JUDITH KAYE: BEYOND SCHOLARSHIP, TO THE WORLD OF STYLE AND MIRTH

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For the *Law Review*, the leadership here at NYU Law School has asked me to write an article about Judge Judith Kaye, and has given me some latitude, and so I will forgo the usual format. Instead, and in fond remembrance of my friend and colleague, I will recount a few "Judithisms."

Scholars have long drawn upon her writings, and will for a long time to come. There are dozens such commentaries, including in this issue. I myself have written several, but in this piece I intend to have fun (reader alert)—which is just how she would want it. "Please, Al," I can almost hear her say, "nothing heavy, we have enough of that . . . "

So, here goes.

I
STYLE

Most enduringly, we have her written words, so why not begin with her writing style?

Judicial opinions often require the writer to navigate a blizzard of facts and contentions, and in the wrong hands, chaos. In Judge Kaye's, the opening sentence or two will answer the question that has beset readers for generations: What is going on here? She would likely have been a good novelist had the cards turned out that way, but was not one to begin an opinion with "on a dark and stormy night the plaintiff/respondent/appellant was engaged in . . . ." Nor would she try to stuff the entire case into a single sentence struggling against the over-

 I am grateful to Susan McCloskey for her helpful suggestions concerning this article.

whelming forces of syntax. Here is an illustration from early in her judicial career: The opinion, now a landmark, begins:

> A stipulation of settlement made by counsel in open court may bind his clients even where it exceeds his actual authority.[1]

It took a mere twenty-one words to lay out the rule. Its tone and content may be described in two: elegant and complete. Or in six: That's all you need to know.

I remember learning somewhere around the tenth grade to go easy on dashes. Judith obliterated that criticism and used dashes almost as her trademark. She was the queen of the dash, and it worked to perfection, as a stylish substitute for the comma.

We see it in her first writing as a judge of the Court of Appeals. The issue was whether a local law was invalid, either because the state legislature had preempted the regulatory field or because the law was inconsistent with a state statute. Here is how she worded the holding:

> Local Law No. 2, which adds further restrictions to an applicant's ability to conduct the site studies required by article VIII and—most significantly—allows the town to prohibit such studies altogether, is inconsistent with State law.[2]

In place of the dashes, a set of commas would do, or she could have written it:

> Most significantly, Local Law No. 2, which adds further restrictions to an applicant's ability to conduct the site studies required by article VIII and allows the town to prohibit such studies altogether, is inconsistent with State law.

But that would rob the sentence of its punch. By using dashes she was saying: "Here's what we think: The local law restricts the applicant's ability to conduct site studies, and if that is not bad enough, listen up: The worst part is that the local law actually prohibits such studies altogether, and that is the breaking point."

She conveyed that with a pair of dashes. How apt that the usage appears in her very last writing.

> At the core of this litigation—with the Off-Track Betting Corporations (OTBs) on one side, and the State Racing and Wagering Board and state harness racing tracks on the other side—are questions of statutory interpretation.[3]

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[1] Hallock v. State, 474 N.E.2d, 1178, 1179 (N.Y. 1984). Yes, one notes the "his." That was over three decades ago. It was not long before she could, and would, render any phrase free of gender.

[2] Consol. Edison Co. v. Town of Red Hook, 456 N.E.2d 487, 491 (N.Y. 1983).

[3] Suffolk Reg'l Off-Track Betting Corp. v. N.Y. State Racing & Wagering Bd., 900 N.E.2d 970, 971 (2008).

II
Humor, Deceased Horses, and Lettuce

I cannot remember an instance in which Judge Kaye exhibited humor during oral argument.[4] She would have regarded it as unsporting. Among the gravest judicial offenses is making a joke at someone else's expense, let alone someone who is, in a sense, at your mercy. She would likely call the offense aggravated vanity in the first degree.

Humor *behind* the bench (but not at the litigants' expense) is another matter, and Judith could be howlingly funny. It is not unheard of for judges to pass notes to one another during oral argument. Early in my time on the court, during an oral argument, I had been asking counsel a series of questions when I spied a small piece of folded paper making its way across the bench from the center, where she sat as Chief, down my end (the newest judge sits at the end of the bench, stage left). Somberly and discreetly the judges passed it along as it carried the words "to Al" neatly penned on top. When it reached me I opened it. "The horse is dead," it read. I could not suppress a laugh and had hoped that the oralist did not detect it and experience a sudden unease. Why is this judge smiling so broadly?

For most judges, humor in decisions is a taboo. A witty turn of phrase or glint of light-heartedness now and again, sure. But broad comedy, as a rule, has no place in a decision, as the parties have too much at stake to abide judicial self-indulgence. Of course there may be exceptions.[5]

Humor in an article is another matter, as in Judith's hilarious piece entitled, *The Best Oral Argument I (N)ever Made*, describing an

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[4] In a first draft I had written "I cannot remember a single instance in which Judge Kaye . . . ." Judith would strike the word *single* (as I have, in her honor), in keeping with her writing style, usually disdainful of adjectives. You will not find many in her writings. "It was clearly a profitable venture" would draw her pen to strike the word *clearly*. If it was profitable it does not become more profitable by adding the word *clearly*. Judith was a marvelous editor and I would often ask for her editorial comments. Those skills were no doubt sharpened when she assisted NYU Law School Dean Russell Niles, updating his casebook on real property and then as his assistant when he became president of the New York City Bar Association.

[5] *E.g.*, Mary B. Trevor, *From Ostriches to Sci-Fi: A Social Science Analysis of the Impact of Humor in Judicial Opinions*, 45 U. Tol. L. Rev. 291, 316–17 (2014) ("Even Judge Gerald Lebovits, generally a vehement critic of judicial opinion humor, has conceded that '[e]ffective and memorable is truly funny humor that pokes fun at law or society, is in good taste, and does not belittle the litigants, demean the judiciary, or make future litigants apprehensive.'"); Kent C. Olson, *Those Who Play with Cats*, 1 Green Bag 2d 217, 218 (1998) ("A touch of humor in a judicial opinion succeeds because it is a rare flower blooming in a desert of dry legal prose.").

experience as a respondent in an appellate court.[6] As she tells it, the court first roughed up her adversary:

> As my bowed and bloodied adversary took his seat, I gathered up my papers, and my courage, and moved to the lectern. Justice Clark, however, was busily chatting with his colleagues—first one side, then the other. I had just spoken the words, "May it please the Court" when he interrupted. "Counsel," he said, "it will not be necessary to hear further argument. We have decided to affirm."
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> Wait a minute! No fair! Can I be heard on this? What about my meticulous preparation? What about my fifteen-minute presentation? What about my hand-picked audience?[7]

One evening in Albany, Judge Kaye and I were talking about constructive notice in negligence cases, and I said something like, "So if a person slips on the lettuce . . ."

"Grapes" she said.

"Grapes?" I queried. "Grapes?"

"Yes, grapes," she replied, with mock sternness. "Al, you do not spend enough time in the supermarket. Grapes, definitely."

Thus challenged, I headed for the computer to do a word search and punched in *slip! w/8 lettuce* (the spacing seemed about right). The computer produced 141 cases! Well, that should settle it, I thought, feeling triumphant. Expecting a big win for the lettuce, I punched in *slip! w/8 grapes*. In a flash, the computer turned up 258 cases. She was right. The grapes had it by an almost 2-1 margin, even deducting at least one recent instance in which the computer turned up "Grape's counsel" within eight words of "slippage." The story circulated around the courthouse, with various people taking sides before the result was revealed.[8]

Judith also knew how to recount an event for our entertainment, as when she described a conversation with the people who installed a set of lights for the courthouse renovation:

"I told them the lights looked awful, and cheap," she said.

"And what did they say?" we asked.

"They said 'But Judge, they only *look* cheap.'"

Needless to say, the lights were soon gone. But the phrase "they only *look* cheap" became part of the courthouse lore.

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[6] Judith S. Kaye, *The Best Oral Argument I (N)ever Made*, 7 J. APP. PRAC. & PROCESS 191 (2005).

[7] *Id.* at 192.

[8] That was in 2006, my last year on the court. But Judith's assessment has withstood the test of time. As we go to press, the grapes still have it, now by a better than 2-1 margin.

III
Collegiality and Dissent

In many ways the two words define an appellate court. They often mean different things to different people, but for me, in the judicial setting, collegiality means the way the judges get on with one another in their jobs.

Collegiality, at its best, affords a healthy mix of independence short of egomania, deference and cordiality short of thoughtless conformity, assertiveness short of stridency. I can go on, but you get the idea. In brief, collegiality is a stimulating environment in which people respect one another, and show it, even when they disagree. It makes discourse around the table enjoyable, without recourse to pharmacy products that coat the stomach.

As Chief, Judge Kaye generated collegial qualities that set the right tone. This did not happen by accident. She worked at it. Small things count, like the custom of the judges going out to dinner together after each court session. At dinner, there was no discussion of the cases we had just heard, only small talk (or large talk) of family, news, sports, books, theatre, and of course gossip.

Another important ingredient was how she presided at the conference table, continuing the custom in which each judge spoke without interruption. This seems almost impossible on the part of judges, let alone judges from New York, but it worked well. I can recall only one or two instances in which it was breached, with all eyes falling on the offender, who might just as well have spilled a pitcher of tomato juice.

After oral argument and round the conference table, the deliberative process began with a presentation by the judge who "drew" the case, out of the hat so to speak, and never by assignment. It is a random draw, sometimes followed by cries of delight or pain.

This initial presentation included a recommendation (affirm, reverse, modify, and why), followed by commentary from the other six judges in inverse order of seniority. By this inversion, the newer judges speak first, so as to be uninfluenced by their "elders," with the Chief Judge going last.[9]

She sought consensus whenever possible, a preference I heartily shared, as did most of the other judges. In the main, the judges valued open-mindedness but did not appreciate arm-twisting. Sometimes we would go around the table several times to see if consensus was ten-

[9] Judge Richard C. Wesley described the postargument process in some detail in *Reflections on the Court of Appeals: New York's Court of Appeals: A Personal Perspective*, 48 Syracuse L. Rev. 1461 (1998).

able. The Court was often unanimous, but the judges respected dissent, even if they did not go out of their way to encourage it.

Some renowned judges are remembered as "great dissenters."[10] Judith Kaye wrote some stirring dissents but I would not count her as one of the "great dissenters." In all, she wrote 522 opinions for the majority and authored 77 dissents and 28 concurrences.[11] That tally seems about right. She was not bashful about dissenting when she felt strongly enough, but preferred to lead from the front rather than from the rear.

Speaking of dissents, she once told us what occurred during her first week on the Court of Appeals. She had drawn a vexing case and worked into the wee hours of the morning to make a credible presentation at conference. Before she got to make it, one of the other judges presented her with a written dissent. She was aghast—until the judge explained that he wrote it only to help her sharpen her way toward the proposed outcome, with which he agreed.

IV
A Five-to-Nine Job

Office hours: 9-5, closed Saturday at noon, Sundays, and holidays.

Or so goes the standard display on doors of dentist offices, banks, income tax preparers, and others. When asked about her workday Judith might sometimes say, "I have a 5-to-9 job," by which she meant 5 AM to 9 PM. In Albany she was invariably at her desk by around 5 AM, and I would often come in at about 6 AM for breakfast in her office (oatmeal, orange juice, coffee). At around 7 AM a procession would sometimes begin. Two or three of the maintenance women would stream in, with baked goods for the Chief. Sometimes flowers, when in season. The women and the Chief Judge would exchange hugs and pictures of their respective grandchildren. They called her Chief, of course, and were reverential, but when it came to grandchildren equality reigned. Judith may not have been the only CEO to address everyone similarly regardless of his or her station, but I would marvel at it, and learned a lot from it.

One or two of the maintenance guys sometimes had a similar ritual. During the 2002–2004 renovation, the courthouse was a construction site: wires, sawdust, and pipes everywhere. It is a large

[10] *See* Tinsley E. Yarbrough, John Marshall Harlan: Great Dissenter of the Warren Court 15, 339 (1992); *see also* Liva Baker, The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes 400–01 (1991).

[11] Boolean searches for "opinionby(kaye)," "dissentby(kaye)," and "concurby(kaye)" provided these results.

building with attic storage that rivaled any English manor house, with artifacts going back decades or more. As the maintenance crew cleaned out the attic, each week brought new surprises. "And what have you found?" she would ask the maintenance men, whom she called her curators. They took on the role with no small amount of pride, producing tarnished doorknobs, sheaves of paper in old fashioned, pre-typewriter handwriting, documents held together by brittle rubber bands or rusted paper clips, and an occasional portrait.

"Hmmm . . . Who is that?"

"No name plate. . . . Let us examine the clues," we might say, between spoonfuls of oatmeal.

"Looks like Hugo Baskerville."

As far as I can recall, the maintenance men discovered no spittoons. The reason is plain enough. Made of well-polished brass, the spittoons are still in the courtroom at the judges' feet, under the bench. On my first day touring the court as a fledgling judge, Judith pointed them out.

"They look great. What do you plan to use them for?" I asked.

"Begonias," she said.

V
T-Shirts and Red Shoes

The robe is standard bench attire. [12] Judge Kaye described how the practice began on February 25, 1884, after attorney David Dudley Field had in January addressed the court in its new Richardson-designed courtroom, urging, on behalf of the New York State Bar Association, that judges wear official gowns.[13]

T-shirts are another matter, as she loved to design and give them out to friends and colleagues. My favorites are an orange and yellow one combining the New York Constitution's "Forever Wild" clause with a phrase from the First Amendment, declaring "[f]ree exercise shall be forever allowed in this State"; and one she distributed at a gathering of our court with the appellate judges of the Second Circuit, with the words "New York Court of Appeals for the Second Circuit," emblazoned on the front.

I close with special mention of her shoes. Judge Kaye sported bright red shoes, perhaps to accompany the red blouse she often wore

[12] *See* J.H. Baker, *A History of English Judges' Robes*, 12 Costume 27, 29–32 (1978); Charles Yablon, *Judicial Drag: An Essay on Wigs, Robes and Legal Change*, 1995 Wis. L. Rev. 1129, 1134.

[13] Judith S. Kaye, *The Court Through the Decades*, *in* There Shall Be a Court of Appeals (1997). The Richardson courtroom, still current, was designed by architect Henry Hobson Richardson (1838–1886).

under the robe. At the memorial service, her sons wore red sneakers, and the family distributed red shoe lapel pins. I treasure mine, and keep it in view on a shelf alongside her writings, and those of Kent, Blackstone, and the other greats.