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BOOK REVIEW

AMERICAN JERICHO:
A BOOK REVIEW OF *THE HANGING JUDGE* BY
MICHAEL A. PONSOR

GIOVANNA SHAY*

We may be witnessing a turning point in American criminal justice. In 2009, for the first time since the early 1970s, the U.S. incarceration rate began to decline slightly.¹ The United States is still the world's leader in imprisonment,² but, increasingly, there are calls for change. U.S. Attorney General Eric Holder said in 2013 to the ABA: “too many Americans go to too many prisons for far too long and for no truly good law enforcement reason.”³ The Department of Justice has endorsed a slate of reforms to reduce federal drug sentences,⁴ and it seems like there

* Professor of Law, Western New England University School of Law. Thanks to WNEU Law Associate Dean for Academic Affairs Beth Cohen for helpful comments.

1. *Facts About Prisons and People in Prison*, SENT’G PROJECT [hereinafter PROJECT], http://sentencingproject.org/doc/publications/inc_Facts%20About%20Prisons.pdf (last visited May 14, 2014) (“The number of people incarcerated in state and federal prisons increased by 13% from 1,317,300 to 1,483,900 between 2000 and 2012, although the totals have declined modestly since 2009. . . . Between 2009 and 2012, the number of people in American prisons decreased by 2.8%.”).

2. *Id.*

3. Sari Horwitz, *Holder Seeks to Avert Mandatory Minimum Sentences for Some Low-Level Drug Offenders*, WASH. POST, Aug. 12, 2013, http://www.washingtonpost.com/world/national-security/holder-seeks-to-avert-mandatory-minimum-sentences-for-some-low-level-drug-offenders/2013/08/11/343850c2-012c-11e3-96a8-d3b921c0924a_story.html.

4. Matt Apuzzo, *Holder Endorses Proposal to Reduce Drug Sentences in Latest Sign of Shift*, N.Y. TIMES, Mar. 13, 2014, http://www.nytimes.com/2014/03/14/us/politics/holder-endorses-proposal-to-reduce-drug-sentences.html?_r=0.

might be bipartisan momentum for change in the federal system.⁵

This is the first sign of an incarceration slowdown following a three-decade long period of prison expansion.⁶ In the federal system, the Sentencing Reform Act (SRA) of 1984⁷ ushered in determinate sentencing and mandatory sentencing guidelines⁸ (which loosened somewhat when *United States v. Booker* rendered the guidelines advisory in 2005).⁹ Combined with a wide range of mandatory minimum sentences and a federal “three-strikes” provision,¹⁰ the SRA marked an era of increased federal harshness.¹¹ Some of the early objections to this “punitive turn”¹² were from members of the federal judiciary who were obliged to impose lengthy federal sentences.¹³

Judge Michael A. Ponsor sat in Springfield, Massachusetts during this thirty-year period—first as a U.S. Magistrate, and then as a United

5. Editorial, *A Rare Opportunity on Criminal Justice*, N.Y. TIMES, Mar. 15, 2014, <http://www.nytimes.com/2014/03/16/opinion/sunday/a-rare-opportunity-on-criminal-justice.html> (describing two bipartisan bills that would reduce mandatory minimum sentences for nonviolent drug crimes; provide judges with greater sentencing discretion; and permit federal prisoners to earn credit towards early release for participation in education and programming).

6. PROJECT, *supra* note 1.

7. Pub. L. No 100-182, 101 Stat. 1266.

8. See generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

9. 543 U.S. 220, 220 (2005).

10. Douglas A. Berman, *A Common Law For This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL’Y REV. 93, 99 (1999) (describing passage of numerous federal mandatory minimum sentences in the 1980s and 1990s and the passage of the federal “three strikes” provision, the Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, § 70001(2), 108 Stat. 1796, Pub. L. No. 103-322 (1999), amending 18 U.S.C. § 3559).

11. Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 523 (2007) (writing that the sentencing guidelines “have contributed to the increase in an already legendary incarceration rate in the United States . . . tripled the length of prison terms and resulted in the wildly disproportionate imprisonment of African Americans”).

12. Michael C. Campbell & Heather Schoenfeld, *The Transformation of America’s Penal Order: A Historicized Political Sociology of Punishment*, 118 AM. J. SOC. 1375 (2013).

13. See KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1719 (1992) (describing how judicial criticism of the guidelines came from “recently appointed judges, liberals and conservatives, and former prosecutors as well as former private attorneys”); Nancy Gertner, *Federal Sentencing Guidelines: A View From the Bench*, 29 HUM. RTS. MAG. (Spring 2002) (discussing how the guidelines had increased the severity of sentences, produced “grid-like,” automatic sentencing by judges; and increased the power of prosecutors); Kate Stith & Jose A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247 (1997).

States District Court Judge. In *The Hanging Judge*, he provides a notable, fictionalized account of the federal criminal system. Ponsor uses an imagined death penalty trial to explore themes including issues of race, prosecutorial ambition, and harsh drug sentences. Although narrated from a variety of perspectives, the true protagonist is the federal judge, David S. Norcross, who sometimes seems a captive of the system he oversees.

The novel centers around the trial of Clarence “Moon” Hudson, an African-American man facing federal racketeering charges for a drug-related gang killing that also claimed the life of a bystander, a nurse with family connections to law enforcement. A young gang member who acted as the driver for the shooter initially tells the police that Hudson was the triggerman. Under pressure from the Department of Justice, the U.S. Attorney for the District of Massachusetts seeks the death penalty. Hudson is a former gang member who has found a new life, enrolled in university, and is now married with a baby. Local police are all too eager to convict him, for reasons of their own. Although Hudson may be not guilty of the crime charged, we learn that he is not wholly innocent either. The novel weaves together a number of storylines: the anguish of the deceased nurse’s family; Hudson’s wife’s anxiety and grief; and the uneasy position of the government’s youthful key witness. The prosecutor and defense attorney must deal with the distinct pressures of their respective roles, and anti-death penalty activists take aim at the trial. Through it all, Judge Norcross presides with mixed feelings about the death penalty and the disparities of race and class that are apparent in the federal criminal legal system.

Like the character Judge Norcross, real-life Judge Ponsor has presided over a federal death penalty trial in Massachusetts,¹⁴ a jurisdiction that does not provide for capital punishment in state court. After the trial, Ponsor wrote about the experience for the *Boston Globe*, concluding that, even if the death penalty is constitutional, “[we] will inevitably execute innocent people.”¹⁵ In *The Hanging Judge*, he imagines a scenario in which it seems possible that an innocent man might be convicted, or even executed.

Although the plot of *The Hanging Judge* involves a death penalty trial, the novel takes on a broader range of criminal justice issues. Judge Norcross believes that sentences for federal drug crimes are often too harsh, but there is little that he can do about it. When his law clerk remarks on one particularly hefty sentence, Norcross replies, “Go talk to

14. United States v. Gilbert, 120 F. Supp. 2d 147 (D. Mass. 2000).

15. Michael A. Ponsor, *Life, Death & Uncertainty*, BOSTON GLOBE, July 8, 2001.

Congress. Two priors plus fifty grams of crack equals life. No discretion.”¹⁶ Norcross regrets the inequities of the system and recalls “the faces of the crushed, mostly brown men he sentenced four of five times a week.”¹⁷ The plot illustrates the operation of harsh federal recidivist provisions: at one point, it seems that even if Hudson beats the death case, due to his prior convictions he could receive a sentence of up to life imprisonment for the small amount of marijuana and cocaine that was found in his apartment at the time of his arrest.¹⁸

Set in western Massachusetts, *The Hanging Judge* has an authentic sense of place. In locales ranging from the hardscrabble “Flats” of Holyoke to tweedy Amherst and the courthouses of Springfield, western Massachusetts readers will recognize the Pioneer Valley.

Ponsor links the present-day plot of the novel to the real-life trial of Dominic Daley and James Halligan, Irish Catholic immigrants hanged in Northampton in 1806 on murder charges. Daley and Halligan were exonerated in 1984 by then Massachusetts Governor Dukakis on the grounds that the proceedings were “infected by . . . religious and ethnic prejudice.”¹⁹ In the fictional plot, the innocent bystander who is shot and killed is Ginger Daley, cast as a descendant of Dominic Daley. By connecting the present-day plot to the Daley and Halligan trial, Ponsor evokes the history of the Valley and alludes to mistakes that its communities may be doomed to repeat.

As my Western New England University School of Law colleagues and Associate Deans Beth Cohen and Pat Newcombe have written elsewhere in reviewing *The Hanging Judge*,²⁰ its textured depiction of the legal system makes it particularly appropriate as a community read. Here at WNEU, we used it in first-year orientation in Fall 2013—a great idea for which I cannot claim credit. As a teacher of Professional Responsibility and Criminal Procedure, I find the defense attorney’s conversations with his client about whether to testify and the prosecutor’s interactions with her boss about charging decisions to hold particular potential for classroom discussion.

The Hanging Judge is a work of fiction, and, although it involves capital punishment, it incorporates comic elements and ironic plot twists

16. MICHAEL PONSOR, *THE HANGING JUDGE* 8 (2013).

17. *Id.* at 33.

18. *Id.* at 77.

19. *Id.* at 370.

20. Beth D. Cohen & Pat K. Newcombe, *The Hanging Judge by Michael A. Ponsor – Capital Punishment – Is the Death Penalty Worth the Price?*, 62 CLEV. ST. L. REV. (forthcoming 2014).

that make it entertaining as well as absorbing. (Spoiler alerts: the law clerks save the day, and capital defense work takes its toll!) Judge Ponsor is careful to note, “no one should presume that the opinions expressed or implied in this novel by various fictional characters regarding the American justice system in general, or the death penalty in particular, are necessarily mine.”²¹

While reading the novel, however, I could not help but recall Judge Ponsor’s Convocation Speech at WNEU Law in August 2013. In his remarks, Ponsor spoke about the “sky rocket[ing]” incarceration rate since he began his career on the federal bench in 1984:

When did our beloved country—the land of the free and the home of the brave—turn into the nation that locks up more—many more—of its citizens than any other country in the world? I’m not sure when this transition took place, but it has happened on my watch, and I have definitely played a part in it. I have promised myself that at every public occasion when I speak, I will raise this issue as a gesture perhaps in some small way towards compensating for the role I’ve had in this process.²²

Judge Ponsor has written about these issues in his published opinions as well. In 2011, in *United States v. Watts*,²³ for example, he argued for retroactive application of the Fair Sentencing Act (FSA),²⁴ which “reduced the crack-to-powder cocaine [sentencing] disparity from 100-to-1 to 18-to-1,”²⁵ easing a much criticized source of racial inequality in the guidelines. In his opinion in *Watts*, Judge Ponsor wrote:

The broader question is whether federal trial courts will be required, for roughly the next five years, to perpetuate a congressionally recognized injustice. It is disturbing enough when courts, whose primary task is to *do* justice, become themselves the instruments of injustice, as in the history of our nation it must be acknowledged they sometimes have. But this discomfort reaches its zenith when the injustice has been identified and formally remedied by Congress itself. For a trial judge, the distastefulness of being forced to continue imposing a rejected penalty becomes unendurable in light

21. MICHAEL PONSOR, *THE HANGING JUDGE*, Author’s Note (2013).

22. The Honorable Michael A. Ponsor, Address at Western New England University School of Law Convocation (Aug. 26, 2013), *available at* <http://web7.streamhoster.com/wnec/video/law-library/201314/Law%20Convocation%202013-2014/Lawconvocation2013-14.html> at 23:05.

23. 775 F. Supp. 2d 263 (2011).

24. Pub. L. No. 111-220, 124 Stat. 2372 (2010).

25. *Dorsey v. United States*, 132 S. Ct. 2321, 2326 (2012).

of the fact that Congress acted partly because the injustice is racially skewed and, as everyone now agrees, will fall disproportionately upon Black defendants such as Mr. Watts.²⁶

The following year, the U.S. Supreme Court, in an opinion by Justice Stephen Breyer, concluded, as had Judge Ponsor, that the FSA applied to defendants who committed their offenses prior to the effective date of the Act, but who were sentenced after it became effective.²⁷

Judge Ponsor is not alone among federal judges in criticizing federal criminal justice policy. Indeed, federal judges famously spoke out about the length of federal sentences beginning in the mid-1980s with the implementation of determinate sentencing and the federal sentencing guidelines.²⁸ Since *Booker* rendered the guidelines advisory, some judges have advocated for a more muscular use of their newfound sentencing discretion.²⁹

A transition as big as the end of “mass imprisonment”³⁰ is spurred not only by legal argument and rulings, but also by story telling and shifts in popular culture. If the walls are beginning to crumble, it is because a chorus of voices has clamored for change. In his public remarks and judicial opinions, Judge Ponsor has been one of those voices. In *The Hanging Judge*, Ponsor tells a story that bears witness to the world in which he has lived for the past thirty years as a federal judge.

26. 775 F. Supp. 2d 263 (D. Mass. 2011).

27. 132 S. Ct. at 2335.

28. *See supra* note 13.

29. Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. POCKET PART 137, 140 (2006) (arguing that district court judges should exercise their discretion appropriately, reasoning that “national standards have always evolved from common-law principles by lower courts”); Nancy Gertner, *Rita Needs Gall—How to Make the Guidelines Advisory*, 85 DENV. U. L. REV. 63, 63 (2007) (“To a district court judge who has chafed under the mandatory United States Sentencing Guidelines regime, widely regarded as a failure in many respects, it has been a welcome change.”).

30. DAVID GARLAND, *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* (2001).