

EDITORIAL PREFACE

HONORABLE ALBERT M. ROSENBLATT

Like a symphony, Judith S. Kaye's writings consist of themes, harmonies, and resolutions, encased in creative expression, imbued with beauty and passion.

As with symphonic compositions, her writings can be divided into parts, and we have chosen three: memoir, judicial opinions, and articles. It seemed sensible to begin with the memoir, followed by the opinions and articles. That is probably how Judge Kaye would have prescribed it: "Here I am, Judith Kaye. Would you like to know something of my life? Read on."

Most everyone will. She was a felicitous writer: engaging, modest, and revealing without being indiscreet. Do not look for tell-all diatribes or attempts to settle scores. Judith was not like that, and it would be out of character for her to do so in her farewell account. Instead, she presents a remarkable life, including her childhood and her fidelity to her family, including her late husband, Steve; her children, Luisa, Jonathan, and Gordie; and her grandchildren.

She describes her battle with cancer, a foe she fought for several years, with some public concealment, so as not to be consigned (as she put it) to a "poor Judith" category. The major part of her memoir covers her years on the New York Court of Appeals, and as the state's chief judge. She observes proprieties but does not shy away from describing the background and her thoughts in important cases and about policies. She is candid.

The memoir is followed by a selection of her judicial opinions. Themes and resolutions are the bread and butter of judicial opinions, and as a writer, Judith's style and elegance gave added lift to what would otherwise be little more than superb reasoning and impeccable analysis. Those who know her might read a phrase and say, "Ah, yes, that sounds just like her; no one else could have written with such verve and clarity."

Judith's writings are vast, which required some difficult editorial choices. Covering a substantial span of those "hard-bound green books," her judicial opinion writing began in 60 NY 2d and ran up through 11 NY 3d, covering some fifty volumes over a quarter of a century, from 1983 through 2008.

In all, she wrote 522 majority opinions, 77 dissents, and 28 concurrences. The tally seems proportional, considering that she was not a "great dissenter." She preferred to lead from the front, seeking consensus when possible.

Choosing representative opinions was no easy matter. Judith's writings are so consistently good that even a random selection or the use of a dartboard might have acquainted the reader with her legacy quite well. But that would not be fair to her, as she did have her preferences, and we could identify them—or at the very least make some good guesses.

A random sampling process would also have been unfair to us as editors, because it would have denied us a frolic through a field of plenty. Presenting the opinions unadorned would have been adequate, as they stand on their own, needing no enhancement. But as an added treat for the reader, we asked Judge Kaye's former law clerks to pick an opinion or two (preferably ones they worked on) and give it a short introduction. We thank them for sharing their thoughts.

The decisions cover a wide range of topics. In the realm of family law, we have included several, most notably her dissents in *Alison D.* and *Hernandez*. In *Alison D.*, she argued for the visitation rights of a lesbian parent and in *Hernandez* for marital rights for same-sex couples. Both dissents proved prescient. The state legislature enacted marriage equality in 2011, five years after *Hernandez*, and in 2016 the Court of Appeals came around to the viewpoint she expressed twenty-five years earlier in *Alison D.*

We have also selected others dealing with family law and intimate relations, such as sexual discrimination in student housing (*Levin*), adoption (*Piel*, *Ross*, and *Matter of Jacob*), and domestic violence (*Nicholson*).

Passionate as Judge Kaye was in these opinions, she was a commercial litigator who keenly understood the need for predictability and stability in the commercial realm. Her *Levandusky* opinion forged New York's Business Judgment Rule, and her decisions in *Deutsche Bank* and *Brandon* are models of writings in banking and insurance law. When it came to business contracts, her parol evidence discussion in *W.W.W.* is among the most cited in the field.

Although gracious, she had little tolerance for procedural laxity and drew the line sharply (as in *Kihl* and *Brill*) if court practice allowed the system to become sluggish or unresponsive. She held people to appropriate standards of accountability when it came to consumerism (*Karlin*), government (*Maybee*, *Schulz*), negligence (*532 Madison Ave.*), or medical malpractice (*Tebbutt*).

In the criminal arena, we have chosen several opinions displaying her keen sensitivity in balancing the rights of criminal defendants with those of public order (*Johnson*, *Catu*, *Wesley*, *Gonzalez*, *Hill*).

Any list of her writings would have to include *Campaign for Fiscal Equity (CFE)*. It is one of her longest opinions, but there is hardly a wasted word, addressing the state constitutional requirement for a sound basic education for students and ruling that the state had not met its constitutional and statutory obligations for New York City schools.

Judith was a champion of the state constitution. She proclaimed it in *CFE* and elsewhere revealed her affinity for that document, never hesitating to remind us that it was ten years older than its federal counterpart. She repeatedly pointed out that while a state court could not deny anyone a constitutional right below the federal interpretative "floor," there are instances in which a state court should and will exceed the federal floor and accord greater rights and liberties than those found in the US Constitution (*Class*, *O'Neill*, *Caban*, *Immuno AG*).

Hank Greenberg, a stalwart of our editorial team, took on the duty of assembling a representative sampling of Judge Kaye's articles. As with choosing from among her opinions, it was an agreeable task, but very difficult, given the length of her publications list and breadth of her work. A search tells only a part of the story. It is easy to go online and find dozens of her articles, but that does not include her unpublished works, articles stashed away here and there, that she may have written for a synagogue or a middle-school journal. When it came to requests for essays, she was an easy touch and rarely said no. Hank surveyed the field and came up with excellent choices.

They fall into several brackets.* There are the law review-type articles, written in the classic style, with prolific notes and stellar scholarship. This includes her articles on "The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern" (1988); "Delivering Justice Today: A Problem-Solving Approach" (2004); and "One Judge's View of Academic Law Review Writing" (1989).

Then there are the articles advancing a cause or point of view: "Women in Law: The Law Can Change People" (1991); "Law Is Pivotal in Advancing Women's Rights" (1993); and "The Changing World of Children: The Responsibility of the Law and the Courts" (1993). Her kinship with state constitutional law comes across compellingly in her articles "Dual Constitutionalism in Practice and Principle" (1987) and "State Constitutional Common Law: The Common Law as a Full Partner in the Protection of Individual Rights" (1992), as well as in "State Courts at the Dawn of a New Century: Common-Law Courts Reading Statutes and Constitutions" (1995).

There are remembrances and tributes, of which two are especially touching: "In Memoriam: William J. Brennan, Jr." (1997) and "A Lecture about Judge Benjamin Nathan Cardozo" (1986). There is also her own account in "My Life as Chief Judge" (2006).

Beyond that, one article deserves special mention, as we all agreed that it must be included. We understand that scholarship and enduring jurisprudence were Judge Kaye's stock in trade. But those who knew her often saw a lighter side that could be hilariously funny, and we wanted to be sure that her entertaining essay "The Best Oral Argument I (N)ever Made" (2005) made the cut.

Readers will approach this volume differently; some may browse or turn to one section or another first. Judith would not decree the sequence, nor will we. No single volume or even set of volumes can fully present a life, let alone one as singular as Judge Kaye's. Her achievements are legendary and will live on long after her lifetime and ours.

*Needless to say, given the breadth of the various pieces collected here, and the variety of sources in which they were originally published, readers should expect to see some variation in editorial style.