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Barbara Young Welke. *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920.* New York and Cambridge: Cambridge University Press, 2001. xx + 405 pp. $27.99 (paper), ISBN 978-0-521-64966-7; $75.00 (cloth), ISBN 978-0-521-64020-6.

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Railroads and the Emergence of the Paternalistic State

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Railroading produced a profound and often unsettling transformation in American society and law. The iron horse forged a national market, facilitated passenger travel, threatened local autonomy, and introduced new and potentially dangerous technology. The most visible symbol of industrial growth, railroads inspired both hope and fear in the American public. Not surprisingly, many looked to the legal system to safeguard them against injuries inflicted by rail operations.

Barbara Young WelkêÒs study of the impact of railroads on conceptions of individual liberty and legal doctrine is a welcome addition to the growing literature on how railroading shaped legal culture. Although the author draws most of her evidence from railroads, it should be noted that her work also encompasses steamboats and streetcars. Liberty, she posits, was traditionally defined in terms of autonomy and self-responsibility. But the pervasive reach of railroads caused Americans to reconsider the meaning of liberty in a novel environment of technological advance and corporate power. Welke focuses on cases involving physical injury, nervous shock, and social status as crucial in the transformation of attitudes toward liberty. The upshot, according to the author, was an appreciation that the enjoyment of liberty required governmental protection in the face of private economic power. "Dependence," she asserts, "rather than autonomy was a hallmark of modern life" (p. xi). This perception led to "the emerging ethic of a protectionist state" (p. 116) that downplayed the injured party's responsibility for mishaps.

A second important theme in Welke's book is the extent to which gender assumptions shaped changes in legal doctrine. She finds that lawsuits by women were instrumental in bringing about this new understanding of liberty. The social norm of female dependence, the author contends, made courts more receptive to injury suits by women. For example, women were seen as more at risk for nervous shock resulting from accidents than men, and were thus deserving of special solicitude. Welke insists: "Women were a wedge here just as they were more generally in the dawning recognition at the turn of the century that the state must intervene to protect its citizens" (p. 377). On the other hand, gender norms, which rested on the notion of an able and self-reliant male, initially discouraged claims by men.

It gradually became clear, however, that men were as vulnerable as women in dealing with matters beyond their control, and that therefore uniform rules should govern all injured persons. As the author explains, "modern industrial life fundamentally undermined the ability of men to protect themselves" (p. 179). This growing dependence not only fueled angry outbursts at railroads but also opened the door for protective labor laws and an expansive concept of the police power. Yet such legislation further undermined the traditional sense of individual autonomy.

Welke also perceptively analyzes issues of social status posed by company or legal rules which divided passengers in the late nineteenth century. Railroads symbolized the freedom to travel, but access to space on trains reflected gender, racial, and class norms that contradicted rhetoric about the democratic nature of rail travel in America. Railroad companies, for example, commonly designated a special "ladieŝÒ car" for women and men traveling with female passengers. Access to this car became a badge of respectability because it publicly affirmed middle-class status. At the same time southern whites feared that sharing facilities with blacks on trains would imply social equality. In southern states Jim Crow laws therefore limited the authority of railroads to assign space to passengers by mandating racial segregation. Gender and racial assumptions collided as black

women repeatedly challenged their exclusion from the ladies' car.

The author makes two insightful points about the Jim Crow laws. First, she correctly points out that segregation statutes were part and parcel of "a dramatic increase in railroad regulation by both state and federal governments which extended beyond the issue of race and beyond the borders of individual Southern states or the South as a region" (p. 350). Indeed, separate car laws fit comfortably within the ambit of Progressive era rail regulations. They represented use of the state police power to preserve social status by taming the authority of private corporations which were often indifferent to the sensibilities of white southerners. By 1900 most southern rail lines were under the control of northern financial interests, and, in Welke's words, "became increasingly distanced from local norms and state governmental power" (p. 268). Second, Welke stresses that many railroads opposed the enactment of separate car laws. As she amply demonstrates, such statutes were uneconomical and destroyed the right of carriers to control their own property. Moreover, the separate car laws proved difficult to administer and embroiled the railroads in a stream of litigation.

One of Welke's most striking conclusions is her rejection of fashionable arguments that seek to explain the evolution of tort law in the late nineteenth century. She finds no support for the contention "that appellate judges consciously sought to subsidize industry by imposing on injured individuals the cost of industrial accidents" (p. 105). Not only did carriers face a rapidly growing number of personal injury lawsuits, but courts, especially in cases involving women, began to reshape the law to impose greater liability for accidents. Nor does the author believe that courts acted to achieve economic efficiency in allocating the cost of injuries. Rather, they were moved to protect vulnerable individuals in the face of dangerous technologies, and in so doing gave voice to a new concept of liberty that stressed paternalism rather than autonomy.

A few caveats are in order. Welke concentrates on claims by passengers, but might profitably have explored the important role of employee accidents in shaping the legal culture. This leads to the thought that Welke calls upon gender to explain too much. Frequent injuries to rail workers, almost entirely male, were a major force in the move to mandate safety devices and provide compensation. Moreover, it is simplistic to picture the Interstate Commerce Act as representing "the culmination of a long struggle to protect the rights of the individual against the power of the railroad" (p. 350). In fact, powerful sectional and shipper interests were behind the drive to impose federal control of railroads. These criticisms aside, this is a rewarding volume. Based upon meticulous research in legal records, it will stimulate debate and deserves a large audience.

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