

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

within the prison system are effectively rendered, providing a window into a world with which few readers may be acquainted. Many television shows and movies have attempted to portray the realities of prison life, but, because of their limited running time, few are able to impart a true reflection of the often chilling, often numbing nightmare of decades spent behind bars. Killian's innocence compounds the horror of days, months, and years spent in a deadening monotony with little hope.

One of the more gripping aspects of Killian's chronicle shocks the conscience: the apparently deliberate railroading of an innocent person through the suppression and manipulation of testimony by an ethically ambiguous prosecutor. Kit Cleland, the prosecutor from the Sacramento district attorney's office, is revealed as an arrogant man who cares more for his conviction rate than for the truth. The authors describe him as "full of hubris," his "face set in a hard sneer," "roaring that Gloria was a vicious criminal," and, "his mind made up ... pursu[ing] the defendant relentlessly, with a ruthlessness that could border on obsession." Admittedly, Killian has an axe to grind and, considering what she had to endure because of Cleland's misconduct, she is entitled to describe him as unsympathetically as possible. Still, the result of the constant, intensely negative descriptions of Cleland's actions inside and outside the courtroom is that he begins to seem like a cartoon figure; one would hardly be surprised if Killian portrayed him twirling his mustache à la Snidely Whiplash. But Cleland's actions alone condemn him; by engaging in personal diatribes couched as colorful portraiture, the authors do their narrative a disservice. Still, despite this, one cannot help but be aghast at Cleland's actions in the case, question his motivations, and wonder if his heart is truly so cold to injustice and the suffering of innocents.

A significant portion of the book involves Killian's time in prison. Killian is frank about her inability to reconcile herself with and adjust to prison life, and it is a lesson in the truth of St. Francis of Assisi's observation, "For it is in giving that we receive," that only after she begins to use her knowledge of the law to help other women in

prison does she find some measure of peace and even satisfaction in her life behind bars. She began working in the prison law library, and soon threw herself into legal assistance projects for which her legal training made her uniquely qualified among the inmates. She became engaged in everything from assisting inmates in appealing citations for prison rule infractions to preparing inmates for media interviews. In one project alone—a campaign for clemency for battered women who killed their abusers—"Gloria wrote over six thousand letters. Each letter had to be written individually, because the prison charged ten cents for a copy and no one could afford it." For Killian, "her job and the legal work were the only things that kept her feeling sane."

Regardless of the positive impact that Killian made on the lives of the women with whom she served—an effort she turned into her life's work after she was freed—one is left with a profound sense of her frustration and despair, and a deep sympathy for the nearly two decades of mental and emotional torment she suffered. "[M]ost of her days were spent in limbo, just waiting. She found it very hard to keep from being overwhelmed by fear or anger or sadness." Her ordeal ended after a favorable decision from the U.S. Court of Appeals for the Ninth Circuit. Her appeal not only would have failed, but it would not even have been possible without a significant amount of time, tenacity, and money contributed by her attorneys, investigators, and supporters.

Killian's chief supporter was Joyce Ride, a widow who had raised two daughters (one of them the late astronaut Sally Ride) and headed a group of volunteers who assisted the families of female prisoners and provided aid to women who were awaiting trial or who were incarcerated. At a symposium on battered women who were imprisoned, Ride met a woman who had received a compassionate release from prison after serving time for killing her abusive husband; this woman told Ride of the prison law clerk who had helped her: Gloria Killian. Ride met Killian, became convinced of her innocence, and was the driving force pushing Killian not to give up on her appeal. Ride even provided significant funding for Killian's

legal representation. Without Ride, it is probable that Killian would still be serving time.

Killian asks, "Was everything I learned about fairness and justice a lie?" Although fairness and justice finally arrived for her, her vindication will not give her back the years she lost in prison, nor return to her the life she once led. After reading her story, one wonders how many others are living the horror that Killian, by grace and good fortune, finally escaped. **TFL**

JoAnn Baca is retired from a career with the Federal Maritime Commission. Her husband, Lawrence Baca, is a past president of the Federal Bar Association.

Discretion

By Allison Leotta

Touchstone, New York, NY, 2012. 325 pages, \$25.00.

REVIEWED BY JOANN BACA

The title of Allison Leotta's second novel, *Discretion*, has multiple meanings. One is the legal sense of the latitude permitted within the rules. It also refers to prudence, as in the way that politicians and other powerful people in the novel should conduct their personal lives and office romances to avoid scandal. In the novel, it is also the name of an escort service that bills itself as "For the gentleman who can afford anything but publicity." Leotta has found the ingredients for a fascinating story as she delves into the inner workings of the high-end escort business and its interaction with the rich and powerful in a city where public personas do not always reflect private faces. In describing how the case that lies at the heart of the plot became a sensation in the media, Leotta effectively sums up the appeal of her terrific new book: "The story had the perfect dynamic: Murder and sex drew in the readers, and the political element meant even the most respectable journalists could talk about it."

Part cautionary tale, part unabashed titillation, Leotta's story plunges us quickly into the legal and ethical quag-

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mire that results when a beautiful young prostitute is pushed to her death from the balcony of a congressman's hideaway in the U.S. Capitol. Her identity will quickly be established, but the police and prosecutors are stymied in their attempt to inspect the scene of the crime. They are stymied because, in *United States v. Rayburn House Office Building, Room 2112*, 497 F.3d 654 (D.C. Cir. 2007), the court of appeals held that a Justice Department search of Rep. William L. Jefferson's congressional office, for evidence of a crime, violated the Speech or Debate Clause. The machinations of both defense and prosecution pepper the novel, as each conducts its work under the intense spotlight of public scrutiny.

As in Leotta's first novel, *Laws of Attraction*, which I reviewed in the February 2011 issue of *The Federal Lawyer*, Assistant U.S. Attorney Anna Curtis is assigned to the case. Chief among those assisting in the investigation of the escort's murder is FBI Special Agent Samantha Randazzo, a tough, first-through-the-door agent who dislikes interference from Curtis in the investigative phase of the case. Hampered by a defense attorney who knows every rope when it comes to tying the hands of the prosecution, Curtis and her team struggle to gain traction in the investigation. When the lead attorney on the case, Jack Bailey, chief of the Homicide section in the U.S. attorney's office in D.C., steps aside to avoid the appearance of a conflict of interest, a determined Curtis immerses herself further in the case in order to prove that the faith that has been placed in her is justified. Complicating matters is her personal relationship with Bailey, which brings with it its own set of problems, not the least of which is that Bailey's young daughter is not happy to be sharing her father with Curtis.

Leotta skillfully crafts a complex plot, revealing layer upon layer of intrigue and making each page bristle with crisp, crackling writing. There is not a proverbial gun on the wall that is not fired. A reader should try to remember every incident and every reference, as Leotta is a marvel at bringing everything she happens to mention into play later

in the story. The plot is remarkably red-herring-free, yet, until the very end, one cannot feel comfortable that one has figured out all the angles.

As in her first book, Leotta displays an intimate knowledge of Washington, D.C., and its environs. Her ability to describe and simultaneously size up the workings of the city behind its facade is one of her great strengths as a writer. Leotta understands the complex dynamics of living in the District, its moods, its realities, and the face it presents to the world. In analyzing the reasons that the District's real estate market recently boomed, she explains that the boom began in earnest "[o]nce yuppies realized they could live in D.C. and actually have their trash picked up." Those who are familiar with the phenomenon of transitional neighborhoods will nod in recognition at her succinct definition: "The addict-to-architect ratio was about even, but the architects had the momentum." A home in Kalorama Circle "looked like the mansion Hansel and Gretel would have bought if they'd grown up and become lobbyists." When introducing "the track" on K Street from 10th to 14th streets in the Northwest section of D.C.—a stretch of real estate that houses many high-powered firms and associations—Leotta notes that, "[l]ate at night, when the lawyers and lobbyists were tucked into their suburban homes in McLean and Bethesda, an older profession did its own billing by the hour along these streets."

Similarly, Leotta puts to good use her knowledge of the legal world in which *Discretion* is set. A former federal prosecutor, her adeptness in explaining the law flavors the novel; she provides the astute insight of an experienced professional. Beyond her expertise in the legal arena, Leotta's firm grasp of character development ensures the seamless integration of new characters into the catalog of returning favorites. Whether a character appears only briefly or is an integral part of the plot, he or she is indelibly imprinted through Leotta's brief but perceptive descriptions. An intern appears to guide a visitor to an office in the Capitol: "He wore an ill-fitting suit and sneakers, along with a smudge of tinted Clearasil on his tem-

ple." A potential witness's "expression was blank—she either had a perfect poker face or too much Botox."

In my review of Leotta's first novel, I noted that the author is the daughter of Alan Harnisch, a past president of the Federal Bar Association. I mention it again in the interest of complete transparency, although it may be that, soon enough, Mr. Harnisch will be known as Allison Leotta's father.

A reviewer should comment on aspects of a novel that do not work well in addition to those that do. I have two complaints about *Discretion*: its 325 pages are over too quickly, and we likely must wait a year for Leotta to publish another novel. These objections aside, *Discretion* is the perfect book to pick up for a long plane ride or while waiting in the jury assembly room to be called for a case. Escapism and entertainment are guaranteed. **TFL**

JoAnn Baca is retired from a career with the Federal Maritime Commission. Her husband, Lawrence Baca, is a past president of the Federal Bar Association.

Guilt: Stories

By Ferdinand von Schirach

Alfred A. Knopf, New York, NY, 2012. 143 pages, \$24.00.

REVIEWED BY JOANN BACA

Guilt: Stories, written by Ferdinand von Schirach and translated from the German by Carol Brown Janeway, is a brooding, moody, eerie, and incisive compilation of 15 stories on the eponymous theme. A reader may rightly wonder if the essence of the writer's voice has been diluted or compromised by translation. But considering the quiet power of the stories in this volume, it appears that Janeway has done a remarkable job of retaining the intangibles of von Schirach's writing style, which is reminiscent of Camus' (in translation). Although no translation can convey the exact tone and spirit of words written in another language, Janeway's nuanced and sensitive trans-

lation must come very close.

The description of von Schirach on the book jacket is simple, terse, and somewhat enigmatic. He was “born in Munich in 1964. Since 1994, he has worked as a criminal defense lawyer in Berlin. Among his clients have been [a] former member of the Politburo ... [a] former East German spy ... , and members of the underworld.” If this scanty but intriguing description makes you want to know more about von Schirach, you have caught the essence of his short stories: written in spare, intense, deceptively simple prose, the offerings in *Guilt: Stories* rarely speak above a whisper. They do, however, speak precisely, each presenting a tale stripped of pretense, devoid of artifice, and compelling in the extreme.

The stories are presented as fiction, although considering von Schirach’s background, it seems unlikely that they are all entirely fictional. Each story is narrated by a lawyer, and we don’t know to what extent the lawyer is von Schirach describing his own cases. Von Schirach used this tactic in his first collection, *Crime: Stories*, reviewed in the October 2011 issue of *The Federal Lawyer*. Undoubtedly, von Schirach’s years as a criminal defense attorney have allowed him glimpses into the lives of many people during their darkest moments. A career of dealing with the criminal justice system apparently has imbued him with a healthy skepticism for its ability to dispense justice. He has distilled his observations into these stories, providing a glimpse not only into the lives of a series of criminals and victims, but perhaps also into his own psyche.

Von Schirach’s stories all concern a crime, but each story is distinct, as well as unblinking and evocative. The first story, “Funfair,” juxtaposes the eerie funhouse atmosphere of a small town fair with a horrific gang rape; the assault is perpetrated by “respectable men with respectable jobs,” whom “[y]ou would have no cause to find fault with.” In the carnival atmosphere, these men are wearing costumes that mask more than their individuality. The description of the assault begins with deceptively benign words: “The first man reached out a hand towards her, and it all began.” But by the time the attack

ends, the reader is left with no illusions: “[s]he was lying there naked in the mud, wet with sperm, wet with urine, wet with blood.” The story describes the outcome of the trial, and it is not one with which a reader will feel comfortable; it results from the victim’s inability to identify her attackers, coupled with well-meaning but inept handling of physical evidence. The outrage must come from the reader, as von Schirach relates only the matter-of-fact realities of a case of injustice, providing a sop to the reader’s sensibilities only when he confides that the defense lawyers “knew we’d lost our innocence and that this was irrelevant.”

As unsettling as this initial entry is, it sets the tone for the others. Nearly all the stories describe a circumstance in which the guilt of a party or parties is unambiguous, yet justice rarely results. The stories demand the engagement of the reader, forcing ultimate judgment to come from outside the story and inviting the observer to consider various aspects of the concept of guilt, and, beyond that, of true justice.

Some of the stories are nearly 20 pages, some only a few, yet each is exactly as long as it needs to be for maximum impact. Descriptions are terse but drenched with meaning. Consider how we meet Waller in “Family”: “Waller wore his father’s only suit, which fit him perfectly. He had his father’s square face and his thin lips. Only his eyes were different. And everything else.” In “Desire,” the main character is a woman whose life has lost meaning: “She uttered the same sentences she always uttered; she wore the same clothes she always wore.”

One of the shortest stories in the book, “Anatomy,” forces a grim smile of satisfaction from the reader. In little more than two pages, we follow a sick mind as it contemplates committing a horrific crime. The resolution of the story is shocking, yet so apt that von Schirach earns a smile from the reader. One of the longer entries, “Children,” draws us in immediately: “Before they came to take him away, things had always gone well for Holbrecht.” Finding out why his world came crashing down is unsettling. Even more unsettling is Holbrecht’s reaction to his upended life: grim acceptance of

reality. He considers revenge, but his essential goodness makes the ultimate resolution all the more heart-rending, for a path destroyed cannot be recovered. In this story, however, amidst other stories in the book in which dignity is in short supply, a quiet dignity seems like victory.

Not every story hits the mark. “The Briefcase” is so baffling that the reader may at first believe a page of the story is missing. A foreigner driving a car through a checkpoint is pulled over and a briefcase containing vile contents is discovered; the man has no knowledge of what is inside the briefcase and the police cannot figure out his connection to the contents. Guilt is uncertain and the punishment at the end comes out of the blue. The context seems incomplete, the point ambiguous. But this is a rare misfire in a collection that otherwise shoots straight and true.

Despite the title of the collection, not every story in it concerns a guilty person. “Justice” involves a man ground under by the rules and procedures of the justice system, a victim not only of a misunderstanding but also of his own inattention and ennui. And not every story relies on a spare, simple narrative. “The Key” uses acerbic humor and plot twists to explain a Three Stooges-like series of misadventures as a hapless criminal is overwhelmed by the three simple things he must look after: “Key, Maserati, Buddy.”

Otherworldly at times, even as his language is simple and grounded in the everyday, von Schirach evokes a complex emotional response from his reader. By capturing important elements of his stories in a few words or sentences, he has produced a work of almost poetic sparseness. These stories reflect characters in the throes of hopelessness, helplessness, depravity, ennui, depression, frustration, unconscious submission to victimization—in short, the gamut of human emotions and reactions in response to crime, punishment, and guilt. There is much to contemplate in these 143 pages. **TFL**

JoAnn Baca is retired from a career with the Federal Maritime Commission. Her husband, Lawrence Baca, is a past president of the Federal Bar Association.