

Finding Certainty and Often Solace Elusive

BY PRESIDING JUSTICE ARTHUR GILBERT*

RUSSELL CANAN, GREGORY MIZE, AND
FREDERICK WEISBERG (EDITORS)

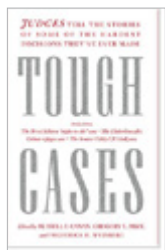
TOUGH CASES:

JUDGES TELL THE STORIES
OF SOME OF THE HARDEST
DECISIONS THEY'VE EVER MADE

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THEY PROFOUNDLY INFLUENCE our lives. They can be found all over the world. When not fulfilling their mission, they blend in with the general populace so as to be undetectable. They are young, old, of different ethnicities, political points of view, personalities and dispositions. They are fat, lean, gregarious, cranky, loquacious or taciturn, sometimes both. Their cover is so complete that even among themselves they can rarely detect that a stranger is one of them.

But when they meet and reveal themselves, there is an immediate unspoken mutual sympathy, an instantaneous bond. They know the emotions, the trials and tribulations (pardon the cliché, yet there is no better way to say it) each has endured from time to time. Their nods of understanding, their occasional smiles, reflect the unexpressed satisfaction that comes from carrying out their special mission.

Is there a name for this cult of individuals who mingle among us and deeply affect our lives? Yes, I know them well, because I was once one of them. They are called . . . trial judges.

Certain members of this unique society now reveal their innermost feelings and secrets in *Tough Cases: Judges Tell the Stories of Some of the Hardest Decisions They've Ever Made*. Their riveting accounts of trials over which they have presided compel me to reveal what I have long suspected and suppressed for years: trial judges have the hardest and most demanding job in the judiciary. Would appreciate it if you keep this under your hat.

The existential philosophers wrote that all human beings are “condemned” to make choices. Judges have chosen a profession that demands of its members that they make reasoned choices in deciding which side prevails in

litigation. The compelling chapters in *Tough Cases* reveal what many in the legal profession know but seldom articulate — judges are students who must make decisions. They rely on the law written in statutes and cases and the arguments of counsel urging the interpretation and application of the law to the facts in the case at hand. And let’s add intuition and commonsense to the mix.

In *Tough Cases*, judges share their innermost feelings, their fears and doubts about how to rule. They reveal their emotions about the effect their decisions will have on litigants and the public. One thing they have learned: certainty and often solace can be elusive.

Judge George Greer in Florida explains how he arrived at his agonizing decision to terminate life support in the famous Terri Schiavo case. He weighs the omnipresent emotional conflicts, the opposing pleas of Terri’s parents, and her husband, the evidence of her medical condition, application of the law, and what Terri would have wanted. How can any one human being make this judgment in light of so many competing points of view? And in the background, there are pleas of religious and political leaders from all over the world and the cacophony of the press. Solomon would understand. Judge Greer received threats and was called a terrorist and murderer by a few members of Congress. We all know how he ruled, but in so doing he raised a significant point: “As much as you read, and as well as you listen, and as hard as you think about a case, for a good judge there is always doubt.”

Judge Greer tells us he is a “Southern Baptist at heart,” even though the pastor of his church told him to leave the church after his decision. Whatever his personal religious and philosophical beliefs, Judge Greer was committed to one certainty — the issue in the Schiavo case “was not a religious question; it was a legal question.” Judge Greer is the epitome of Socrates’ ideal judge. He did his job.

Recently appointed Los Angeles Superior Court Judge Michelle M. Ahnn tells the compelling story of her transition from public defender to the bench. During her first year, seemingly routine matters were as difficult as deciding guilt or innocence, like, whom to release on bail? Many of us grappled with that in the trial court. Judge Ahnn asks herself whether a female defendant accused of domestic abuse is less of a flight risk than a similarly charged male defendant. She worries about unconscious biases. Good for her. She struck a responsive chord with me when she reveals that making decisions each day compelled her to

* Justice Arthur Gilbert is Presiding Justice of Division 6 of the California Court of Appeal, Second District and writes the “Under Submission” column for the *Daily Journal*.

avoid restaurants with large menus requiring yet more decisions. Now that her first year has passed, Judge Ahnn makes decisions more easily. But I know how she feels. I have been a judge for 45 years and still have trouble deciding which socks to wear each morning.

Judge Gregory E. Mize served as a judge of the Superior Court of the District of Columbia. He presided over a dependency case involving a mother who he concluded suffered from Munchausen Syndrome by Proxy. Because the mother's illness placed her minor daughter in danger, Judge Mize awarded custody to the father, and allowed monitored visits with the mother and daughter. The daughter fared well with therapy, but the mother did not: her illness progressed and a few years later her body was found washed ashore in the Chesapeake Bay.

Years later Judge Mize and the now-grown daughter met. She became a dental hygienist, has many friends, and lives a happy and productive life. Many judges have decided similarly wrenching dependency cases, and moved on to the next case. Judge Mize points out he has made thousands of decisions in tens of thousands of cases, yet this case still haunts him. It prompts him to think about questions that trouble many of us, "questions about our human condition and the limits of the judicial office."

Remember "Scooter" Libby? He was an assistant to President George W. Bush and at the same time chief of staff and assistant for national security affairs for Vice President Cheney. There were rumors and allegations concerning whether Iraq sought to purchase uranium from Niger. If true, they would support President Bush's desire to pursue a war against Saddam Hussein. A former ambassador, Joseph Wilson, was sent to Niger to investigate the truth of the allegations concerning the alleged transaction in Niger. He reported that the allegations were false. Shortly thereafter, Wilson's wife, Valerie Plame Wilson, was revealed to be a CIA employee with a covert position. Was this leak revenge for embarrassing the president for his contention that Saddam Hussein had weapons of mass destruction? Following another investigation, Libby was charged with obstruction of justice for lying to the FBI and a grand jury about his knowledge of Valerie Wilson's CIA employment.

Judge Reggie B. Walton was a U.S. District judge for the District of Columbia when he was randomly assigned the case. Judge Walton's account of the trial grabs the reader by the throat and doesn't let go. He points out that a seemingly routine case can be challenging. This happens when the facts have political implications, the public is "polarized" and the accused has generated notoriety. Add to that, controversial expert testimony, a defendant who does not testify, and motions implicating the federal Classified Information Procedures Act that protects unnecessary disclosure of classified information. After the jury convicted Libby of some of the charges, how does Judge Walton arrive

at the appropriate sentence? Should letters from Henry Kissinger, Donald Rumsfeld, and John Bolton, to name a few well-known figures, matter? Despite the political pressures, Judge Walton did what was required of him when he took the oath of office. He assured that Libby received a fair trial and sentenced him accordingly. President Bush commuted the prison sentence. Last year the current president pardoned Libby. But that is all beside the point.

In a chapter titled "A Quiet Grief," Judge Lizbeth Gonzales recalls a case when she sat in the New York City Housing Court. A father lived with his autistic son in an apartment. They both appeared in court for the hearing in which the father complained about outstanding repairs not made to his apartment. The son's odd behavior in the courtroom prompted Judge Gonzales to call in other agencies to determine if the boy was living in a safe environment. Those agencies determined the boy was safe. Years later when Judge Gonzales was sitting in the City Civil Court, she read in the newspaper that the father had slashed the son's throat and left him to die in the bathtub. Over the years there had been hearings in family court concerning whether the father should have custody of the son.

Judge Gonzales shares with us her sorrow and regret over what later happened to the son. She points out that when the case first came to her, her jurisdiction was limited to rent and housing repairs. She recognizes that investigators and social workers are bound by protocols and legal constraints. She agonizes that she could not have done more. She points out what we all know: judges decide motions, make rulings, adjudicate trials, and do their best to ensure that justice is done. But they do not have limitless power. She still wonders if she could have done more to save the son. And she reveals that "like litigants, and lawyers, we too suffer when things go wrong." Judge Gonzales still grieves for the son. That is why people like her belong on the bench.

It is difficult to imagine the convoluted intricacies of the world-famous Elian Gonzalez case. Elian and his mother fled Cuba in a boat that capsized off the shore of Florida. The mother drowned but Elian was saved. At the time, Judge Jennifer D. Bailey was a family law judge in Miami. The case, which began as a custody matter before another judge, wound up in Judge Bailey's court when the original judge and others had to be recused. In what on the surface would be a simple case became complicated by federal law, immigration agencies, and massive public, media and political pressure. Pressure from thousands of protestors and from prominent political leaders demanding a particular outcome raised the stakes even though most had not the slightest idea of what the case was about. Judge Bailey did what was required of her. She decided the case according to the law. Federal orders to return Elian to his father controlled. She lost and gained some friends over her

decision. But she concludes by modestly refusing to take praise for resisting political pressure because that “is what judges are supposed to do.”

Remember at the beginning of this review I wrote that trial judges have the most difficult job in the judi-

ciary? I also facetiously suggested you keep it under your hat. Just in case anyone took me seriously, let us publicly praise trial judges and acknowledge their significant contribution. The engrossing narratives in *Tough Cases* remind all of us: “always seek and speak the truth.” ★