be more reporting of misconduct — that there’s a lot going on and we’re not finding out about it, that it seems there’s too much of a club where lawyers don’t really tattle on each other and the judge doesn’t report anything either. So, they want

to encourage reporting by judges of both prosecutorial misconduct and constitutional violations, even where the errors were thought to be harmless. And this is a problem I didn't really know existed, but judges, in writing opinions about misconduct, don't always use the full name of the attorney, so it's hard to actually go back and track it, so one of the suggestions for reform is to have judges include the full name of an attorney in any opinion involving misconduct. Others are monitoring of judicial reporting, public records, and replacing the prosecutors' current actual immunity from civil liability with a form of qualified immunity.

In terms of the California State Bar, there's a recommendation that they adopt the revised ethical rules about special responsibilities of prosecutors that are a part of the ABA Model Rule 3.8, and so, just to summarize that, there's more of a focus on cases where this is bad evidence, how prosecutors should disclose Brady evidence, and on the prosecutor's role in overturning convictions where there is some evidence of innocence. In terms of attorney reforms, there are recommendations that there be more training for both prosecutors and defense attorneys. There's a recommendation that when a prosecutor has been found to commit misconduct, there's a need to look into all the previous cases that have been handled by that attorney, the same as when a defense attorney has a finding of ineffective assistance of counsel. More oversight, internal to the prosecutor's office, has also been a recommendation, as well as developing internal misconduct procedures and policies on exculpatory evidence — when the prosecution should turn that over — and an accountability with the district attorneys and prosecuting agencies.

I want to talk a little bit about the problem of Brady evidence because Brady is a big problem when it comes to prosecutorial misconduct. When it comes to disclosing Brady, the recommendations of the study are to develop and implement exculpatory evidence policies, and so it makes sense for a moment to address a problem of prosecutors' not disclosing Brady the way they should. In a common conversation you might hear between a prosecutor and a defense attorney, the defense attorney might say to the prosecutor who's just handed over some information, "Why didn't you give this to me earlier? It's Brady!" The prosecutor responds to the defense attorney, "You think everything is Brady." I don't know how many times I've heard that conversation, or participated in it.

And the problem breaks down like this: Defense attorneys lament that prosecutors don't turn over Brady and don't understand what Brady evidence is. Somehow, if it doesn't change the mind of the prosecutor about the guilt of the defendant, it must not be Brady, so where is this disconnect, and why does it exist? Well, there's a requirement that the prosecution turn over evidence that is material to the issue of guilt or innocence, and this is where it gets a

little bit tricky in practice. Prosecutors and defense attorneys do not agree on what is material. A defense attorney would be able to make an argument that a broad range of information is material. A prosecutor would look to the specific areas that the court has deemed are material to the issue of guilt or innocence, and probably not see this materiality requirement as broadly as a defense attorney does. After all, what prosecutor would want to disclose information that's going to negatively impact their case? So there are the clearly defined categories — impeachment evidence, prior convictions of a testifying witness — and other than that, what I have found in my own practice in seeking Brady is that defense attorneys need to be specific about what it is they're asking for, and break it down for the prosecutor, so the prosecutor knows what to look for and what to ask the police for.

Prosecutors are never going to be trained — so they need defense attorneys to point out — when Brady evidence may exist. So it's the best practice, when you really need this evidence and you can only get it from the government, that you've just got to explain to them what it is that you're looking for. The limitation I see, even if better policies are created, is this: Prosecutors are never going to be trained to look at a case like a defense attorney or to be as tuned into Brady evidence as the defense attorneys are, so that's a challenge we'll face in the criminal justice system if these policies are created by, and administered by, prosecutors. And I'll make a small note, just about a peculiarity in California in the area of Brady, and that's the practice of Pitchess Motions. When I was in Washington, D.C., as a public defender, I would routinely file letters pursuant to the Freedom of Information Act to get information on police misconduct in the past and would be able to have unfettered access, once requesting it, to a lot of information. Here, California law requires that a defense attorney file a motion with the court when seeking Brady information about a police officer's prior acts of misconduct — it's called a Pitchess Motion — and it limits the access of both prosecutors and defense lawyers to police personnel records, limiting the disclosure of those records as well. It adds layers of protection for the police for their records, and it can be quite a burdensome process. It also, interestingly I think, takes the district attorney out of this process of disclosing Brady, so it's something that the district attorney isn't always aware of here.

I'm going to talk to you about two examples of how Brady comes up. One is an example where I think it represents a systems problem, and another is an example that is much more egregious and reveals some more deliberation on the part of the withholding party. One of the cases I had here in Los Angeles — I represent children in the delinquency system, with law students, through my job — and in one of the cases where the sole complaining witness was the sole testifying



Armando Rodriguez, L.A. County Public Defender's Office, and Sean Chandra, Esq.



From Pepperdine University Law School: Lauren Moon (student), Prof. Chris Chambers Goodman, Professor and CSCHS Board Member Kristine Knaplund, and Jessie Johnston (student)

witness in the case, we found some information about him after the trial had occurred. Our client had been found involved in a school fight, and the complaining witness was the other party in the fight, and he was the only person who testified in the case. We had asked the district attorney for information about other bad acts, other convictions or other pending cases. In particular, we'd already found out about another school fight he'd been involved in and referenced that school fight, and that school fight occurred on a particular day — we'll call it "Day A." Then we received information about a school fight on Day A, we go to trial, and after the trial, because we had lost — through continued investigation, and also in part, just through happenstance (I happened to practice in a number of juvenile delinquency courts that are spread out through Los Angeles) — was sitting in another juvenile delinquency court, and I saw the complaining witness walk by me. There are not a lot of reasons that kids are in juvenile delinquency court.

They're separated from other courts, so he probably wasn't a witness in another case, and it wasn't the case that we had received information about — it wouldn't have been in that jurisdiction — so we did more digging and found out that he had another case. That other case turned out to be a robbery — a robbery, not crime Crime A. Crime A, which occurred prior to the trial, was the school fight. This robbery also occurred on the same day as the school fight — he was arrested twice on that day — and juveniles who are convicted of robberies can actually be impeached at trial in juvenile court in California. That was a really significant piece of information that we didn't have, and when I asked the prosecutor about it, they did some digging and turned over all sorts of information and all the police reports from the case. This was something that the individual prosecutor at trial knew nothing about. They just didn't know about it. What Brady tells us is that it's not about blaming that individual prosecutor, looking for malice on their part, it's about looking to the entire government. This was information within the possession of the government. It was within the possession of the police officers who arrested him, so it's clearly Brady information. It's clearly information that would have been helpful with impeachment evidence — a clear category — and it wasn't disclosed. That's one example of Brady evidence where it's just something that's indicative of a systemic problem where there's not enough information flowing, not deliberate malice by the individual prosecutor.

I can't tell you [due to shortage of time] about the other case. But let me talk to you just quickly about a recent Brady case, and I think this recent Brady case, just decided by the Supreme Court, is one that impacts some of the findings and recommendations about reform in the area of prosecutorial misconduct. One of the recommendations for reform was that we have systems within prosecutor offices to make sure that information is being disclosed and to have checks internally. In this case, in 1985, a gentleman by the name of John Thompson was convicted for murder in Louisiana. He was a 22-year-old African-American father of two, and he was convicted of murdering a white New Orleans hotel executive. Because three weeks prior he had been convicted of an armed robbery, a crime that he also claimed he was innocent of, Thompson was advised not to testify, and in fact he did not testify at the murder trial. The jury found him guilty, sentenced him to death, and that was in part based on the aggravating factor of his armed robbery conviction. Thompson then spent 18 years in prison, 14 of those years on death row. During this time there were seven executions that had been planned for him. There was a lot of Brady evidence, information that would tend to exonerate him in both the robbery and the homicide, including forensic evidence like blood types that didn't match and eyewitnesses who gave

descriptions that weren't consistent with his appearance — and money to informants and plea deals.

This information all came to light because the defendant, Mr. Thompson, had investigators who learned part of the truth and because, in part, Gerry Deegan, the junior assistant deputy attorney at the district attorney's office, who had worked on Thompson's case confessed nearly twenty years later — literally on his deathbed — that he had withheld the crime lab test results and removed a blood sample from the evidence room. The prosecutor to whom Deegan confessed said nothing about this for five years, but at least Deegan spoke up. Based on the new evidence, Thompson's attorneys moved for a stay of execution. Eventually, the Louisiana Supreme Court vacated the robbery conviction. A state district court changed his death sentence to life in prison because the aggravating factor of the robbery was no longer present. Four years later his murder conviction, which had been based entirely on testimony from witnesses who got cash or plea bargains for their testimony, was also overturned. The retrial took place in 2003 and the jury took 35 minutes to find him not guilty. With both the convictions overturned, Thompson sued the former Louisiana district attorney for Orleans Parish, Harry Connick, Sr. — yes, Harry Connick Junior's dad — for failing to train his prosecutors about their legal obligation to turn over exculpatory evidence to the defense — just exactly what the recommendations are by the Veritas Initiative Report on Prosecutorial Misconduct in the Santa Clara Law School Innocence Project study. A \$14 million verdict was upheld through the Fifth Circuit, and then the Supreme Court overturned the decision and went to great lengths to portray this as an act by a single prosecutor rather than a problem related to system issues in the prosecutor's office.

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RONALD L. BROWN, MODERATOR:

Our last speaker, last but not least, is Carlton Gunn, a deputy federal public defender for more than 27 years. As Mr. Gunn says, he's approaching half of his lifetime as a public defender. He's practiced most of that time here in Los Angeles. He's tried more than 75 federal cases in District Court, and he's handled more than 100 Ninth Circuit appeals. He even argued before the United States Supreme Court. As we say in the business, he got the silver medal on that one — he finished second. But there is a distinction, it was 9–0. He likes to say that he has the joy of having given that his best shot, and what I like most about Mr. Gunn is, he says he can't think of a better way to have spent half of his life, except during those stressful times when he daydreams about being in a mountain wilderness with his backpack and no one else but his wonderful wife and companion.

Public Defense and the Legislative Process

CARLTON F. GUNN

DEPUTY FEDERAL PUBLIC DEFENDER



I found the most interesting thing in the Clara Foltz book, personally, something that has nothing to do with the law, or being a public defender. I have an uncle Charlie, last name Gunn — he's on my father's side. He's not alive any more. I always thought he was just a Massachusetts farmer, and as I was thumbing through the Clara Foltz book, when I got it from Barbara, and hadn't read it yet, I noticed there was a reference to a lifelong companion, a reliable friend with a young eager face, and his name was Charles Gunn. I thought that was pretty cool, and I said, "I'm going to go back and ask the family some questions."

I'm getting just old enough to think I have a history. I recently realized, as Ron read in my little bio, that I spent just short of half of my life as a public defender. It calls to mind the Jerry Garcia "Grateful Dead" song phrase, "What a long, strange trip it's been." But it's been a wonderful trip, and I wouldn't have traded it for anything.

But what I was going to talk about was that I've been doing this long enough, and that enough stuff has happened in my lifetime, I can say there's been a lot that's really had an impact on public defense. And what stands out in my lifetime, for me — I grew up just short of the '60s, I wasn't quite back there enough to be a child of the '60s, but I was what we call a wannabe — I was in the

early '70s, when you're sort of reaching back, wanting to be cool like they were. What stands out in my lifetime is the impact of politicians on public defense.

Prosecutors have always, I think, probably had the politicians on their side, but in my lifetime, it seems like it's not just been that the politicians are on their side, but that politicians have gotten much more involved in the system. One thing I noticed when I was reading Clara Foltz's bill that struck me was that the Public Defender was going to be elected. So I got curious. I'd never heard of that before; it doesn't happen in L.A. County. They don't get elected in the Federal Public Defender Office, though they're appointed by the judges, which raises issues that I know Barbara has talked about to me when I was a law student. I got on the Internet — you know, the thing we didn't have back when I started as a public defender — and I did a little search.

I found an example of why we need to keep politics out of the system. Florida is apparently one of the states where they elect Public Defenders — there are actually very few — and this is what one of the candidates for the elected Public Defender spot said his goal was: "To ensure the taxpayers are getting their money's worth, I also will increase the caseloads for those in senior positions." I found that interesting, and it sort of feeds into what I'm going to talk about, which is my concern about politicians having gotten too involved.

It started when I was in sixth grade or ninth grade, in the late '60s — I was born in '55 — with the — do you remember the Warren Court? Do you remember Richard Nixon? Do you remember what Richard Nixon said about the Warren Court? And that was the first thing I remember in my life about politicians impacting the system for public defense, and it was Nixon saying the Warren Court had gotten out of hand and he was going to appoint what I think he called "strict constructionist" judges, except I'm not so sure they always do strict construction. Related to that, another court example of the problem with politics and the effect on public defense — Rose Bird getting voted out of office in 1986 — that I think illustrates the problem of voting on appellate judges. But far worse, or at least what has been more striking for me in my federal practice, maybe because it's more immediate and obvious, are the legislative changes.

I always practiced in federal court — that was the first job I had after clerking for a judge up in Washington — so I don't know a lot about the state system, but I remember coming down here in 1983, and there was this real interesting Ninth Circuit decision where you could grab state law if it was a state officer search, and I got all excited because California had all this great, what they called "independent state grounds" case law. And I thought this is wonderful — I'm going to start using all this California law, with all due respect to Judge

Alarcón — I won't think about the Ninth Circuit law — and I wrote up this motion, and there was a Ninth Circuit case that actually supported the argument that you could pull in the state law, and I was all ready to file this motion, and then it was 1984. And you may remember what happened in 1984 — they passed Prop. 8, and now we don't have any independent state grounds, at least to give you any action in a criminal case. In California, one other thing that's also happened in my lifetime is the three-strikes law that now sends people to prison for life for stealing a pizza.

So there's been some interesting things on the state side, but the federal law is where I've really seen it happen, my colleagues and I. Maybe it just seems that way to you, but it seems that everything bad started happening just as I came in. It's always been that way in my life. In 1983, when I started, every defendant had a right to bail. A lot of times they couldn't post it, and it didn't help a lot if your bank robbery client who came from the streets had a \$25,000 secured bond and he didn't know anyone, but at least he got a bond. And — God forbid — judges could consider what a fair sentence was. Different judges had different ideas, of course, about what was fair, and they didn't usually track our ideas, but at least we got to be heard on what was fair.

And Congress then started getting involved. Just about every election year — I think there have been a couple that have been skipped since I've been a public defender — Congress has passed an anti-some-crime bill. And sometimes it was anti-a-whole-bunch-of-crimes bills. It was never a pro-crimes bill. It was never even a pro-defendant bill, or never even a "maybe we'll look at whether these people really did something, or why they did what they did."

That actually started back in 1968, too, when I was in sixth or seventh grade. Remember? 1968 was a bad year. I remember going to junior high school and running up to my friends and saying, "Did you hear Robert Kennedy got shot?" And one of my friends said, "Oh, I knew Carl would come running and say that." In response to that we got an actual statute that Congress passed to repeal Miranda. We got limits on what's called the McNabb-Mallory rule. We got wiretaps. Do you know, they didn't have statutory authority to tap phones until 1968? And we got about six other titles in something called the Omnibus Something-Something Act, that weren't pro-defendant.

It's really interesting, actually, how that bill passed. In the Supreme Court argument I did, it involved a part of that bill, and so I looked at the legislative history, and it's a very interesting little thing. I'm reading through the *Congressional Record* — June 16, 1968 — and there's this guy named Celler, he's a Congressman, the head of the House Judiciary Committee, and you can see him, he's about to bury this bill that had passed the Senate.

He's about to bury it in the Judiciary Committee in the House. And then I turn the page to June 17, 1968, and the Congress people are talking about how Robert Kennedy is lying in the hospital badly wounded. They make some special legislative maneuver, and the Omnibus Crime Control Act doesn't go to committee and gets passed.

Far worse stuff has happened since I've been a Public Defender, I'm afraid. In 1984, they passed the "Bail Reform Act," but it didn't reform bail. It eliminated it, at least in some cases. It federally codified the concept of preventive detention with no bail at all. And worse, it said you could detain people based on danger to the community. Now think about that — what is that? You keep people in jail not because they've committed a crime, because they haven't been convicted yet. You keep people in jail because they might commit a crime in the future. There was a Tom Cruise movie about that a couple years ago called "Minority Report." I don't know if any of you remember it. It's not the way we used to do things in this country.

In 1984, they passed the Sentencing Reform Act and created this concept of what they call sentencing guidelines, except they weren't guidelines. With narrow exceptions, they were mandatory. One of the few exceptions that you might have heard about was the cops who beat up Rodney King. One of the lead Supreme Court cases where they loosened things up a little bit was because they didn't want those cops to spend quite so much time in prison under the guidelines.

It did two horrible things to sentencing: First of all, it made it a numbers game, with just a number attached to a few selected facts — numbers that you added up. And second, what's the hardest thing that you might want to consider at sentencing to put a number on? Maybe things about this human being they're calling the defendant? So guess what got left out of the sentencing guidelines? Everything about your client. They did decide, though, to consider remorse. They called it "acceptance of responsibility." You know how much remorse is worth? Three points. Now, I have lots of clients who've had just one point of remorse, but I've had lots of clients who had eight or ten points of remorse, and I never thought a client just had three.

They also passed a whole bunch of statutory mandatory minimum sentences. Drug defendants that used to get two, or three, or four years in prison when I started in 1983 now get a mandatory minimum sentence of ten years. Crack defendants who sell a few — I think a couple — thousand dollars of crack cocaine get ten years in prison, and you can't even talk about it, with a few exceptions, one of which is if you cooperate with the government and snitch on all your friends. Every time Congress hears about a problem, they pass a new mandatory minimum. Child porn cases have



*Hon. Yolanda Orozco, Hon. James R. Dunn,
Deputy Federal Public Defender Carlton Gunn*



*Syna Dennis and Adrienne Byers,
Office of the L.A. County Counsel*



The CSCHS display table

a mandatory minimum. Aggravated identity theft has a mandatory minimum.

I think the problem for public defense of passing laws at the congressional level this way is two-fold: First, the sentencing laws like this put this extra power and leverage in the hands of the prosecutors. They are



*Hon. Michael Garcia and
Deputy Federal Public Defender Myra Sun*



*Prof. Olu K. Orange (RIGHT) with two of the
law students he coaches on the USC Mock Trial Team,
Katelyn Williams and Pratusha Erraballi*



*Los Angeles County Counsel Andrea Sheridan Ordín
(LEFT) with attorneys Denise Ambrosio and Joanne
Nielsen of the Office of the County Counsel*

the ones who decide whether or not to charge or drop a mandatory minimum, not the judge. *They* can agree not to ask for some guidelines number. The judge has to rule on that, so you've got a little bit of action there with the judge, but you know . . . Second, the creation of detailed sentencing law at a broad policy level and the politicization of Supreme Court appointments creates an inherent bias against the defense side of the equation.

With respect to Supreme Court appointments, I think the problem is pretty clear. If you make that process too political, then you're going to be going against the Court's duty to protect individual rights from the tyranny of the majority. That's one of the reasons we have courts. And courts have trouble doing that if they're looking over their shoulder all the time at Richard Nixon deciding he's going to get you. With respect to sentencing, the problem is a little more subtle, but I've done a lot of thinking about this. I've thought, what's the problem here? One of the problems is trying to put numbers on things you can't put numbers on. And the things that it's hardest to put numbers on are the human factors that weigh in favor of the defense. But the other is this: Think about your people in Congress. What percentage of your Congress-people, do you think, either have been victims of crimes themselves or know someone who's been a victim of crime? A hundred percent, right? Everyone knows someone who's been a victim, but how many of those Congress-people do you think know someone who is a criminal defendant? Like one percent? How many of them know how much it tore up that defendant and tore up that defendant's family to get thrown in prison for even two years, let alone ten years? And if you think about it, if sentencing is supposed to be a balancing of the defendant's interests — he's part of society, too, right? — against society's, or whatever, it's not going to happen up in Congress, because they don't know anyone who's a defendant.

It might happen in a court, and do you know why it might happen in a court? Because you have an individual judge — and an individual defendant — and the judge has to look the defendant in the eye and hear what the defendant has to say, and even if he doesn't know the defendant, at least he's learning a little bit about him there in that case. And with the guidelines and the mandatory minimums and all this sentencing policy being set at the high level, it's not just that it doesn't take into consideration the human stuff, it's that it tilts it, it biases it, in a pro-punishment way.

There are some glimmers of hope. Just as I'm getting near the end of my history, I guess, things are getting a little better. Mandatory sentencing guidelines in federal court were held unconstitutional in this decision called *Booker*. And so now they're advisory, and now the judges are at least thinking about how, maybe, they don't have to be so tied to the numbers. Of course, the

Barbara Babcock Speaks on Clara Foltz at AOC Forum

On June 13, 2011, Stanford Law Professor Barbara Babcock addressed the AOC Forum in an event cosponsored by the Society and the Administrative Office of the Courts. She presented highlights from her new book, *Woman Lawyer: The Trials of Clara Foltz*, published this year by the Stanford University Press. She informed the audience of Foltz's dual importance as the first woman lawyer in California and as the inventor of the American public defender system. The event was held in the Milton Marks Conference Center Auditorium at the Supreme Court in San Francisco.



Professor Babcock was introduced by William C. Vickrey, Administrative Director of the Courts, who gave greetings from Society President David L. McFadden. Board members who were present and recognized as Society representatives were Chief Justice Tani Cantil-Sakauye (chair of the Society's board), Associate Justice Kathryn Mickle Werdegar of the Supreme Court, Justice James Marchiano of the First District Court of Appeal, and Chief Supervising Attorney Jake Dear of the Supreme Court.

Babcock's subject was "Clara Foltz and the California Courts," which included "how Foltz was the first woman admitted to practice in California" and several of her cases "that became important precedents in the California Supreme Court." Babcock focused on two of the most important stories in her book — the *Hastings* case, in which Foltz "battled the most eminent lawyers of the state to open the doors of legal education to women on an equal basis," and the *Wells* case, "which shaped her arguments for the creation of a public defender — her most lasting legacy."

"I want to assure the audience that the book is full of such stories," Babcock continued. "The subtitle is, 'The Trials of Clara Foltz' — with its double meaning. I have written the book with the hope that it will be entertaining and interesting enough to carry all readers along through her adventurous and complicated life — by which we can measure both how far we have come and how much there remains to do."

The AOC Forum was established in 2002 to broaden awareness and knowledge on diverse issues and developments within the social, political, and legal environments in programs that are held periodically throughout the year for AOC staff and employees of the Supreme Court and First Appellate District of the Court of Appeal. ★

problem is we've had them so long none of the judges remember what it was like not to have them, but we're trying to make them brave. The three-strikes modification act — remember that? — we nearly got rid of, or at least made the three-strikes law more lenient. Schwarzenegger came barreling in and stopped it, but it got close, so maybe people are starting to see it at least a little bit there.

We just recently had passed in the federal system the Fair Sentencing Act. I call it the A-Little-Less-Unfair Sentencing Act. I don't how many of you know this: The defendants who are convicted for crack cocaine are almost ninety percent African American. They get the same sentence for one one-hundredth the amount of crack that they get for the powder that gets used to make the crack. That was one of the horrible inequities. We were going to have the Fair Sentencing Act, that was going to make the ratio one-to-one, and then we got the A-Little-Less-Unfair Sentencing Act when they decided on some sort of compromise. They made it some weird number like eighteen-to-one.

So we've got a few glimmers of hope coming, and one likes to think the system had swung back just a little bit

before I started in the '60s, and maybe now it'll swing back a little bit as I'm getting near the end. I thought I'd share that with you, and I think that's been the biggest thing I've felt in my history in public defense, and I thought I'd share it.

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RONALD L. BROWN, MODERATOR:

I'd like to give thanks to some people here. I'd like to thank Judge Alarcón [applause]. I'd like to thank Judge Edmon [applause], our four panelists [applause], and Selma Moidel Smith, past president of the Women Lawyers Association of Los Angeles — she's also a board member of the California Supreme Court Historical Society — and she put this on. She deserves all the credit in the world [applause]. I'd like to thank the audience for being here, and I'd like to thank Barbara Babcock for bringing the story of Clara Foltz and the Public Defender into the present for the recognition it has long deserved [applause]. And next time you're over at the Clara Shortridge Foltz building, you'll know a lot more about the person for whom that building was named. Thank you so much for coming out this evening. ★