

Pursuing the Horizon

Also by Russell F. Canan

*Tough Cases: Judges Tell the Stories of Some of the Hardest
Decisions They've Ever Made* (Canan, Mize, Weisberg)
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Pursuing the Horizon

Stories of Justice



Russell F. Canan



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To Lee, Lukas, and Ethan

For Jeff

I Saw a Man Pursuing the Horizon

By Stephen Crane

I saw a man pursuing the horizon;
Round and round they sped.
I was disturbed at this;
I accosted the man.
“It is futile,” I said,
“You can never—”
“You lie,” he cried,
And ran on.

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Foreword



The pursuit of justice is a noble quest, but the particulars of how it is accomplished are often complicated, difficult and challenging. In this book, Judge Russell F. Canan describes struggles for justice in different contexts and from different perspectives. He examines the availability of justice for the powerless—migrant farm workers and poor people facing the death penalty. He confronts issues of life and death from different perspectives—as an attorney representing two people facing the death penalty, as a judge deciding whether to take a person off life support, and, in a particularly moving chapter, as a brother visiting Vietnam to answer questions about the death of his brother during the war and honor his service and his memory. We learn how as a lawyer he advocated for the condemned, and how as a judge he grappled with difficult issues of fact and law to answer the questions presented by the cases before him. Judge Canan’s detailed descriptions of his experiences provide a rare and valuable look into how justice is dispensed in the courts.

Long before he became a lawyer and a judge, Judge Canan served as a health aide and saw the need for the rule of law and the consequences of its absence. In “Welcome to Smithfield” he describes what he aptly calls “twentieth century

slavery”—the brutal abuse of migrant farmworkers in North Carolina in 1972. The workers were not allowed to leave the farms where they worked because of the debts they owed. This condition—called peonage—has been illegal since 1867 and is punishable by up to five years in prison. But no one enforced the law. In addition, some of the workers were brutally beaten with tire chains, leaving a pattern of scars across their backs. These were serious crimes—aggravated assaults—that should have been prosecuted, but were not. Judge Canan and a dynamic nun, Sister Joseph Beatrice, courageously recorded accounts of the abuse and turned them over to the governor and the Department of Justice, but no charges were filed. Justice required attorneys who would enforce the law, but local officials were unwilling and federal officials were indifferent. The best that could be done was getting some of the workers to their homes and out of harm’s way.

As a criminal defense lawyer, Judge Canan took on the most challenging cases, including capital cases. He describes two cases at each end of the process of inflicting the death penalty—one at the start, “Helter Skelter’s Son,” when a Maryland jury decided whether to sentence a man convicted of murder to the death penalty or life imprisonment; the other is at the end, “Burning at the Wire: The Execution of John Evans,” when Alabama electrocuted John Evans for killing a man in a pawnshop robbery.

John Evans was executed in 1983 as Alabama and the rest of the country were resuming the death penalty after a hiatus of ten years in the country and eighteen in Alabama. The Supreme Court ruled in 1972 that the death penalty was unconstitutional because it was imposed in an arbitrary and haphazard manner. The justices in the majority could discern no reason why some people were sentenced to death when many others who committed similar or even more heinous crimes were not. As one of the justices said, being sentenced to death was like being struck by lightning. Many people

thought that was the end of the death penalty in America. But just four years later, the Court held that it could be carried out so long as states complied with certain procedures, including conducting a separate phase of the trial for sentencing and requiring the jury to consider factors to identify those deserving of the death penalty—the worst of the worst.

The first execution in each state following the Court's ruling attracted an immense political and media attention. It was a time when politicians were declaring a war on crime, calling for "law and order," and competing with each other to show that they were the toughest on crime. Alabama's attorney general, a demagogue, led the charge in demanding that Evans be executed. The media covered every aspect of the case.

What little hope Evans had of avoiding execution was a commutation from Governor George Wallace. The attorney general made it clear that there were no political benefits to commuting the sentence—the governor would be subject to blistering attacks if he commuted the sentence. But Wallace was near the end of his political career. He was in his fourth and final term as governor. He had apologized to African Americans for his past actions as a segregationist. He seemed to be interested in what Evans' family and pastor had to say about him and why his life should be spared. What does one say to a governor who has the power of life and death? Defense counsel Canan describes his plea for life along with the pleas by Mr. Evans, his family and his pastor, and the catastrophic botched execution in Alabama's electric chair that followed.

The question in the Maryland trial was what does one tell a *jury* that decides between life and death. Maryland had responded to the Supreme Court's concern about arbitrariness by requiring that the jury consider evidence in aggravation that supported the death penalty and any evidence in mitigation—circumstances about the defendant that might be a reason to reject the death penalty. Then the jury is to answer an unanswerable question—is this person so beyond redemption

that he should be eliminated from the human community? How does a lawyer defending the person answer that question? What information about the crime and about the client does the lawyer give the jury to help it answer the question? It starts with an investigation into the life and background of the person and an attempt to understand how life experiences, intellectual development and brain function influence judgment and behavior.

Richard Mason was facing a jury for a second sentencing trial. The first jury sentenced him to death, but the Supreme Court set aside that sentence. Through the eyes of a defense counsel, Canan tells us about “two shattered men” who had suffered abuse and trauma throughout their lives and how they ended up in a cell together where one, Mason, stabbed the other to death. It was not hard to understand why the first jury sentenced him to death. Mason, who was just two years into a thirty-year sentence for another murder, stabbed the victim forty-five times, just as he promised to do in a letter to the warden, and wrote “Helter Skelter’s Son” in the victim’s blood on the wall of the cell. The death penalty is for the “worst of the worst” and Mason certainly seemed to fit that description. What could possibly explain what Mason did? What could a defense lawyer tell a jury to convince it to spare Mason’s life?

It was an enormous task to examine every aspect of the life of Richard Mason and the murder that he committed. It would not have been done in many of the states that impose most of the death sentences in the United States. In those states, people who cannot afford a lawyer are often assigned lawyers who lack the competence to handle a capital case and the resources for investigation and experts. However, the Maryland Public Defender had a special death penalty unit that insured that any capital cases in that state were tried with the care appropriate for a decision of life and death. The unit made sure that Mason was represented by two experienced death penalty lawyers, Canan and Jerry Fisher, who also

became a judge. The Public Defender also provided them with resources that enabled them to conduct an exhaustive investigation, and consult with and present leading experts in the fields of neurology, psychiatry, and social work. They found that even in a most difficult case of a man who had committed a murder while serving a sentence for murder, there was a compelling story to be told.

Judge Canan undertook a different investigation in “Death on the Ho Chi Minh Trail,” to learn about the death of his brother, Jeff, who joined the Army at age seventeen and volunteered to serve in the infantry in Vietnam. He was killed in a combat operation eight months after arriving there. For many years, the circumstances of his death were a mystery to Judge Canan and his family. But thirty-four years later Judge Canan’s sister discovered a picture of their brother and other information on the internet. This led to Judge Canan connecting with a soldier who had served with his brother. And a few years later Judge Canan visited Vietnam at the invitation of its judiciary to speak on the rule of law at programs in Hanoi and Ho Chi Minh City. This provided an opportunity for Judge Canan, his wife and two sons to visit the site of his brother’s death to honor and respect his memory. In describing this remarkable journey, Judge Canan reflects on the war, the sacrifices, the protests, and questions of forgiveness, redemption and reconciliation.

It is not surprising that Judge Canan, who liked being the catcher when he played baseball growing up because he could call the pitches and direct the players on the field, would find fulfillment in being a judge presiding over cases in a courtroom. But, like catching, judging is not for the faint of heart. Judges must make very difficult decisions and there is no avoiding them. Unlike the attorney who can decide what cases to take, a judge must take whatever case is assigned and bring about a just resolution. Sometimes there is no good answer, and sometimes there is not as much information as one would

like, but a decision is required. No case is more difficult than deciding issues of life and death for a person who is incapable of making that decision. In “Right to Live; Right to Die,” Judge Canan was called upon to decide whether to remove life support from a person who had suffered massive brain damage and was left in a persistent vegetative state, lacking cognitive function. An additional layer of difficulty and complexity was added when family members disagreed—some wanted to remove life support and others wanted to maintain it. The judge must determine what the law requires and then follow it regardless of any personal preferences. Judge Canan describes how he determined the legal principles that applied, how he protected the interests of everyone involved, and how he applied those principles in deciding the question. It is a lesson in the application of the rule of law.

But what does a judge do when it looks like following the law may lead to an unjust outcome? Not all disputes are resolved by judges. Juries decide some cases and the overwhelming majority of cases are settled—plea bargains in criminal cases where the prosecution and defense agree, and settlements in civil cases where the parties agree to a resolution of the case. In “Rough Justice,” Judge Canan tells us about a case committed to a deliberating jury that appeared to be headed toward a miscarriage of justice. It looked like the jury was going to find an innocent person guilty of a crime that required a minimum sentence of five years in prison. If it did, Judge Canan’s hands would be tied—no matter what he thought about the crime or the fact that the person had no criminal record, he would be required to impose a sentence of at least five years in prison. What does a judge do in this situation? Judge Canan describes the ethical and legal issues he faced in dealing with the dilemma.

Another difficult case was presented in “The Illusion of Delusion: The Murder of Viola Drath and the Strange Case of General Albrecht Gero Muth,” by the bizarre and baffling

behavior of a man who was accused of murdering his wife, a prominent writer, who was ninety-one years old and forty-four years older than him. He claimed to be a general in the Iraqi army and more than a few people believed that he was. The case presented a number of difficult issues: whether the man had genuine delusions because of a mental disorder or whether he was an accomplished con artist, psychopath, and master manipulator; whether he could understand the court proceedings and cooperate with his lawyers; whether he could discharge his lawyers and represent himself; and, not insignificantly, whether he was guilty of the crime. The mental health experts reached different opinions about his mental condition. Judge Canan conducted an eight-day hearing before deciding the questions about the man's mental conditions and his ability to understand the proceedings he tried. But not long after those rulings, the man complicated things further by going on a hunger strike. This presented yet another issue: how to conduct a trial when the man's starvation brought him so close to death that he could not be transported from the jail to the courtroom. These legal and practical challenges required Judge Canan's patience, creativity and perseverance. In this case and throughout the book, Judge Canan tells us about the role of the lawyers on each side. We see the importance of good lawyers on both sides of a case if justice is to be done.

We learn from these chapters that the pursuit of justice must be continuous and relentless; for we never reach justice as a final destination. It is a continuing and evolving process as lawyers, judges, jurors, law enforcement officers, investigators, experts and others involved in the legal system confront new controversies with complicated facts and complex issues. One case may require them to straddle the thin and precarious line between life and death. Another may ask them to fathom the working of the mind. Another may ask them to make sense of senseless violence. Yet another may present a

new legal question that has not been previously answered. As we will see, there may be several issues of fact and law that must be resolved before reaching the main dispute in a case. Judge Canan tells us how he and others wrestle with what often seem like impossible questions in the pursuit of what justice can be obtained for each case.

Stephen B. Bright

August 26, 2020

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