

Law and the Borders of Belonging in the Long Nineteenth Century United States

By Barbara Young Welke

Cambridge University Press, New York, NY, 2010.
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REVIEWED BY R. MARK FREY

At the beginning of *Law and the Borders of Belonging in the Long Nineteenth Century United States*, Barbara Young Welke, a professor of both history and law at the University of Minnesota, asks, “What does belonging mean? Who belongs? Does belonging depend on there being others who do not belong? What is their relationship to the polity? Does it matter what the basis for belonging is, what the defining characteristics of belonging are? Who decides? What does law have to do with it?” Welke attempts to answer these questions by examining developments in the United States in the 19th century, a period she defines as running from the ratification of our Constitution in 1789 to the establishment of quotas in 1929 under the Immigration Act of 1924.

Welke begins by explaining three concepts that she uses in the book: personhood, citizenship, and borders of belonging. Personhood denotes “legal recognition and protection of *self*-ownership, that is, of a right to one’s person, one’s body, and one’s labor.” From that starting point flow other features of personhood, such as the right “to marry, procreate (or not), ... to contract, to inherit and devise property, and so on. Protection of these basic rights of personhood requires, in turn, basic civil rights, including the right to sue and be sued, the right to suffrage, and the right to serve on juries and to be eligible for elective office.”

As for citizenship, Welke is not as interested in the fundamental rights and obligations that derive from it as she is in the relationship between citizenship and personhood. Clearly, personhood can be coterminous with citizenship. But this need not be the case, and

Welke’s interest is in the disjuncture between the two. One may be considered a citizen but fail to enjoy the benefits of full personhood and thus effectively lack full citizenship. This was all the more pertinent in the developing 19th century United States, where one finds evolving views of the personhood of African-Americans and other non-white people, of people who faced physical and cognitive challenges, and of women.

The concepts of race, disability, and gender, among others, are to a degree socially and legally constructed. Welke suggests “that we think more generally of how law *constructs*, that is, lends consequence to elements of individual identity—race, sex, age, ability, religion, birth status and place of birth, marital status, and so on. ... [E]lements of individual identity do not have any set meaning. They are given meaning socially, culturally, and, most importantly here, legally. They are thus set apart; they are given borders. ... Law in this way has been fundamental in the construction of personhood, citizenship, and hence borders of belonging.”

Borders may refer in a traditional fashion to boundaries between nations, but it may also refer to “borders between individuals and the state, and between different levels of governing authority.” Belonging, in turn, may refer to membership as typically envisioned in the concept of citizenship, but it may also be viewed as belonging to oneself or as belonging to others, or at least being subjugated to or excluded by others. Thus, belonging may connote “the realities of belonging to as in legal relationships of ownership, authority, and/or protection and subordination (e.g., master/slave, master/servant, husband/wife, guardian/ward).”

As noted, Welke views gender, race, and (dis)ability as key components of personhood and citizenship in 19th century United States. Able white men were the beneficiaries of the social system, and the law both created and reinforced their position by providing inclusion and privilege for them and exclusion and subordination for others. “Whatever their differences, and I acknowledge that

they were many, able white men shared a legal identity as persons and as citizens. That shared legal identity and the privileges it offers have been, I would argue, a critical element in the failure, not simply in the nineteenth century but since, of laboring white men to see in their situation commonalities with that of disabled persons, racialized others, and women.” Welke uses “racialized others,” rather than “race,” to recognize that race is constructed.

Welke discusses the subjugation of disabled persons, racialized others, and women in 19th century United States. Women as a matter of law could not vote, had no right to their labor or their bodies, were perceived as likely to become public charges if unmarried, and, if considered “feeble-minded,” were often sterilized. Racialized others included many groups of people: “slaves, free blacks, freedmen and freedwomen; Chinese, Japanese, and other Asian immigrants, as well as Chinese-, Japanese-, and other Asian Americans; Mexicans who became U.S. citizens by virtue of the Treaty of Guadalupe-Hidalgo; Mexican-Americans who became U.S. citizens by virtue of birth in the United States; and Mexican immigrants.” Although quick to point out that these people did not comprise a single group, Welke argues that the law nonetheless “*made* skin color and heredity the foundation for personhood and citizenship.”

Welke’s third category is comprised of those who faced physical or mental challenges—those who in the 19th century “were variously labeled ‘cripples,’ ‘idiots,’ ‘the insane,’ ‘the feeble-minded,’ ‘the blind,’ ‘the deaf,’ ‘epileptics,’ ‘defective,’ and ‘unfit.’” Those labels ensured that certain fundamental rights, such as the right to marry, to procreate, and to attend public school, were limited for those on whom such labels were imposed.

Having explained her concepts of personhood, citizenship, and borders of belonging, Welke explores in her first of three chapters the capacities and privileges the law gave to able white men as persons and citizens, as well as the

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privileges they gained through the legally enforced subjugation and exclusion of others. In the second chapter, she focuses on those who were excluded on the basis of their gender, race, or disability. In the third chapter, Welke examines how those others challenged their exclusion and subjugation, using a variety of mechanisms, including the law. She also examines how those with full personhood fought those challenges.

Welke states that her goal

is not to trace in full any of these areas of law. Rather, it is to seek patterns to capture the multiplicity of sites and levels (local, state, federal; common law, statutory, administrative, treaty) within law that gave shape to legal personhood, citizenship, and the borders of belonging in the long nineteenth century.

Welke adds:

Law, of course, does not simply exist or emerge from nowhere, nor is it simply an instrument or tool. So that, one must consider as well the structures and institutions of law and the lawmakers; the dynamics of social, political, cultural, and economic change over time that shape law and that law also shapes; the exercise of power and the agency of the disempowered; and law's unintended, as well as its intended, consequences.

I believe that Welke has succeeded in her goal of capturing the multiplicity of the factors that underlie personhood, citizenship, and the borders of belonging in the 19th century. Although the concepts of personhood, citizenship, and borders of belonging lack precision, they nonetheless give the reader a cogent perspective on the developing law in 19th century United States. Welke provides an excellent review of key cases, statutes, and prevailing attitudes toward those who faced less than full citizenship during this time. She also demonstrates that law is not static but evolves in a dynamic interplay

with cultural, political, economic, and historical forces. This interplay continues today, as witnessed by the vigorous debates over same-sex marriage and voter ID laws. Welke's framework helps one understand the interaction of these forces today.

In a timely passage, Welke equates a person with a physical disability to an immigrant—that is, to one who lies outside the borders of belonging. The comparison is subtle but striking and brings home the tragic fact that this country has lost too much in human potential by excluding so many with promise. Imagine the creative force that would be unleashed if those barriers were removed. **TFL**

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Full Circle: A True Story of Murder, Lies and Vindication

By Gloria Killian and Sandra Kobrin
New Horizon Press, Far Hills, NJ, 2012. 316 pages, \$24.95.

REVIEWED BY JOANN BACA

In 1981, Gloria Killian was on a leave of absence from her last year in law school in Sacramento, Calif., when, through a bizarre string of circumstances, she became a suspect in a murder. There was no solid evidence linking her to the crime, but only an anonymous tip to a police hotline, some inconclusive notations in a notebook, and the subsequent testimony of a career criminal who was given a deal to testify; in addition, the prosecutor withheld evidence that could have exonerated Killian. At every step of the process, Killian believed her innocence would become apparent, but despite a vigorous defense, she was convicted of first-degree murder and sentenced to 32 years to life in prison. *Full Circle: A True Story of Murder, Lies and Vindication* chronicles Killian's experience with the

criminal justice system, including her 16-year battle for freedom.

It is rare that someone has a story to tell that is both as fascinating and as horrifying as Killian's. Many accounts in the true crime genre are written by individuals who observe and report on cases in which they have no personal involvement. So, when a book comes along co-written by someone with firsthand experience of years of tribulation and injustice, expectations may be high. Who better than the person involved to give voice to the unfolding drama of her incredible story? Unfortunately, Killian, along with her co-author, journalist Sandra Kobrin, has written *Full Circle* in the third person. A first-person narrator admittedly would not have worked for this story, because the authors describe much that Killian did not learn until years after her trial. But telling her saga in the third person often mutes Killian's unique voice.

Further muting the impact of Killian's story is its partial fictionalization. An "authors' note" gives a suggestion of what is to come when it indicates that "[s]ome characters may be composites" and "[o]nly minor details may have been altered." For a personal account that calls itself a true story, these comments are troubling. Immediately, the reader becomes suspicious and wonders throughout the book if the people described are real and if the most interesting or telling details given about them are true. The authors even quote some characters' thoughts and conversations that they apparently could not know. This has the unfortunate effect of undercutting the power of the entire story. The bare facts of Killian's story are so compelling that it is baffling why details needed to be altered or characters made into composites.

Despite these disappointments, *Full Circle* works well on several levels. The authors clearly depict the snail's pace of the criminal justice system, with an appeals process that moves so slowly that the delay of justice is practically guaranteed. The book also includes a revelatory, if cursory, examination of the inefficiencies and insufficiencies of medical care within the California prison system. Further, Killian's experiences

How has law structured who belongs and who is foreign to the United States? In this class, we will take a broad historical look at the law of citizenship to answer this question. Beginning with the founding of the nation, we will consider the various ways that law has defined the fundamental privileges and obligations of national belonging, and then policed the boundaries between those entitled to the privileges of citizenship and those denied them. Readings include Barbara Welke's *Law and the Borders of Belonging in the Long Nineteenth Century*, Mae Ngai's *Impossible Subjects: Illegal Aliens and the Making of Modern America*, Risa Goluboff's *The Lost Promise of Civil Rights*, and David Cole's *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*.