

JUDITH KAYE AS A CHIEF AMONG CHIEFS

THE HONORABLE RANDALL T. SHEPARD*

As with most slices of American life, the chief officers of the highest courts of the states have a club. The fifty-eight leaders of the court systems in the states and territories meet regularly to examine and advance the work these institutions do for society. It is a circle of strong intellects and interesting personalities, and Chief Judge Judith Kaye has been one of the genuine stars.

When I first began attending these meetings of chief justices, I was struck by how often the members asked each other the method by which they had been chosen as chief. The long list of variations made for an interesting wrinkle on the idea of the states as laboratories of democracy. After a few dozen such conversations, I began to notice that the crowd also broke down along a different line. Because some states change their chief justice every year or every other year, new arrivals to the crowd rise up to middle seniority in short order. There were short-timers and long-timers. Later yet, I came to the realization that there were certain members who were just passing through, capping off their legal careers by sitting center chair in their home state, and others of obvious gravitas who approached their task purposefully on both the state and national scene. Put another way, there were some who just wanted to be the leader and others who wanted to lead somewhere. In this fascinating cast of characters, Judith Kaye has been a remarkable colleague of the latter sort.

Most lawyers or interested members of the public think about the heft of judges and justices in terms of their opinions. If asked who the great chief justices of the century were, most would mention Chief Justices Earl Warren or William Rehnquist, thinking of their impact on jurisprudence. This is true even in respect to state court judges; most would think of the role of Chief Judge Benjamin N. Cardozo's opinion for the New York Court of Appeals in *Palsgraf v. Long Island Railroad Co.*,¹ Chief Justice Roger J. Traynor's opinion for the Supreme Court of California adopting strict liability for certain torts

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¹ 162 N.E. 99 (N.Y. 1928).

in *Greenman v. Yuba Power Products*,² or the opinion Chief Justice Margaret H. Marshall authored for the Massachusetts Supreme Judicial Court on same-sex marriage in *Goodridge v. Department of Public Health*.³ To be sure, understanding, interpreting, and fashioning law is an important part of what an appellate judge does, even in an age when statutes have come to overtake so much of the common law. And it is easy—and right—to acknowledge that the best appellate law-givers fairly may be called “great” on this basis. Judith’s rank on this basis is a solid one, rated “on a par with greats like Cardozo and Learned Hand” by one observer.⁴ Her contribution to the greatest state jurisprudential movement of our time has been monumental. One colleague who had every basis for assessment, Judge Albert M. Rosenblatt of the New York Court of Appeals, declared that she “has surely done more to advance [New York’s] state constitution than anyone else alive.”⁵

Yet I propose that Judith Kaye be declared great on a quite different basis. It is one that receives far less attention than jurisprudence: building a better system of justice.⁶ Achieving important systemic change usually requires that judicial leaders, sometimes at the top of the pyramid and sometimes in the rank and file, decide to place themselves at risk in the arenas where change can be made. It requires a determination that those of us on the bench and in the bar can do more justice in individual cases if the court system is better organized.

Recharting the course of a court system has never been an easy matter. The judiciary in form and inclination is both beholden to what has been done in the past and typically comfortable with it. Moreover, judges value the relative independence that they possess, an aspect of judicial work that confers benefits on litigants but that also leads to intransigence. Appellate judges, for example, toil each day focusing much of their mental attention on a rearview mirror. They confront allegations of error on some point or another and ask themselves, “What did we say about this the last time?” Independence, custom, and precedent are rightly considered strengths of the judicial

² 377 P.2d 897 (Cal. 1963).

³ 798 N.E.2d 941 (Mass. 2003).

⁴ Roberta A. Kaplan, *Tribute to Judith S. Kaye*, 70 ALB. L. REV. 799, 800 (2007); accord Steven C. Krane, *Dedication to Judith S. Kaye*, 70 ALB. L. REV. 807, 810 (2007) (describing Judith Kaye as displaying “the highest level of judicial reasoning”).

⁵ Albert M. Rosenblatt, *Honoring Chief Judge Judith S. Kaye*, 70 ALB. L. REV. 821, 821 (2007).

⁶ Willard Hurst, *Who Is the “Great” Appellate Judge?*, 24 IND. L.J. 394, 396 (1948–1949) (lamenting lack of attention judicial biographers have paid to state high court efforts with respect to trial courts).

enterprise, but they can also be among its weaknesses. Thus, it is truly remarkable when an appellate judge succeeds in being an agent for change as dramatically as Judith Kaye has.

Assessing judicial leaders in light of their potential to provoke change, a few chief justices stand plainly above the crowd. Chief Justice Arthur T. Vanderbilt of the New Jersey Supreme Court was one such leader. His take on change has become part of our folklore: “[J]udicial reform is no sport for the short-winded”⁷ Chief Justice Walter V. Schaefer of the Illinois Supreme Court was another,⁸ along with Chief Justice Howell Heflin, who lifted the Alabama Supreme Court up out of its segregationist past and then went on to serve his state as a U.S. Senator.⁹ These are all names from the twentieth century. As we contemplate an equivalent list that might be assembled for the twenty-first century, it is safe to say that any informed observer would place the name Judith Kaye on it.

Chief Judge Kaye is a long-distance runner for reform. The Niagara of initiatives for which she became so famous is familiar to the New Yorkers who experienced them at close quarter. Problem-solving courts and jury reform have been two of the most prominent.¹⁰ Not quite as visible to New Yorkers has been Chief Judge Kaye’s role in causing these reforms to be adopted in other parts of the nation. She accomplished this in multiple ways. First, she is a splendid recruiter of both people and resources, a great master and magnifier of the resources available usually only to chief judges from large states. Second, she used the bully pulpit of the chief judge as a terrific place to let the world know what judges, lawyers, and court personnel can accomplish, inspiring her listeners to join the march. Third, she prompted good deeds in moments of quiet conversation involving the smallest of audiences. It was such a conversation I had with her more than a decade ago when the Conference of Chief Justices met in New

⁷ Arthur T. Vanderbilt, *Introduction to MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION*, at xix (Arthur T. Vanderbilt ed., 1949).

⁸ See generally Ed Nash, *Walter V. Schaefer: Retiring Justice of Illinois Supreme Court*, ILL. ISSUES, Jan. 1977, at 8 (discussing Schaefer’s career).

⁹ See William Mike House, *Tribute to Howell Heflin*, 48 ALA. L. REV. 431, 434 (1997) (“During his tenure as chief justice from 1971 to 1977, Heflin made history by developing and orchestrating the enactment of wide-ranging and dramatic reforms to Alabama’s judicial system, ushering the state’s antiquated courts into the twentieth century.”); *Alabama Praised on Court Reform*, N.Y. TIMES, Jan. 19, 1975, at 47 (describing “extensive judicial reform” after Heflin became Chief Justice).

¹⁰ See Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL’Y REV. 125 (2004) (explaining how and why New York’s state courts adopted problem-solving approach to delivering justice); Jeffrey Toobin, *Special Kaye*, THE NEW YORKER, December 15, 2008, available at http://www.newyorker.com/talk/2008/12/15/081215ta_talk_toobin (discussing Chief Judge Kaye’s jury-reform initiative).

Orleans that convinced me to make jury reform a priority for my own state. Judith Kaye was the perennial spark plug of the Conference of Chief Justices's Committee on Courts and Children, and it was not above her to recruit us one-by-one for a major national summit on reforming how we protect the country's children. Many other chiefs could describe similar experiences. Litigants and lawyers in my state and in others continue to enjoy the benefits of Chief Judge Kaye's missionary work, even though not all are aware that it was she who led the charge.

Judge Kaye has also left us gifts that will keep on giving—institutions that will advance the cause of reform for years to come, like the Center for Court Innovation.¹¹ This enterprise made its early mark with a special focus on problem-solving courts, and more recently, it launched a regular journal¹² that gathers and distributes the best thinking about court reform. It is one of the many ways that Judith has managed to marshal intellectual and financial capital.

Judith's success in these ventures is surely the product of her tenacity; she always seems to be on duty. I recall an encounter in the hallway of yet another conference of the chiefs. Judge Kaye asked me where I was headed, and I replied I was in between my various committee obligations. "I'm on my way to the Education Committee," she said. "Why don't you come along and let's see whether we can make something happen?" As it turned out, the Education Committee aimed high that day, putting together programs on judicial independence and on civics education and outreach to the media. Judge Kaye both urged us to be ambitious and volunteered to use her considerable network to attract the highest-caliber speakers. As was so often the case, the meeting was more productive with Judith Kaye in the room.

Of course, being recruited by Judith does not always turn out the way one expects. When Professor Oscar Chase invited me to give the annual Brennan Lecture at New York University School of Law, he mentioned that he had learned from Judith that I could carry off a passable rendition of "Ya Got Trouble" from *The Music Man*. She proposed that I perform it after dinner on the evening of the lecture. I demurred on the grounds that following up what I hoped would be a provocative lecture by doing a song and dance would make me seem like a rube from the provinces. "Oh, no," Oscar said, "Judith intends

¹¹ Center for Court Innovation, <http://www.courtinnovation.org> (last visited Mar. 31, 2009). The Center is a non-profit think tank that helps courts and criminal justice agencies aid victims, reduce crime, and improve public trust in justice.

¹² Center for Court Innovation, *Journal on Court Innovation*, <http://www.courtinnovation.org/journal.html> (last visited Mar. 31, 2009).

to sing it with you.” So, I agreed to do the gig. At the appointed hour some months later, I arrived at the Dean’s office with my music in hand. Judith entered the room a few moments thereafter, and she did not seem to have a score. “Judith, where’s your music? I thought you promised to do this with me,” I said. “I lied,” she answered. I suppose she had not been under oath.

On my first trip to Court of Appeals Hall during the early 1990s, I remember thinking that the locals seemed to take extraordinary pleasure in mentioning the names of the great judges of New York’s storied past: the two Peckhams, Cuthbert Pound, Cardozo, Lawrence Cooke. I am happy in the knowledge that, in that glorious transported courtroom, people surely will mention our treasured colleague and friend Judith Kaye in the same breath.