

BIOGRAPHICAL INTRODUCTION

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By her own account, Judith Smith Kaye was first and foremost a writer. Having started out as a journalist, she went on, as a lawyer and then judge, to write 627 judicial opinions (522 majority opinions, 28 concurrences, and 77 dissents) and over 200 articles (some of which are included here).

In writing her memoir, she did what she had done throughout her life as an author, lawyer, and judge and as a woman of impeccable integrity: defied convention to do what she thought was right. The organization of her memoir resists what her daughter, Luisa, calls a “conventional, chronologically ordered account.” That was not the frame Judith wanted for telling her story. What she did want to do was to use part 1 (The Court Years) to educate readers about the life and work of the New York State Court of Appeals, from the physical courthouse, to her colleagues, to court procedures and output. It is characteristic of the Judith I knew that her story of “the” court years (as opposed to “my” court years) is about so much more than her own journey.

In part 2 (Return to the Real World), Judith talks candidly and movingly about coping with the “triple whammy” of mandatory retirement from the court; the death of her beloved husband of more than forty-two years, Stephen Rackow Kaye; and receiving a diagnosis of cancer. Her life at the time she was writing became the filter through which she reflected on her earlier years—a perspective on her story from a point near its end. Her mission here is more educational than self-centered: to offer readers her own example and her thoughts about how to cope with painfully difficult transitions.

It is only in part 3 (Who I Am, from Day One) that the memoir turns to the question most biographies start with: how did she become Judith S. Kaye, chief judge and

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legal lion? And even here, she frequently shifts her gaze from her younger self to the reader, sharing wisdom she accumulated through the years. With her extraordinary blend of majesty and modesty, she tells the reader about what she has learned, showing her evident belief that sharing knowledge is a more important goal than talking about herself.

It is my aim to provide a “conventional, chronologically ordered” biography so that readers will have an objective frame of Judith Kaye’s life to complement her memoir.

Judith Ann Smith was born in Monticello, New York, on August 8, 1943. She describes her parents, Benjamin Smith and Lena Cohen Smith, as “Jewish immigrant farmers turned small-town shopkeepers.” Both had fled Eastern European poverty and persecution. Benjamin was turned away on his first attempt to enter the United States, went to Cuba and then Panama, and ultimately entered the United States illegally. Benjamin and Lena married in 1936 and settled on a farm in Maplewood, New York, near Monticello. When Benjamin’s immigration status came to the attention of authorities in the 1940s, the fact that he was a responsible farmer and the parent of US citizen children (Judith and her brother, Allen, who went on to become an executive at Sony Music) helped him escape the fate of his brother, who was deported and later killed in a concentration camp in Poland.

Judith started her education at a one-room schoolhouse in Maplewood at the age of five. In a harbinger of academic successes to come, after one year of schooling she was tested and placed in the third grade. Although two years younger than most of her classmates, in her later school years she towered over them physically as well as intellectually: she was a full head taller than most.

Judith’s ambitions exceeded her parents’ expectations for her—that she should become a teacher or perhaps work in the ladies clothing store the family opened in Monticello, where she helped out from the age of twelve. At Monticello High School, confronted with a choice between an academic and a secretarial program, Judith took both because her parents thought secretarial skills were important for a woman, but she was not willing to consign herself to a future as a secretary. Honing skills she would need in her later life, she participated on the high school debate team, served as an editor on the school newspaper, and became an excellent typist. In juggling these multiple demands on her time, she had a role model in her mother, who worked full-time in the store and still ran a household, including cooking all the family’s meals.

At the age of fifteen, Judith was admitted to Barnard (“in the wilds of New York City”) where, planning to be a journalist, she majored in Latin American civilizations and was editor-in-chief of the *Barnard Bulletin*.

Judith self-deprecatingly says that she was a bit “block-headed” about the lack of opportunities for women. After graduating from Barnard, she applied for newspaper positions with little success and had to settle for a job as a social reporter—the area the male-dominated profession regarded as suitable for women—for the *Hudson Dispatch* of Union City, New Jersey. Hoping to provide herself with a platform for breaking out of the society columns, she signed up for a night program at New York University Law School in 1959. Law school agreed with her. She graduated at the top of her class; all three of the pieces she wrote while in law school were published. Law became her chosen profession.

As Judith later memorably said (in a *New York Times* quote of the day), “I take my gender with me everywhere I go.” The white-shoe law firms where she applied for a position turned her away, sometimes explaining their decisions in overtly sexist terms. These rebuffs increased her determination to succeed in that world. She eventually received and accepted an offer at the highly prestigious Sullivan & Cromwell LLP, where she spent two years as the only woman in the litigation department (the firm’s other two women practiced in trusts and estates). While there she met Stephen Kaye, the rare man who shared her range of passions—he had season tickets for both the New York Rangers and the Metropolitan Opera—and entered into an “almost perfect” marriage where the two were “fiercely independent and fiercely interdependent.”

When Stephen left Sullivan & Cromwell to join a different firm, Judith also left for a job in the legal department of IBM, where she stayed for about a year. As was expected at the time, she gave up that job during the seventh month of her first pregnancy. From 1965 to 1969, while she had her three children, Luisa, Jonathan, and Gordon, she worked as a part-time assistant for Dean Russell Niles, first at New York University and then at the Association of the Bar of the City of New York, on research, speeches, and articles. She developed a practice of rising at 5 a.m. so she would have several hours to work before the children were up and the household’s day began. Arranging for full-time help at home, she took a part-time job at Olwine, Connelly, Chase, O’Donnell & Weyhar in 1969 which turned into a fifteen-year stay, initially as the firm’s first female associate and later as its first female partner.

By the 1970s, the legal profession was sufficiently defensive about its previous dismissive treatment of women that being a woman could sometimes be a benefit. Olwine offered Judith partnership after she told them that she would be leaving for a highly paid position at Exxon, which was eager to hire its first woman attorney. The firm accommodated Judith’s sense of work/family life balance, which included not working all weekend, taking family vacations, and showing up for school conferences, swim meets, and concerts. She succeeded without complaining about the profession’s discriminatory treatment of women, simply by doing her job well. She became a leader of the bar in the public sphere, devoting precious time to serving on the executive committee of the Association of the Bar of the City of New York, numerous committees of the New York State Bar Association, the board of the Legal Aid Society (including serving as vice president), the American Law Institute Council, and so on.

During his campaign for election in 1982, Governor Mario Cuomo (a former New York Court of Appeals law clerk) announced his intention to appoint the first woman Court of Appeals judge. He had his first opening to fill shortly after taking office with the retirement of Associate Judge Domenick L. Gabrielli in 1982. But the new governor found the list of possible nominees presented to him by the Commission on Judicial Selection consisted only of men. Not only were there no women on the Court of Appeals in that era, there were no women on the Appellate Division benches, the most obvious source of candidates. A few months later, when Associate Judge Jacob J. Fuchsberg retired, Cuomo had another opportunity. This time, the commission’s list included the names of two women, one of whom was Judith Kaye.

Judith's road to the Court of Appeals was not free of bumps. The New York Women's Bar Association supported the other female nominee, an active member and past president of their association, and declared Judith Kaye to be unqualified. But other bar associations disagreed, as did Governor Cuomo, and the New York Senate unanimously approved Judith's appointment as the first woman on the New York Court of Appeals. (It was not long before the Women's Bar Association warmly embraced Judith on the basis of her performance on the court—and her former rival, Betty Weinberg Ellerin, was subsequently appointed to the Appellate Division.)

Judith Kaye was sworn in as an associate judge on September 12, 1983, a day she describes as terrifying. The job of a Court of Appeals judge was extremely intense in her first two years, as the court was required to hear many kinds of appeals and thus faced a daunting caseload. Legislation in 1985 allowing the court greater freedom to select cases reduced the sheer quantity of cases and left the judges free to spend more time on the quality of their work.

In many respects, Judith Kaye approached the court as an outsider: she had not previously been a judge, she was a woman, and she was unaccustomed to dealing with criminal cases, a substantial part of the court's work. ("I was lost in the ether of the criminal law," she says.) She was forty-five years old, in contrast with the majority of her new colleagues—Associate Judges Hugh R. Jones, Matthew J. Jasen, and Bernard S. Meyer, and Chief Judge Lawrence H. Cooke—who were all close enough to seventy that they were compelled to retire within several years of her arrival. But she quickly became part of the community of the court. She followed her lifelong practice of putting in as much time as was needed to get things right—even mastering criminal law. She worked toward consensus, as was the court's custom. But she maintained her distinct voice and perspective, calling on her "life experience as a woman, wife, daughter, mother and grandmother."

Judith Kaye's clear, confident, and empathetic voice is heard in landmark opinions in many areas, from family law to commercial litigation to criminal law, where she made some of her greatest contributions to New York jurisprudence. During her first year on the court, she cast the deciding vote and then wrote the majority opinion in *People v. Lemuel Smith*,¹ finding the state's mandatory death penalty for murder committed by an inmate already serving a term of life imprisonment to be unconstitutional. If his conviction had been affirmed, Smith would have been the first person to have been executed in New York in over twenty years. Instead, Kaye's vote took New York State a significant step down the path of questioning and ultimately abolishing capital punishment.

Among the other cases she recalls with pride is *Matter of Jacob*,² where her opinion (over a vigorous three-judge dissent) interpreted New York law as recognizing the rights of an unmarried partner of a child's biological mother, whether homosexual or heterosexual, to adopt the mother's child. Protecting the interests of children was a particularly important issue for Judith, who proudly served for years as chair of the New York State Permanent Judicial Commission on Justice for Children.

Jacob also sounded a theme of other cases Judith regarded as among her "best": the right of couples to structure their own relationships, regardless of whether they were

1. 63 NY2d 41 (1984), *cert. denied*, 469 US 1227 (1985).

2. 86 NY2d 651 (1995).

of the same sex. *Braschi v. Stahl Associates Co.*,³ another hard-fought case, resulted in a plurality of the court defining a deceased tenant's same-sex partner as a "family" member entitled by statute to continue living in a rent-controlled apartment. These cases were especially important to Judith not just because of the legal craft involved but because they made a difference in many people's lives. It was thus a source of considerable dismay when, years later, she had to write an opinion dissenting from a plurality 2006 refusal to recognize a constitutional right to same-sex marriage in New York in *Hernandez v. Robles*.⁴ (The legislature conferred that right five years later.)

Judith Kaye also had a tremendous influence in the area of state constitutional law, in New York and around the nation. Justice William Brennan's article, "State Constitutions and the Protection of Individual Rights," published in the *Harvard Law Review* in 1977,⁵ inspired her to do extensive research on the New York State constitution during her early years on the court. This led to her enormously influential speech and article, "Dual Constitutionalism in Practice and Principle," first delivered at the Association of the Bar of the City of New York as the Benjamin N. Cardozo Lecture in 1987.⁶ This masterful exposition of the history of the state's constitution, case law interpreting it, and a theory of dual constitutionalism encouraged lawyers to take the New York constitution seriously as an opportunity to forge law recognizing rights beyond what the US Constitution provides. I still assign this scholarly article to my law students for its comprehensive clarity and incisive analysis.

As a Court of Appeals judge, Judith Kaye took her own advice and looked to New York's constitution as a basis for rights in cases like *People v. Class*,⁷ which was being argued in the Court of Appeals around the same time she was writing "Dual Constitutionalism." Judge Kaye's initial opinion in *Class* mentioned both state and federal constitutional provisions in reversing *Class*'s conviction. When the Supreme Court found that the federal Fourth Amendment had not been violated, on remand the New York Court of Appeals interpreted the New York constitution to provide greater protection against searches and seizures than the US Constitution.⁸ Later cases like *People v. Scott*,⁹ where Judge Kaye's concurring opinion set out a defense of her theory of state constitutional interpretation,¹⁰ made the state's constitutional protection of privacy an essential argument for defense attorneys. The New York constitution also became the basis for the Court

3. 74 NY2d 201 (1989).

4. 7 NY3d 338 (2006).

5. 90 Harv. L. Rev. 489 (1977).

6. Originally published in the City Bar Association's *Record*, the article based on this speech was republished at 61 St. John's L. Rev. 399 (1987).

7. 63 NY2d 491 (1984), *rev'd*, 475 US 106 (1986) (as not violating US Constitution).

8. *People v. Class*, 67 NY2d 431 (1986) (after Supreme Court remand, finding right based on state constitution).

9. 79 NY2d 474 (1992).

10. See Susan N. Herman, *Portrait of a Judge: Judith S. Kaye, Dichotomies, and State Constitutional Law*, 75 Albany L. Rev. 1977, 1985–2002 (2012) (discussing Judith Kaye's conception of state constitutional law as a double protection for liberty and as an essential part of federal–state dialogue about rights).

of Appeals enhancing the rights of New Yorkers in areas as varied as free speech¹¹ and educational equity.¹²

Judge Kaye spent about ten years as an associate judge “in a place perfectly suited to me.” She thrived on the challenge, the collegiality, and the practice of her craft of writing. Then the small world of the court was roiled again when Chief Judge Sol Wachtler was forced to resign in November 1992. It says something about Judith Kaye that in her account of the resignation, she chose not to revisit or even mention the circumstances surrounding Judge Wachtler.

Governor Cuomo selected Judge Kaye to be the next chief judge, the Senate unanimously confirmed the appointment, and she was sworn in as the twenty-second chief judge of the New York State Court of Appeals on March 23, 1993, the first woman ever to serve in that position.

If appointment to the Court of Appeals had enabled her to play a role in effecting changes in the substantive law, her role as chief judge of the Court of Appeals and as chief judge of the State of New York put her in a position to bring about deep and abiding changes in the state courts, in the justice system, and even in the courthouse itself.

Undertaking these challenges entailed personal sacrifice. In December 1992, while the chief judge selection process was going on, Judith was interviewed by President-elect Bill Clinton for a position as his attorney general. Even before knowing that she would be Cuomo’s choice for chief judge, she withdrew from consideration because she thought the New York courts needed stability after the disruption of Judge Wachtler’s departure. Janet Reno got the attorney general job; Judith Kaye got the chief judgeship. When US Supreme Court Justice Byron White announced his retirement on March 20, 1993, President Clinton had Kaye’s name on a short list of those considered for that position. But having been sworn in as chief judge just a few weeks previously, she again declined to leave the New York courts, forgoing the possibility of life tenure as a Supreme Court justice. Ruth Bader Ginsburg got that job. President Clinton had been as serious as Governor Cuomo in his desire to select women for top positions.

Cuomo chose wisely. Judith’s influence on the New York courts has been truly transformative. Judith credits her time on the Permanent Judicial Commission on Justice for Children (which she calls “a centerpiece of my life”) with teaching her how to go about initiating reform in a stagnant system. Using what she had learned about process, she appointed commissions, consulted with experts, and enlisted allies to formulate what were sometimes audacious goals and then implement them.

One result of her efforts was the advent of specialized courts—like the Midtown Community Court, where low-level offenders received not just punishment but respectful counseling, treatment, and training. This innovative problem-solving approach was tried in other specialized courts in New York, addressing issues like drug abuse, mental health problems, and domestic violence and was emulated in other states. Judith took endless pride in the success of defendants who were empowered to turn their lives around. The

11. *Immuno AG v. Moor-Jankowski*, 77 NY2d 235, cert. denied, 500 US 954 (1991) (free speech and libel law).

12. *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 NY2d 893 (2003) (educational equity).

Center for Court Innovation, a public-private collaboration inspired by Judge Kaye's vision and founded in 1996, continues to seek new approaches to the problems confronting our courts.

A similar idea led to the creation of a specialized commercial court (the Commercial Division of the Supreme Court), which enabled the New York courts to play the role Judith thought they should rightly play in one of the world's greatest commercial hubs.

One of her crowning achievements as chief judge of the State of New York was her transformation of "jury duty" into "jury service." Jury service law had become riddled with automatic exemptions for people in some twenty professions, ranging from lawyers to podiatrists to embalmers. Judith persuaded the legislature to abolish those inequitable exemptions (even the exemption for lawyers and judges), adding more than a million names to the eligibility lists. She overhauled the whole experience of jury service, finding myriad ways to respect the comfort and convenience of those called for jury service, like adding a call system so prospective jurors could be spared an unnecessary trip to the courthouse. She spoke inspirationally (including in a video welcoming prospective jurors to the court) about the key role of juries in our democracy.

Under Judith's watchful eye, the Court of Appeals courthouse itself was dramatically expanded (by 30,000 square feet), refurbished, and renovated to replace the electrical, plumbing, ventilation, heating, cooling, and telecommunications systems. On her watch, the New York courts adapted to new technologies, including electronic filing. She celebrated the rededication ceremony of the renovated courthouse in 2004 with an eclectic "law and" lecture series, sharing with the public her extraordinary range of interests. The series started with two prominent architects talking about courthouse architecture, and later included my law and literature talk about Theodore Dreiser's novel, *An American Tragedy*, and the New York case on which it had been based, *People v. Chester Gillette*.¹³ Also on the program that evening was Francesca Zambello, who had just directed an opera based on *An American Tragedy*, connecting Judith's love for opera with her interest in law and literature and her pride in her court and courthouse.¹⁴ Judith was a champion for funding improvements of deteriorating courthouses around the state.

Among other groundbreaking initiatives Judith set in motion during her tenure as chief judge—the longest serving chief judge in New York as well as the first woman—were the Committee on the Profession and the Courts, which held hearings throughout the state and issued a report leading to a number of positive reforms, including mandatory continuing legal education for all lawyers in New York, new rules regulating frivolous litigation, the adoption of standards of civility for lawyers, and the creation of what became the New York State Judicial Institute on Professionalism in the Law; the New York State Judicial Institute, the nation's first facility for judicial research and training built by the court system itself; a Special Commission on the Future of the New York State Courts, established in 2006 to evaluate the problems of the court system as a whole

13. See Susan N. Herman, *People v. Gillette and Theodore Dreiser's An American Tragedy: Law v. Literature*, <http://www.nycourts.gov/history/programs-events/images2/Judicial-Notice-11.pdf#page=23>.

14. See Susan N. Herman, *Portrait of a Judge: Judith S. Kaye, Dichotomies, and State Constitutional Law*, 75 Albany L. Rev. 1977, 1977–82 (2012) (describing this event).

and assess the need for further reform; review of the fiduciary appointment system, matrimonial lawyers, and judicial compensation; and the Historical Society of the New York Courts.

All in all, it is no wonder that one prisoner addressed his letter to Chief Judge Judith Kaye, “Dear Mother of Justice.”

In Judith Kaye’s farewell speech on November 12, 2008, she revealed how she had been able to accomplish so much as both chief judge of the Court of Appeals and chief judge of the State of New York: “Each of these jobs,” she said in a line I shamelessly plagiarize, “takes 80 percent of my time.”

Judith Kaye’s “afterlife” at the law firm of Skadden Arps, Slate, Meagher & Flom LLP called on her judicial skills in conducting arbitrations and high-profile investigations (including an investigation of Governor David Paterson) and on her continued dedication to public service as chair of the Commission on Judicial Nominees and some dozen boards of directors. In addition to her law and policy work, she happily agreed to serve on the board of directors of Lincoln Center for the Performing Arts.

Above all, the fair treatment of children continued to occupy her attention. She chaired and served on committees on youth and citizenship, and youth and courts. When the (US) Supreme Court Historical Society invited her to give its annual lecture at the Supreme Court courtroom itself, the topic she chose was due process for children.

Among the many revelatory stories studding her memoir is her reminiscence of an American Bar Association meeting she was attending when her granddaughter, Sonja, cut her first tooth. When a reporter asked her which of those events was more important, Judith replied, “It’s not even close.” Fortunately, she did not have to choose between dedication to her family and dedication to being New York’s “mother of justice.” She met the challenges she set herself, as a woman, of having it all.