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BOOK REVIEW: *THE HANGING JUDGE* BY MICHAEL A. PONSOR—CAPITAL PUNISHMENT: IS THE DEATH PENALTY WORTH THE PRICE?

BETH D. COHEN* & PAT K. NEWCOMBE**

The Boston Marathon bombings raised again the discussion of the death penalty in Massachusetts. Although Massachusetts currently has no death penalty, the federal government can prosecute capital cases in Massachusetts.¹ In fact, U.S. prosecutors have decided to seek the death penalty in the case against Dzhokhar Tsarnaev, Boston Marathon bombing suspect.² Previously, in 2000-2001, United States District Court Judge Michael A. Ponsor³ presided over the first death penalty case in Massachusetts in nearly 50 years, *United States v. Gilbert*.⁴ Gilbert's trial marked only the third time that a federal capital case had gone to trial in a state without the death penalty.⁵ In 2013, Michael A. Ponsor published *The Hanging Judge*, a novel about a death penalty case.⁶

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¹ "[T]he supremacy of federal law make[s] it impossible to stop capital prosecutions in non-death penalty states." Eric A. Tirschwell & Theodore Hertzberg, *Politics and Prosecution: A Historical Perspective on Shifting Federal Standards for Pursuing the Death Penalty in Non-Death Penalty States*, 12 U. PA. J. CONST. L. 57, 86 (2009).

² Matt Apuzzo, *U.S. is Seeking Death Penalty in Boston Case*, N.Y. TIMES, Jan. 31, 2014, at A1, available at 2014 WLNR 2779223.

³ In 2011, Judge Ponsor took senior status. Michael A. Ponsor was appointed a United States Magistrate Judge in Springfield, Massachusetts in 1984, and in 1994 was appointed by President Bill Clinton to the United States District Court for the District of Massachusetts, Western Division, in Springfield, Massachusetts. Born and raised in Chicago, educated at Harvard and a Rhodes Scholar, Ponsor studied for two years at Pembroke College, Oxford. He graduated from Yale Law School, clerked in federal court in Boston, and worked in Boston for several years at various law firms, specializing in criminal defense. Ponsor was a trial attorney in private practice in Amherst, Massachusetts before he was appointed to the bench.

⁴ *United States v. Gilbert*, 229 F.3d 15 (1st Cir. 2000).

⁵ Elizabeth Mehren, *Ex-VA Nurse is Spared Death Penalty; Courts: Federal Jury Hands Down Life Sentence to Woman Convicted of Fatally Injecting Patients with Heart Stimulant*, L.A. TIMES, Mar. 27, 2001, at 5, available at 2001 WLNR 10497065.

⁶ MICHAEL A. PONSOR, *THE HANGING JUDGE* (2013). *The Hanging Judge* is published by Open Road Media. The book was first published in April 2013 by Massachusetts Continuing Legal Education (MCLE), a Boston nonprofit that publishes educational material for attorneys. A novel is clearly outside of MCLE's usual scope, and is the organization's first published novel. Judge Ponsor has directed sale proceeds to the Frank H. Freedman Scholarship Fund, which provides funding for financially needy attorneys to attend MCLE courses.

A novel about a death penalty case written by a judge who presided over a death penalty case—this is the intriguing hook for *The Hanging Judge*, providing the reader with a unique perspective. The book, a captivating and engaging read, is not only enjoyable and interesting to individuals, but it can easily be adopted as part of a community read in colleges and law schools.

In *The Hanging Judge*, Ponsor brings to bear his experience as the presiding judge in the actual case of nurse Kristen Gilbert. Gilbert was convicted in 2001 of killing, by lethal injection, four patients under her care at the Veterans Affairs Medical Center in Leeds, Massachusetts. Although Gilbert did not ultimately receive the death penalty, she is serving a life sentence without the possibility of parole. Ponsor felt a particularly heavy responsibility to ensure that both the government and the defense got a fair trial. His involvement in a case where a defendant faced the possibility of execution left its mark.⁷

In fact, in 2001, after the conclusion of the trial, Judge Ponsor did something somewhat unusual for a judge—he wrote a lengthy editorial about the death penalty.⁸

The experience left me with one unavoidable conclusion: that a legal regime relying on the death penalty will inevitably execute innocent people—not too often, one hopes, but undoubtedly sometimes. Mistakes will be made because it is simply not possible to do something this difficult perfectly, all the time. Any honest proponent of capital punishment must face this fact.

In saying this, I take no position on the death penalty per se. Our Constitution gives Congress the duty to weigh the costs and benefits of particular statutes, and I apply them as enacted. Should another capital case come my way, I will again preside, and perhaps find myself with the duty to order a defendant put to death. I accept this.

.....
I love our judicial system, and I am proud to serve in it. As I believe this trial demonstrated, no structure of law, anywhere or at any time, has tried so earnestly to protect the rights of those involved in it. But I have a hard time imagining anything as complicated as a capital trial being repeated very often, even by the best system, without an innocent person eventually being executed.

The simple question—not for me as a judge, but for all of us as citizens—is: Is the penalty worth the price?⁹

Michael Ponsor develops a compelling narrative to grapple with that very question in his first novel, *The Hanging Judge*. The book explores issues including the death penalty, mandatory sentencing, and racial bias, all against the backdrop of

⁷ Michael A. Ponsor, *Life, Death and Uncertainty to the Judge in Charge, the Murder Trial of Kristin Gilbert Offered an Unsettling Lesson—and Inescapable Conclusion—about the Ultimate Cost of the Death Penalty*, BOSTON GLOBE, July 8, 2001, at D2, available at 2001 WLNR 2280523.

⁸ *Id.*

⁹ *Id.*

love and loss and how the complexities of individual lives intersect in communities and courtrooms. *The Hanging Judge* provides a fictionalized narrative of a federal death penalty case as well as insights into the workings of the justice system. The book addresses the insurmountable challenges our society and legal system face in attempting to fairly implement the ultimate criminal penalty.

The events leading up to the trial begin with a drive-by shooting in western Massachusetts that ends the lives of a Puerto Rican drug dealer and a white nurse who volunteers at a neighborhood clinic. The police arrest a small-time African-American drug dealer, Clarence "Moon" Hudson, in the double homicide. Given the public outrage that ensues, the political decision is made to maneuver the case to federal court in order to seek the death penalty.

While the reader gains the perspective of Moon, the defendant, the reader also gains the perspective of Judge David S. Norcross, the presiding judge whose career was launched with the help of a family member with strong political connections. Faced with handling the first death penalty case in Massachusetts in 50 years, Norcross, a somewhat novice judge, has much to contend with in his attempt to provide both sides a fair trial. He faces a zealous prosecutor, an experienced defense attorney, and a public enraged by the cold-blooded murder of a young white middle-class mother whose relatives serve on the police force. As if this were not enough, Norcross must also contend with the outside media forces, anti-capital punishment activists, vindictive gang members, and other personal and political difficulties. All of these issues provide the opportunity to introduce readers to complex social justice issues.

The Hanging Judge adeptly presents the story through the eyes of memorable characters—not only Norcross and Moon, but the families of the accused, the two victims, police officers, witnesses, judicial clerks, and the attorneys. This is a strength of the novel—the reader gains perspectives on the impact of the death penalty trial from all of those involved.

The story of all of the people whose lives are impacted by the murder and the trial is told in a realistic way. Ponsor's real-life experiences as a judge of the highest caliber inform, but do not overwhelm, the reader. While Ponsor captures the realities of the court proceedings, he avoids distracting the reader with excessive legal details regarding trial procedures that are not essential to the story. For example, the defendant has just one attorney, while defendants in death penalty cases would normally have at least two attorneys; the case goes to trial in a matter of months, whereas it normally takes at least two years for a death penalty case to reach trial. However, these simplifications do not impact the reader's ultimate understanding of the sense of responsibility weighing on a judge's shoulders in a death penalty case. Ponsor conveys the inherent risk of error: an innocent individual may be executed, or a murderer may be set free.

Against the backdrop of this compelling contemporary story, Ponsor skillfully weaves in the true story of Dominic Daley and James Halligan, two Irish immigrants, executed in 1806 and exonerated in 1984. Ponsor dedicates the book to the memories of these two men who, after a one-day trial in a climate of vigorous anti-Catholic fanaticism, were wrongfully hanged in Northampton, Massachusetts. Either one of these stories alone would be sufficiently thought provoking, but juxtaposing the two parallel tales creates a fascinating comparison, as well as a ready vehicle to compare and contrast the inequities and complexities longstanding in our society and legal system.

The Hanging Judge provides the reader with the opportunity to examine the legal system in action—revealing the good and the bad. Ponsor says the law is about trying to do what is fair.¹⁰ He is very cognizant of the fact that the decisions he makes on the bench deeply impact people's lives in very real ways; it is a serious responsibility for him.¹¹

The book has much to offer individuals and groups. For example, Western New England University School of Law incorporated the book into orientation for first-year students. Students read the book during the summer before they arrived and discussion questions¹² were posted to help generate conversation among students at

¹⁰ "Pretty Good Justice", WGGB (May 7th, 2013), <http://www.wggb.com/2013/05/07/pretty-good-justice>.

¹¹ *Id.*

¹² Suggested Book Discussion Questions for *The Hanging Judge* by Michael A. Ponsor:

What are your thoughts about a federal judge who presided over a death penalty case writing a novel about a death penalty case? What does it say about the role of judges in public debate about important issues and the possible ethical implications on future cases?

What did you learn about the role of judicial law clerks from the book?

What are your thoughts about the role of politics in the judicial appointment process?

How did the book impact your views and confidence in the criminal justice system? Did reading the book impact your views about the death penalty?

What are your thoughts about the conversation regarding the likelihood of the death penalty for Mrs. Abercrombie?

What are your thoughts about the actions of Mrs. Abercrombie and what do think her character and actions add to the story?

What did you learn about the status of pro-se litigants?

What are your thoughts about the role of the prosecutor in the case? How do you think she balanced the political pressures with her ethical obligations?

What did you think about the role of the defense attorney? How did his past experience impact his representation of the accused? Did you think he was effective? Ethical?

What are your thoughts about the defense attorney's advice to Moon not to testify in his own defense? What do you think about the dialogue between Redpath and Moon about this issue?

What was your impression of the impact of police work on the investigation and charges against the accused?

What are your thoughts about the 5-week long jury selection process for selecting the first jury? What do you think about the declaration of a mistrial due to the information disclosed about the accused?

small group meetings. This had all of the benefits of a community read; students had a shared experience, a common language, and a vehicle to discuss diverse perspectives to help navigate their entry into a new and challenging academic environment. Students also had the opportunity to meet the author and ask him about the book during orientation. In addition to orientation, the book was incorporated into an upper-level externship seminar to generate discussion to enhance the experiential learning.¹³ The book also spurred a social justice tour in the Pioneer Valley that included a tour of a jail.

The Hanging Judge would also be appropriate for a community read at the undergraduate level or for use in courses such as criminal justice and sociology. In our experience, the book generated added enthusiasm for discussing an array of important social justice issues because it raised these issues in an accessible way. For example, the story of the Irish immigrants hanged in the early 1800s provides the reader with a glimpse of bias, religious intolerance, and the possibility of error in hasty justice. The contemporary saga offers insights into the disparate impact of race in rates of incarceration and in the implementation of the death penalty.

The statistics support that race, of both defendants and victims,¹⁴ has a significant impact on the death penalty.

[T]he most salient feature of the federal death penalty appears to be that it is used most frequently for inter-racial offenses where the defendant is black and the victim is white. Thirty-three of the 57 (58%) current federal death sentences involved white victims. And although minority-on-white killings make up an incredibly small fraction of the total number of murders, defendants convicted in these cases make up 23% of the federal death row.¹⁵

Judicial frustration with rates of incarceration and mandatory sentencing, another issue, is evidenced in *The Hanging Judge* when, after a particularly difficult sentencing hearing, Judge Norcross exclaims, “No discretion. I’m not a Judge. I’m an adding machine for crying out loud.”¹⁶ The quote provides a ready opening to explore not only the role of the judge, but also the issue of mandatory sentencing and the resulting over-incarceration in the United States. The statistics are staggering; the

Were you surprised by some of the staged interactions during the trial? For example, the interaction between the Assistant U. S. Attorney and the police officer, Alex Toricelli, when she wrote notes to him asking him to nod or smile for the benefit of the jury? How important is one’s stage presence at trial?

What was your impression of the writer’s use of the real-life story of two Irish immigrants, hanged after a one-day trial in Northampton, Massachusetts in 1806 and exonerated in 1984, as a parallel to the contemporary drama?

¹³ Professor Harris Freeman incorporated *The Hanging Judge* into the Externship Seminar during the fall 2013 semester at Western New England University School of Law.

¹⁴ DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY (Apr. 10, 2014), available at <http://deathpenaltyinfo.org/documents/FactSheet.pdf>.

¹⁵ G. Ben Cohen, Symposium, McCleskey’s Omission: The Racial Geography of Retribution, 10 OHIO ST. J. CRIM. L. 65, 76-77 (2012).

¹⁶ MICHAEL A. PONSOR, THE HANGING JUDGE 12 (2013).

United States holds the unenviable position of “world leader of imprisonment” with more than 2.2 million people incarcerated, a 500% increase in 30 years.¹⁷ “From 1925 through 1975, our incarceration rate was about 160 per 100,000 persons. Today it is nearly 700 per 100,000. Meanwhile, the corrections system costs us \$80 billion a year.”¹⁸ Furthermore, a 2013 report by The Sentencing Project suggests that one in every three black men will go to prison in his lifetime.¹⁹

The Hanging Judge is unique in its depiction of the roles of law clerks and pro se litigants in the judicial system. Both of these characterizations lend an authentic, informative presence to the story. Frank and Eva, Judge Norcross’s two clerks, capture the daily workings of law clerks in a judge’s chamber. Traditionally, judges rely on law clerks to help manage the challenging court loads they face. Clerks have an opportunity to have a close working relationship with the judge and their staff, and are privy to the difficulties of a judge’s daily responsibilities. Duties include wading through numerous pleadings and motions filed in cases, carefully reading attorneys’ briefs, conducting their own research, drafting and editing legal documents, including jury instructions, and recommending how cases should be resolved—often by writing a memorandum to the judge or even a draft opinion. The reader also sees how clerks may serve as sounding boards for their judges. For the over 3,000 judicial clerkships that are filled each year by new law school graduates, *The Hanging Judge* offers a rare behind-the-scenes perspective.²⁰

Regarding pro se litigants, the characterization of Mrs. Abercrombie offers an additional glimpse into the inner workings of the court system. The reader is exposed to the practical, moral, and ethical issues when a judge interacts with a self-represented party. Dealing with a pro se litigant can be frustrating and communication difficulties abound, especially when there are mental health issues. While they may disrupt the efficiency of the courts with frivolous lawsuits, and harass or abuse the judicial process, judges, clerks and lawyers do have an obligation to help pro se litigants through the trial process. Judge Norcross is very accommodating to Mrs. Abercrombie, and it was wise of Judge Ponsor to include such a character in his story, as the rate of self-representation is rising. Litigation is costly, and there is an increasing population that cannot afford attorney assistance.²¹ Indeed, one of the criticisms of the legal profession concerns this “justice gap,”

¹⁷ *Incarceration*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107>.

¹⁸ David Cole & Marc Mauer, *Reducing Crime by Reducing Incarceration*, WASH. TIMES (Nov. 14, 2013), <http://www.washingtontimes.com/news/2013/nov/14/cole-and-mauer-reducing-crime-by-reducing-incarcer/>.

¹⁹ THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE (Aug. 2013), available at http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf; see Giovanna Shay, Book Review, *American Jericho—Michael A. Ponsor, The Hanging Judge*, 36 W. NEW ENG. L. REV. (forthcoming 2014).

²⁰ NALP, JOBS & JD’S: EMPLOYMENT AND SALARIES ON NEW LAW GRADUATES—CLASS OF 2012 (2013).

²¹ Terry Carter, *Judges Say Litigants are Increasingly Going Pro Se—at their Own Peril*, ABA JOURNAL (July 12, 2010), http://www.abajournal.com/news/article/judges_say_litigants_increasingly_going_pro_se-at_their_own_.

where there is a marked difference between the level of legal assistance available and the level that is necessary to meet the needs of low-income citizens.²² This imbalance is one of the egregious flaws of our judicial system, weakening our underlying foundation of equal justice under the law.

Although a novel, *The Hanging Judge* communicates the controversy behind the death penalty in a realistic, compassionate manner, leading the reader to critically examine the death penalty as well as many other aspects of the criminal justice system. The book is both authentic and accessible and readers are given a rare glimpse into the fairly enigmatic environs of a judge's chambers. It is unusual to experience, as a reader, the perspective from the bench. Ponsor's book has already received praise from Pulitzer Prize winning authors Tracy Kidder and Madeline Blais, as well as Jonathan Harr, author of the widely acclaimed *A Civil Action*. Kidder lauds Judge Ponsor's work of legal fiction because it informs "in the best way—that is indirectly— . . . about the facts that ought to inform debate on the death penalty." Blais called *The Hanging Judge* "an ode to the law in all its glory and a reflection on its sometimes tragic limitations." Harr praises *The Hanging Judge* as it "entertains, as a good novel should, but even better, it also informs, as only the best ones do." *The Hanging Judge* offers an example of storytelling that encourages readers to reflect on the important legal, social, and moral issues that are at the core of the novel's narrative.

²² See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET LEGAL NEEDS OF LOW INCOME AMERICANS (Sept. 2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.