

Focus Questions for “Tough Cases”

These focus questions are intended to aid you in the active reading of “Tough Cases,” one of the books selected by the faculty of the Syracuse University College of Law to help prepare you for your time studying law. This book was chosen by the Professor Mary Szto.

The questions are written with the intention of helping you. You won't be tested on your answers and you can feel free to read the book without them should you choose. And there aren't any correct answers for these questions. It's more important to question the text and reflect on what the answers might be than to seek for a definitive “correct” answer.

The questions are designed to model the process of active reading, which is a skill with which you should already be familiar. Active reading is a crucial skill for doing well in law school, and the more adept you become at it before you come to school, the better you will do during your time here. If you would like to learn more about active reading, there will be content discussing the topic in more depth on the Legal Writer's Toolkit site.

You shouldn't assume that these questions indicate a point of view or that they're trying to steer you to answer them in a particular way. Rather, they're intended to provoke you to think critically about what you read and to help you form your own conclusions, based on the information the author gives you about the topics discussed in the book.

We hope you enjoy “Tough Cases,” and we look forward to meeting you and working with you over the course of the next few years.

INTRODUCTION

1. Have you been in a position where you had to make important decisions about someone's life? Your own life? If so, how easy was it for you to make those decisions? How easy is it for you to make decisions in general?
2. Had you considered that state court judges are under potential political pressure when they make their decisions? That the judge might be voted out of office at the next election if the majority of voters don't agree with the decision the judge made? Is the federal system - where judges derive lifetime protection from political influence - superior? Or is it better to have judges be responsive to political pressure?
3. As you read these descriptions of judging decisions, try also to put yourselves in the position of the lawyers - for both sides in the litigation - and ask how you would feel arguing for, or against, a position that conflicts with your personal views. How much should a lawyer's personal beliefs be considered when the lawyer is advocating a position on behalf of a client? Should lawyers who disagree with a client's position seek not to represent that person?

TERRI'S JUDGE

1. Why does the judge start this chapter by telling us "It's Palm Sunday?" He also gives us the date, so why isn't that sufficient to tell us when the events he's describing took place? Do you think there will be significance in his use of a religious celebration to locate the events he's about to describe?
2. How would you react to being called "a terrorist and a murderer" by the Majority Leader of the United States House of Representatives? Is this type of rhetoric appropriate when describing a sitting judge in this country?
3. Based on what you know at the moment about the Constitution, how appropriate do you think it is for federal courts to be allowed to intervene in a final state court decision? Are there any circumstances when this type of action is appropriate? Inappropriate?
4. The judge describes the two questions he had to answer in order to render a decision in this case: was Terri Schiavo in a persistent vegetative state and, if so, what would she want done? Do these seem like hard questions or do you agree with the judge that it is the responsibility of making the decisions that is hard, not the decisions themselves? How difficult would you find it to make these decisions?

5. Do you see why the right to deny medical treatment flows from a Constitutional right to privacy? Had you considered that you had such a right or that it might be applied even when you are incapable of addressing the issue yourself?
6. The judge describes the testimony of those who felt Terri Schiavo would want her treatment to cease if she was in a persistent vegetative state and those who felt she would want her treatment to continue. Based on what you read here, how would you rule? What's the basis for your decision? Do you agree with the judge's reasoning or do you come to a different conclusion? The same conclusion as the judge but for different reasons? To what extent do your personal beliefs influence your thinking?
7. In describing his responses to the court-appointed expert's conclusion that there were no treatments that would improve Terri Schiavo's quality of life, the judge writes "I would have loved to hear otherwise." Should a judge's personal wishes have a role to play in a decision like this? Were you surprised to read what the judge wrote here?
8. The judge describes receiving death threats and observes that putting on a bulletproof vest became part of his daily routine. How do you respond to this? Is it ever justifiable to threaten a judge's life in order to attempt to obtain a particular result?
9. Had you considered, before the judge made the connection, that the judge's decision in the Schiavo case would be related, at least in some people's eyes, to the Supreme Court's Roe v. Wade decision? Are you surprised to read that there was little public response to a case in which a man had his life-support withdrawn by the same judge?
10. The judge describes what he considers to be a calculated attempt by the legislative and executive branches to undermine the judicial branch of government. Was this an appropriate action for the Governor and the legislature to have taken? Is it ever appropriate for the executive and legislative branches to work together to wrest control of a matter away from the judicial branch?
11. The judge describes the Governor's and the Legislature's actions as "a violation of foundational legal principles." What foundational principles do you think those might be?
12. Based on what you know about the law, and what you've read about this case, do you believe that S. 686 was unconstitutional? If the bill gave the federal courts jurisdiction to hear the Schiavo case, why do you think the federal courts who were asked to hear the case declined to do so on the basis of lack of jurisdiction? Would it have been better for the courts to consider the Constitutionality of the bill?

13. The judge says the decision in this case was a legal one, not a religious one. Do you agree? Are courts qualified to answer religious questions? Should they be?

ROUGH JUSTICE

1. The judge here describes a situation where he anticipated a miscarriage of justice because he would have found the defendant not guilty of both charges of which he was accused, and he was sure the jury would find the defendant guilty of at least one charge. Is it a miscarriage of justice if a judge disagrees with a jury's verdict? Should the judge be able to intervene and change the jury's verdict when he disagrees with it?

2. Having read the judge's description of the facts of this case, what is your sense of how you would have ruled were you the judge? Are you surprised that the jury is contemplating a lesser included offense?

3. The judge describes the way some plea bargaining is conducted, with the judge "twisting arms." How do you feel about this process? Is it appropriate for a judge to be engaged in the plea-bargaining process, or do you prefer the approach taken in the rules the judge describes where the judge "must not participate in [the] discussion?"

4. After the judge's intervention, the parties came to a plea agreement that would likely result in no jail time for the defendant. Is this a fair result, in light of what you know about the case? How would having a criminal conviction for Assault with Intent to Kill affect the rest of the defendant's life? His ability to get a job?

5. Once the judge realized he had gone too far in encouraging the plea deal, should he have stopped accepting the plea from the defendant? Did the judge go too far in encouraging the defendant to plead guilty?

6. If the jury had not left the form in the jury room would the judge have granted the motion to withdraw the guilty plea? Why did the prosecution decline to re-prosecute the case? If you were the judge in a similar case, having read about this case, would you encourage the defendant to consider taking a guilty plea?

A JUDGE'S HIDDEN STRUGGLE: OVERCOMING JUDICIAL CULTURE

1. The judge describes various presumptions the law used to use when determining how much time children should spend with each parent. Do you think these presumptions have any validity? Is there a valid presumption that justifies placing children with their mothers over their fathers? What support can you muster for your position? Or should each case be decided on the individual facts presented by the parties?
2. Having read the judge's description of how child custody cases are tried, do you agree with her assessment that these cases are often not about the child's best interests but are instead about one parent "winning" and the other one "losing?" Is there any way to avoid such a process and still achieve a result in the best interests of the child?
3. In this case, the mother states that she needs her child to help keep her sober. Is this an argument made in the best interests of the child or in the best interests of the mother? If it's an argument made in the best interests of the mother, is it an appropriate argument? If the mother had a lawyer in this case would she have made this argument?
4. In considering this case, the judge recalls her own childhood and raises the concerns she had as a child as concerns she now has for the way the child in the case before her will be treated. Should judges allow such personal recollections to form part of their decision-making process? Should the judge have revealed her own childhood experiences to the parties and the attorneys in this case and allowed them to question her about her childhood?
5. The judge says that judges must rely on their life experiences as well as the law in making their decisions. When she made her decision in this case, was it her life experiences that led to her ruling? Or was it the new information about the parents' relapses into drug and alcohol use, together with the mother's prison sentence and the felony charges against the father, that caused her to rule the way she did? Given the facts of the case, and the existence of stable grandparents who were willing to take the baby, was there realistically another decision the judge could have made?

UNEASY LIES THE HEAD THAT WEARS A CROWN

1. The judge describes a practice of a judge calling a lawyer before a hearing and soliciting a campaign donation. Are you surprised to read that this was a common practice? How do you feel about the practice? Should judges be elected or appointed to the bench? Are their potential abuses to both approaches? What are they?
2. Law is, essentially, a self-regulating business, with lawyers deciding what is and is not permitted behavior. Given what the judge says about Texas lawyers rejecting a rule change that would prohibit sexual relations between an attorney and a client, should lawyers continue to have the power to set their own rules?
3. The judge describes why this lawsuit could not settle. Do you understand the reasoning the judge gives? Did you know that malpractice insurance policies typically only cover negligent acts and don't cover intentional acts? Without insurance coverage, any settlement would have had to be paid completely out of the attorney's pocket, and in a \$3.5 million case, the settlement amount would likely be very high.
4. The judge discloses that a close friend of his had told him that the lawyer being sued for rape in the case before him had attempted to have sex with her. Should the judge have disclosed this information to the parties? If so, when: before trial? Before accepting the case as a judge? The judge decided not to reveal his friend's comment, because it was not directly relevant to something the lawyer said under oath. Do you agree with the judge's decision? What do you think the judge should have done?
5. Having read about the way the judge conducted the trial and his reasons behind the rulings he made, do you agree or disagree with his rulings? Should the judge have granted a new trial, despite the possibility of remittitur? Are you surprised to learn that judges remember old cases and can even have nightmares about them?

BRAVE JENNY

1. Have you ever heard of Munchhausen's Syndrome by Proxy? If not, are you surprised to learn of such a diagnosis? Can you see why the potential of this condition causes the legal system concern?
2. This case re-introduces you to the concept of the court working to determine "the best interests of the child." This, in fact, is the legal standard that governs almost all legal decisions involving children's welfare. If you were the judge in a case like the one described here, would you err on the side of caution in order to protect the child's best interests or would you insist on strict evidentiary proof before reaching a decision? Regardless of what you think you would do, what should judges do when confronted with a situation like this?
3. Should the judge have made a decision in the initial hearing without meeting and speaking with the child? Can you see why the judge might have avoided such a meeting when ruling on the mother's medical condition?
4. Put yourself in the judge's position. Having learned that the mother is not receiving therapy for her condition, that she denies harming her child, and that she is telling her child that she'll be coming to live with her soon and is offering "wrapped candy" to her, would you terminate her visitation rights? Modify them to include greater security for the child? Condition them on the mother agreeing to receive therapy and actually receiving it?
5. Given everything you know at the end of the "why or why not" hearing, what would your decision be? Would you allow visitations? Why? If you agree the judge was right to deny visitations, do you agree with the judge's reasons for his decision or do other factors come into play for you?
6. The judge writes that he made hundreds of thousands of decisions in tens of thousands of cases, and yet he remembered the intimate details of this case clearly. Are you surprised to learn that judges take such a personal interest in their cases? Do you think the judge left such an interest in all of his cases? If not, what is so special about this case?

EVERY CASE IS A TOUGH CASE FOR A NEW JUDGE

1. This is the second time you've read of a judge taking a deep breath before beginning a day on the bench. Did you expect that judges would do this, or did you think that they would be so used to the daily activities of being a judge that they wouldn't stop and think about what they do each day?
2. The judge writes about handling thirty-five to sixty cases a day. Are you surprised by that number? How much time do you think the judge spends on each case if she hears sixty cases a day?
3. The judge writes of domestic cases where the victim wants the alleged perpetrator to come home. Are you surprised by this? Did you assume that victims of alleged domestic violence would always ask that the perpetrators be kept away from home?
4. The judge, an experienced and knowledgeable trial lawyer, describes sleepless nights preparing for a trial. Does this surprise you? Did you assume that the rulings judges make would come easily to them?
5. Have you ever suffered from "decisional fatigue?" Can you see why a judge might not want to go to a restaurant with a large menu of food options?

UNITED STATES v. I. LEWIS "SCOOTER" LIBBY

1. Federal judges are supposed to be insulated from the political process by the Constitutional protections of Article III. And yet Judge Walton starts this chapter with an acknowledgement that a case with political implications can be hard for a judge. Are you surprised by this? Did you expect this to be true? Judge Walton's reaction to political cases is worth remembering when you study Article III in law school.
2. The judge mentions the possibility that the prosecutor can taint a jury pool by having a press conference in which the prospective evidence in the case is outlined. Do you see the danger in this? Do you think the free flow of information and the need for the public to be informed outweighs this concern?
3. The judge writes of the sequestration process. Given the issues in this case, do you think the judge got it right in ordering partial sequestration? Should he have ordered total sequestration? None at all?

4. Before reading about the thinking that went into the judge's sentencing decision, consider what you think was an appropriate sentence for Mr. Libby's actions. Don't worry about an actual sentence but consider if he should have received any jail time, some jail time, or a lot of jail time. Now read what the judge did and compare it to what you would have done. Did you change your mind? Do you agree or disagree with the judge's sentence?
5. Does the fact that Mr. Libby was an attorney change your view of the correct sentence? Should it?

A QUIET GRIEF

1. This chapter, juxtaposed with the last, takes you from the highest level of trial court proceedings - with batteries of experienced and skillful trial lawyers on both sides and months of intensive, complex, written legal analysis - to Housing Court. And yet for the parties in both cases the stakes are incredibly high, and for the family in Housing Court they're even higher than they were for Mr. Libby: there's no likelihood of Presidential help if things go against them. Do you see why attorneys and judges must always do their best work for every case that comes before them?
2. Would you have realized that the father was manipulating the situation by using his son as a distraction? If you were the judge, how would this realization affect your ruling in this case, or would you ignore it?
3. This case had a tragic outcome, and the judge writes that she still grieves for Aaron. Are you surprised that judges are emotionally connected to the cases that come before them?
4. The judge here was constrained by the jurisdictional limitations imposed by her position. Should that be a comfort to her? Should she have done more to protect Aaron? Was there anything else she could do?

CAN AN ELECTED JUDGE OVERRULE NEARLY A MILLION VOTERS AND SURVIVE?

1. Unlike Judge Walton in the chapter about Mr. Libby's case, Judge Alsdorf, as a state court judge, has no Constitutional protection and could be voted out or recalled if the public disagreed with his decision. Should that affect how a judge rules? Does it? Is this appropriate?
2. Were you in Judge Alsdorf's position, would you have transferred the case to a retiring judge? Why? Why not? Should a judge avoid a controversial case simply to avoid being potentially being voted out of office? If a judge who could have avoided the situation and did not is subsequently voted out, has the judge harmed the stability of the judiciary in the state?
3. The judge discusses some principles that have helped him as a judge. Do these principles also apply to lawyers? Lawyers have an obligation to be vigorous representatives of their clients. Should they also strive to be fair? Or is that something best left to the judge?
4. How would the existence of the affidavit of prejudice affect your conduct as a judge on a case? If it would change it all, does that suggest that you should not be hearing the case and that the party filing the affidavit is correct?
5. In talking about how he crafted his opinion, the judge explains that he wrote so that the general public would understand his reasoning. And in the examples he gives, and the explanations he gives for how he wrote, you can see that the judge is trying hard to persuade the general public of the rightness of his opinion. Is this because he is concerned about being voted out of office? Or is the judge writing this way because he genuinely thinks it's important that everyone understand his ruling? Should judges (and lawyers) use a writing style that makes their opinions easy for everyone to understand or should they only write for lawyers and other judges?

WALKING WITH MY ANCESTORS: JUSTICE FOR SALMON RUNNING

1. This chapter is an important reminder that the United States is not just home to federal and state courts. There are numerous tribal courts, hearing issues of importance to everyone who lives under their jurisdiction. We might not spend much time in law school on their decisions, but we should never forget their existence or their importance. Before reading this chapter, did you know much about tribal courts? Anything?
2. Why does federal law cap the length of jail time a tribal court can impose? Are tribal courts truly free to work justice in their communities if the federal government imposes such limitations on them?
3. Although this case is happening in tribal court, the issues and the decisions facing the judge are identical to those in all criminal courts. Did you know how the bail bond process works? If you were the judge, what would you have done about setting bail for this defendant?
4. The judge here describes the process by which she reached her sentencing decision. In some details, it's a process that's very specific to the judge and the culture in which she lives and works. In essence, though, there is no difference between this judge's process and a judge who prays, consistent with that judge's religious beliefs, for guidance, or one in which a judge seeks some secular way to find wisdom when making a decision. Had you imagined that judges would struggle to make decisions, or did you expect judges to have no difficulty when making decisions that have a profound impact on people? Does this make you interested in perhaps becoming a judge one day or do you think you would not enjoy the responsibility?

CRAZY OR CRUEL: THE TRIAL OF AN UNEXPLAINED FILICIDE

1. The judge describes the lawyer from the Public Defender Service as "among the best criminal defense attorneys practicing in the District of Columbia courts." That's an opinion likely to be shared in every court in the country: Public Defenders are usually thought of very highly by anyone who has seen them work. Given the opposite view of Public Defenders often offered on television and in books, are you surprised by this? Why do you think it's true that Public Defenders are so highly regarded?
2. The judge writes of the legal test to determine if someone is competent to stand trial. What did you know of this test? Do you feel the bar is set too low or too high for a defendant to be declared competent? Do you agree with the test or would you prefer it if the law employed a different measure of competence?

3. Should a court allow a person to make decisions that are not in her (in this case) best interests? How about in a case where there is strong evidence of insanity but where the defendant refuses to rely on an insanity defense?
4. Put yourself in the judge's position and consider the evidence. How would you rule on the insanity issue?
5. Why might the judge have felt a knot in his stomach about the defendant deciding to waive a jury trial?
6. Before reading what the judge decided, but having considered his synopsis of the evidence, how would you rule?

BUILDING JUSTICE IN KOSOVO

1. Before reading this chapter, had you considered the difficulty the UN faces when confronted with the need to create a country's legal system? Before reading too far in this chapter, what type of system would you propose for a country with no functional legal system? Would it be based on the Napoleonic Code model that's prevalent in Europe? Or would you choose the Common Law model that's the approach adopted in most English-speaking countries, including the United States? Who would be the lawyers in your system? Who would be the judges? How would you train them? And who would substitute for them while they were undergoing training?
2. The judge writes of the courtroom in which he held cases as being "wholly unsuited for judicial hearings of any length." Have you given any thought to the architecture of court rooms or why they're designed the way they are? What should the ideal courtroom look like? What equipment should it have?
3. What sentence would you have given to Arben Ramadani, given the evidence the judge presents in this chapter?
4. The judge's discussion of the Basha trial brings out many problems of the jury trial process and shows how important it is for cases to be decided on the evidence and not the biases of jurors or threats to those jurors by defendants. Do the facts of how the trial proceeded suggest some additions to your thoughts about courtroom design?
5. Had you considered the importance of the voir dire process before? Have you ever participated in voir dire? What questions would you ask a prospective juror to identify any biases that juror might have?

ELIÁN

1. You might be too young to remember the Cuban immigration crisis of the late 1990s, but the judge if anything undersells the media's focus on those events generally, and the Elián Gonzalez case in particular. Most people who were adults at this time, on reading the one-word title of this chapter, would know exactly what it is about. As you read this chapter, try to imagine the grinding pressure anyone connected to this case must have been under.
2. The judge describes the "lack of fitness" test as a much higher one than the "best interests of the child" test. Although from a legal perspective this is correct, do you agree that it's a "higher" test? Do you see the difference in looking at a case from the parent's perspective and the child's perspective? Do you see, though, why the judge had to use the "lack of fitness" test here?
3. Are you surprised to learn that some of the judge's colleagues have refused to speak with her again? Had the case been in front of one of these judges, how do you think that they would have ruled? Would they have been correct, assuming the law is as the judge describes it here?
4. The judge writes that judges are "supposed to ignore the politics." It's a theme you've heard more than once in this book. But how easy is that for an elected judge? Based on what you've read in this chapter, and in this book as a whole, do you think we have the balance of political pressure about right with state judges or do you think they should have the same protections from political pressure that federal judges have?