

A PORTRAIT OF JUDITH S. KAYE

THE HONORABLE RICHARD C. WESLEY*

My purpose here is to give a voice to the judges of the New York Court of Appeals—both past and present—who have served with Judith Kaye at Court of Appeals Hall on Eagle Street. Let me begin, then, with an early remembrance: In January of 1995, I was in Albany with my family, staying at the Crowne Plaza Hotel. I decided to get up very early to go for a morning run. I boarded the elevator expecting a quick trip to the lobby, but suddenly the car stopped at a lower floor. I walked the Chief. I had met Judith Kaye several years earlier when I was a trial judge in Monroe County Supreme Court,¹ though I had since been appointed to the court's Appellate Division. On that early morning in January, Judith invited me to walk up the hill and visit Court of Appeals Hall, the first time I'd ever seen it. She had the courtroom lights turned on, and we stood there for a minute in silence. I was overwhelmed by the beauty of the room. Judith pointed to a number of portraits of judges—Cardozo among them—adorning the walls and turned to me and said, “Your portrait could hang here someday, you know.” Fortunately for me, Governor Pataki made Judith's prediction come true—I joined the state's highest court two years later, and today my portrait hangs in Court of Appeals Hall. Judith Kaye's will hang there soon.²

The tradition of displaying the portraits of all who have served at the high court provides a great link between the past and the present. The portraits epitomize a key aspect of common-law judging: The judge looks to the efforts of those who came before her in seeking to resolve the problem at hand. Every judge hopes to have her portrait reflect something about her time at the court. That will be a tall task for the artist selected to paint Judith's portrait. There is much to tell.

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¹ In 1993, I was involved in the creation of a program to reduce the backlog of felony cases in Monroe County. A newly minted Chief Judge Kaye heard of our efforts and showed up unannounced in my courtroom in Rochester to observe how the process worked. Judith encouraged me to keep data to track the success of the project. The process we designed, known as felony screening, remains in place to this day.

² Judges receive a portrait upon leaving the court. I left the court in 2003 to join the Second Circuit.

Judith was a pathbreaker in many respects, not least in her service as the first woman on the Court of Appeals. Governor Mario Cuomo picked her to be the court's first female judge on September 12, 1983. Times have changed—at the time of Judith's retirement, women held four of the seven seats on the Court of Appeals. But Judith will always be the first. She remains a symbol of the great advances women have made in our profession and a hero to many young women, including my own lawyer daughter, Sarah Wesley.

Following her nomination and confirmation in the fall of 1983, Judith quickly won the respect and friendship of her colleagues. She has great stories of her early days on the court. One involves former Associate Judge Hugh Jones, one of Judith's mentors.³ Judith had delivered a report on a case, summarizing the relevant case law and recommending a particular disposition; Judge Jones, without disputing her interpretation of the case law, expressed concern about the fairness of the result. By the time Judith returned to chambers the following Monday, Jones already had sent her his dissenting opinion. However, Jones told her that if she managed to resolve his concerns, he would join the majority. Judith worked hard to fashion a compromise opinion, and, ultimately, Jones withdrew his dissent and signed onto Judith's opinion.

I think Judith liked to revisit that story because Jones's views on judging played a big role in how she came to view her own work. Hugh Jones was the consummate appellate judge—principled, respectful, and always mindful that dissents very rarely make law. Judith also was not big on dissents—indeed, she wrote few for all her years on the court.⁴ As counseled by Jones in his classic Cardozo lecture on appellate judging,⁵ Judith throughout her judicial career sought common ground among her colleagues to explicate the law of New York clearly with one voice.

The New York Court of Appeals is a direct reflection of Chief Judge Kaye's stewardship—and what a wonderful court it is. In my new job at the Second Circuit—Judith refers to me now as the “Fed”—I am often called upon to examine a state's laws to resolve a dispute. New York's high court shoulders a heavy load of certified questions due to New York law's unique prominence as the bedrock

³ See Joel Stashenko, *Kaye's Approach to Change Cautious and Pragmatic*, N.Y. L.J., Dec. 1, 2008, at 1, 8.

⁴ See *id.*

⁵ See Hugh R. Jones, *Cogitations on Appellate Decision-Making*, 34 REC. ASS'N B. CITY N.Y. 543, 551 (thirty-fifth annual Benjamin N. Cardozo lecture delivered Nov. 28, 1979) (emphasizing for courts of last resort importance of issuing single opinion to foster collegial unity and appearance of certainty in law).

of commercial transactions. Even contracts executed on the other side of the world direct that New York law govern their interpretation. Judith Kaye has always been aware of the important role New York law plays in commercial relationships. No doubt partially as a result of her conscientious jurisprudence, the commercial world respects the views of the New York Court of Appeals, further reinforcing New York law's continuing central role in such transactions.

On the bench, Judith treated each case and the attorneys before the court with respect. She was a gentle but direct questioner; the Kaye Court was always polite and dignified. It reflected the seriousness of the work before it and the commitment of its Chief to creating an atmosphere where men and women could come to explore difficult legal issues. In the conference room, Judith was always prepared. She listened carefully to the views of her colleagues, and she conducted the business of the court with fairness and dignity. Judith set the tone; Judith guarded the flame.

Part of Judith's great strength—both as a judge and as a person—lies in her exceptional ability to empower people. Judith's support and encouragement of judges all across the state to look for ways to improve judicial procedures spawned a period of judicial creativity that has made New York a leader in "outcome-related justice," using initiatives such as problem-solving courts that seek to treat offenders' underlying pathologies rather than simply prosecuting the offense. She also has a unique ability to recognize people's potential and to encourage them to improve their lives. Many who work in positions of responsibility at the Court of Appeals started out with lesser jobs. It is a wonderful process to observe—Judith finds a skill, a spark in someone, and soon she or he is working at a new job with greater responsibilities. To my mind, Judith's great successes in changing how justice is delivered in New York and in encouraging others to succeed come from the same source—her strongly held belief in the inherent goodness of humankind.

For all her accomplishments as a judge, Judith's tenure on the Court of Appeals involved more than just judging. The court was like her second home—in fact, during its refurbishment in 2002, Judith herself picked out every fixture, every carpet. She also brought her personality and sense of community to the court. Because both of us enjoy the predawn portion of the morning, Judith and I became regular jogging/walking partners in Albany. A traffic-savvy pro, she once counseled me that when crossing the street, one should never look at oncoming traffic. "It's a sign of weakness," she explained. (I confess I lived in fear that if Judith were ever somehow injured during one of those walks, observers would suspect that I was part of a plot!) On

our morning journeys, Judith often would regale me with stories about the court and former colleagues—stories that reflected her deep personal affection for the community she led. Serving on the court draws judges into tight and loving friendships with each other; the judges labor together and come to know each other's oddities and inclinations. Judith's stories reflected her joy in sharing time with her colleagues, a joy that also came through in her countless personal touches. To this day, for example, each of us who has served with her gets a phone call from her on our birthday.

No portraitist could capture this aspect of Judith's personality and career—the unbelievable bond that exists between Judith and all those who work at Court of Appeals Hall. Everyone at the court has a distinct sense of the importance of the court, a sense that comes directly from Judith. Judith's commitment to the court is ever present. Judith knows the name of every employee. She knows about every birthday, new baby, family triumph, and tragedy. When a member of the court family is in the hospital, Judith is always a visitor. The people who work at the Court of Appeals genuinely love her—they respect her as the Chief, but they also view her as a friend. Dolores Denman, the Presiding Justice of the Fourth Department and a long-time Kaye confidante, once said with characteristic South Buffalo frankness, “Judith Kaye is one classy dame.” Judith's charm and grace turned court dinners into a chance to relax and put aside the difficulties of the day. It is said that Chief Justice Marshall achieved a collegial Supreme Court through his generous offerings of Madeira from his wine cellar at evening meals; Judith accomplished the same result, but she employed Merlot—lots of Merlot.

Many people don't know that there already exists a portrait of Judith that speaks volumes about the woman and the judge, if in a somewhat unusual way. In 1998, Annie Leibowitz was commissioned to take a photo portrait of Judith for *Vanity Fair's* issue entitled “America's Most Influential Women.” The portrait shows Judith in the Chief's chair in the courtroom at Court of Appeals Hall. The picture is taken from behind the bench and shows Judith with her robe parted, revealing her trademark red shoes and . . . (unintentionally, she later claimed) a fair bit of her shapely legs. I will never forget when Judith first showed me the picture—she was mortified! She was very concerned about the reactions it would receive from her family—most notably her best friend, life adventurer, and husband, Stephen Kaye, and her lawyer daughter, Luisa (NYU '91). Stephen counseled, “Put it away—no one will ever know.” Luisa's response, though longer in coming, as she was living in England at the time, reflected a different perspective. Luisa loved the photo. She exclaimed, “It's

perfect Mom! It reflects power *and* femininity.” Luisa was right on the money. That picture is vintage Kaye: confident, unafraid of her femininity, and joyful in her role as leader of the courts of New York.

Let me close with a few final thoughts. I harbor no foolish hope that what I write here has conveyed all that is Judith Kaye. The woman is just too complex, dynamic, and exquisitely unique to portray her fairly in a few paragraphs. But this much I know: Judith Kaye has reshaped the courts of New York with her bold vision of a better way to deliver justice, and she has left her own indelible stamp on its jurisprudence and on those who were privileged to serve with her. How can someone who is so busy always manage to find time to be such a good and loving friend?

In June of 2003, when I bid goodbye to my colleagues and friends at the Court of Appeals, I said of my dear friend: “Is there another human being on this Earth with more energy and enthusiasm for just causes, with a kinder heart—a nobler view of what we do? I think not. When the book is closed—the portrait hung and the tally made—Kaye will stand with the great judges of all time.” In this cynical age in which we live, it is refreshing to see someone who is the real deal—a person whose compassion and commitment are genuine. It was a great honor for me to serve with her on the New York Court of Appeals. I truly believe it changed my life.