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# MASTER, JUSTICE, CHANCELLOR KENT: HIS LEGACY FOR TODAY'S JUDGES

PENNY J. WHITE\*

## INTRODUCTION

As a member of the Tennessee judiciary, I chaired a committee on Judicial Performance Evaluation. It was a controversial proposition—that a system of evaluation would be adopted to judge the judges. Judges, who had previously been subjected only to the periodic evaluation of voters, would now face ongoing evaluations by their peers, by lawyers, by court personnel, and by jurors.

Despite its unpopularity, and the fear that its adoption struck in the hearts of many senior judges convinced that things were just fine as they were, the committee was intent on doing something to improve the quality of judging and hopefully, the public respect for and confidence in the justice system. We plodded on, determined to create an evaluation system that would be palatable to our senior members and yet accomplish our overall goal of improving the administration of justice in our state.

The task was not a simple one. We did not want in any way to interfere with the decisional independence of individual judges. We were convinced that, despite the fact that we might get varying answers to the question, “What makes a good judge?”, that most respondents would agree that the task of judging requires certain attributes that are basic to the profession. Weren't there some identifiable qualities that all good judges shared?

We thought so. And thus, our task turned to identifying those universal qualities that made a good judge and, in turn, positively affected the administration of justice.

In our efforts to identify those qualities, we did what all good committees do, we investigated. We looked to other states and found that less than ten states were doing judicial performance evaluations. We gathered their materials and learned what, for example, Alaskans

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thought were important judicial qualities, how they differed from the traits thought important in New Jersey, and how Colorado, with a mostly citizen-administered evaluation program, differed still.

We had a retreat—always a good committee strategy. We brainstormed individually and in groups. We listed traits on flipcharts, taped the charts to the wall, voted, deleted some traits, added others. We discussed, we deliberated, we disagreed. We presented our findings to the judicial conference; their reactions caused us to revisit our conclusions and to revise some of them. We hosted a panel discussion including New Jersey, Illinois, and Colorado judges. We revised again.

We found the American Bar Association Guidelines for the Evaluation of Judicial Performance issued some ten years earlier.<sup>1</sup> We compared our conclusions to theirs, and finally, after almost three years of intensive work, we devised a plan for judicial performance evaluation in Tennessee, designed to identify the strengths and weaknesses of the members of the bench, capitalize on their strengths, and provide training to improve their weaknesses.<sup>2</sup>

While those countless hours of investigation led us, eventually, I believe to identify the qualities a good judge should possess or aspire to possess, our task could have been much simpler. We simply could have looked at the judicial career of Chancellor James Kent. For each of the qualities that we ultimately deemed significant, and ironically most of those identified by the ABA Special Committee on Evaluation of Judicial Performance, were exemplified by Chancellor Kent as a jurist. In effect, then, Chancellor Kent was the paradigm of a good judge. Had anyone of us on the committee studied his life, we would have known immediately the standards that we wanted to establish for our own judiciary.

### KENT'S JUDICIAL TRAITS

As professor of law, master in chancery, recorder of New York City, associate justice and chief justice of the New York Supreme Court, and finally as Chancellor of New York—judicial positions held by Kent over a period of more than twenty-five years—Kent epitomized the highest standards and ideals of judicial office. His legacy for today's judges is to set the bar which they should all aspire

1. AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (1985).

2. See TENN. SUP. CT. R. 27 (1999).

to scale.

### A. Integrity

First, Kent demonstrated the utmost integrity as a jurist. Kent was a man of character on and off the bench. Before he became a jurist, and perhaps largely responsible for his doing so, Kent demonstrated leadership and integrity as a member of the New York Assembly.<sup>3</sup> In the bitter gubernatorial controversy between George Clinton and John Jay, Kent vigilantly represented the minority in its action against the state canvassers who threw out votes in the election, thus defeating John Jay.<sup>4</sup> In this difficult turmoil, Kent demonstrated the strength of character and integrity which were to become his hallmark and, not inconsequentially, which would win him the lifelong esteem of John Jay.<sup>5</sup>

As a jurist, Kent likewise held himself to the highest standards of conduct. When confronted by resigning Chief Justice Morgan Lewis, a candidate for the governorship of New York who proposed naming Kent as chief justice if Kent would vote for Lewis for Governor, Kent answered, "No, sir, personally I admire and respect your character and attainments; but I utterly detest your political principles!"<sup>6</sup> Nonetheless, after Justice Lewis was elected, one of his first acts as governor was to name Kent chief justice.<sup>7</sup>

### B. Knowledge and Understanding of the Law

Kent's knowledge and understanding of the law was extraordinary. In the speech commemorating the presentation of the Kent Memorial Tablet in the Hall of the Court of Appeals in Albany, New York, in 1924, Edward M. Colie of the New Jersey Bar described Kent's intellectual acumen as follows:

He was endowed with a studious temperament which compelled him to go to the root of every question that engaged his attention . . . . He read widely and acquired great familiarity with the Civil Law and the writings of the continental jurists. But his learning was not that of the mere scholar; he transmuted it and it

3. See Charles Evans Hughes, *James Kent: A Master Builder of Legal Institutions*, 9 A.B.A. J. 353, 354 (1923).

4. See *id.*

5. See *id.* at 354-55.

6. Macgrane Coxe, *Chancellor Kent at Yale* (pt. 2), 17 YALE L.J. 553, 558-59 (1908).

7. See *id.* at 559.

became his own to use effectively whenever it was needed to accomplish his purposes.<sup>8</sup>

One oft-repeated example of his legal brilliance was his introductory lecture delivered at Columbia University in November 1794. In a prophetic voice Kent declared:

[I]n this country we have found it expedient to establish certain rights, to be deemed paramount to the power of the ordinary legislature, and this precaution is considered in general as essential to perfect security, and to guard against the occasional violence and momentary triumphs of party. . . .

No question can be made . . . , but that the acts of the legislative body, contrary to the true intent and meaning of the Constitution, ought to be absolutely null and void. . . . The courts of justice which are organized with peculiar advantages to exempt them from the baneful influence of faction, and to secure at the same time, a steady, firm and impartial interpretation of the law, are therefore the most proper power in the government to keep the legislature within the limits of its duty, and to maintain the authority of the Constitution.<sup>9</sup>

The legal historians among us have already realized that those words of Kent were spoken almost a decade before John Marshall's decision in *Marbury v. Madison*.<sup>10</sup>

### C. Communication

The "dominating ambition" of Kent's life was described at the centennial of his resumption of connection with Columbia University as "nothing short of the complete mastery of the jurisprudence of his time."<sup>11</sup> Remarkably, he accomplished this ambition, mastering it personally, and then, in his later years, communicating it understandably in his *Commentaries on Law*.<sup>12</sup>

While Kent was certainly a great communicator after leaving the bench, as evidenced by his lectures and commentaries,<sup>13</sup> his skill as a communicator did not develop late in life. Kent's ascension to the bench happened at a most opportune time for the country. It was a critical period in the development of this country's jurisprudence.

8. Edward M. Colie, Address at the Presentation of Kent Memorial Tablet (Nov. 24, 1924), in 10 A.B.A. J. 851, 852 (1924).

9. James Kent, An Introductory Lecture to a Course of Law Lectures (Nov. 17, 1794), in 3 COLUM. L. REV. 330, 335-36 (1903).

10. 5 U.S. (1 Cranch) 137 (1803).

11. Hughes, *supra* note 3, at 353.

12. See John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 548 (1993).

13. See *id.*

For, as he described it himself, “[O]ur jurisprudence was a blank . . . . [W]hen I came to the Bench there were no reports or State precedents. The opinions from the Bench were delivered *ore tenus*. We had no law of our own and nobody knew what it was.”<sup>14</sup> Kent set about to remedy that state of affairs. He did so by reporting his own opinions and thereby beginning the system of legal precedent which would be so important to the country’s stability and the system’s predictability.<sup>15</sup>

#### *D. Preparedness, Attentiveness, Punctuality*

While Kent was described as having “no talent for advocacy” and, thus, was “never fond of the contentions of the Bar and . . . the drudgery of practice,”<sup>16</sup> those same omissions proved advantageous to him as a judge. He was “enabled to do patiently a vast amount of work that to another type of mind would have been unendurable drudgery.”<sup>17</sup> “[H]is studies absorbed him, and he gave free rein to his talent, making the best possible preparation for the best service he could render to his time.”<sup>18</sup> He was said to be dissatisfied in any case “until he had examined all the law, and all the writings of jurists,— until he had thrown upon the subject all the light that legal literature could give. He not only made exhaustive researches to decide particular cases but he constantly added to his general stock of learning.”<sup>19</sup>

#### *E. Service to the Profession and the Public*

In addition to the tremendous public and professional service occasioned by his authorship of opinions as a supreme court justice, perhaps Kent’s greatest service was as Chancellor. Despite Kent’s example of leadership as a supreme court justice, in 1814 the Chancery court suffered not only the void of existence which Kent had found in the supreme court but a lack of respect and reputation as well.<sup>20</sup> Because of its ability to exercise extraordinary powers, often in conflict with the liberties of the people, Chancery Court was

14. Hughes, *supra* note 3, at 355; *see also* Colie, *supra* note 8, at 852.

15. *See* Colie, *supra* note 8, at 852.

16. Hughes, *supra* note 3, at 353.

17. Colie, *supra* note 8, at 852.

18. Hughes, *supra* note 3, at 353.

19. *Id.* at 355.

20. *See id.* at 356.

viewed with distrust and disrespect.<sup>21</sup> Kent took over the position of Chancellor reluctantly, describing his task as taking the court “as if it had been a new institution, and never before known in the United States. I had nothing to guide me, and was left at liberty to assume all such English chancery power and jurisdiction as I thought applicable under our constitution.”<sup>22</sup>

Such an invitation—to enter an undefined place with unchecked power—could have yielded disastrous results for New York in the 1800s and for our country to this day. But under Kent’s leadership, the equity system developed and in fact flourished. Kent’s contribution to the development of equity jurisprudence was eloquently described:

This was the extraordinary service of Kent, that he was not enslaved by his comprehensive knowledge or overawed by the learning of the past, that his energy was not exhausted in the toil of research and transcription, or in the laborious study of the complicated details of his cases, but always the easy master of his material he used it with the sagacity of a statesman and with the skill of constructive genius, rejecting, selecting, adapting and adding until he gave to the country an equity system suited to its particular interests.<sup>23</sup>

### *F. Collegiality*

Kent earned the respect, and confidence, of his colleagues because of his knowledge and experiences. In his time, the Supreme Court of New York had four associate justices and a chief justice.<sup>24</sup> In searching for correct principles of law, Kent investigated the civil and the common law, making great use of the French and civil law, topics on which his colleagues had little knowledge.<sup>25</sup> Thus, Kent had a tremendous advantage in persuading his peers. He described himself as making his point by using a “mysterious wand of French and civil law,”<sup>26</sup> winning over the judges with liberal views because they were “kindly disposed to everything that was French.”<sup>27</sup>

While Kent, like most judges on multi-judge courts, was not without his opponents, he used the threat of opposition to even more

21. *See id.*

22. Colie, *supra* note 8, at 852.

23. Hughes, *supra* note 3, at 356.

24. *See id.* at 355.

25. *See id.* at 355-56.

26. *Id.* at 356.

27. *Id.*

perfect his opinions, describing the opportunity of opposition as one not only to overwhelm his opponents, but, on occasion, to correct himself.<sup>28</sup>

### G. Humanity

Finally, Kent demonstrated modesty and humanity, two other essential qualities for the skilled jurist. The story is told of a case Kent tried on the circuit.<sup>29</sup> Kent charged the jury that there was sufficient evidence in the case of a valid gift in a trespass case involving whether growing corn could be a gift.<sup>30</sup> On a motion for new trial filed by the defendant in the case, Kent, as chief justice, wrote an opinion for the court reversing himself in which he set forth the important distinction between the common and civil law as to the requirement of delivery.<sup>31</sup>

Despite his brilliance and talent, Kent was not above being humbled. In 1820, after having suffered reversals of his decisions by the Court of Errors—a court of last resort then comprised of members of the State Senate, the Chancellor, and the Judges of the Supreme Court—Kent expressed his turmoil:

After such devastation, what courage ought I to have to study and write elaborate opinions? There are but two sides to every case and I am so unfortunate as always to take the wrong side. I never felt more disgusted with the judges in all my life. . . . According to my present feelings and sentiments, I will never consent to publish another opinion, and I have taken and removed out of my sight and out of my office . . . my three volumes of chancery reports. They were too fearful when standing before my eyes.<sup>32</sup>

Fortunately for all of us, the downtrodden Kent was quickly overtaken by the energetic, positive one who continued to work and produce opinions which would form the basis for the equity system in America.

### CONCLUSION

In addition to providing a stellar example of the traits a judge should possess, Kent's tenure as a jurist had other effects on today's judges. Obviously, the establishment of a system of writing and

28. *See id.* Kent said his mind "was kept ardent and inflamed by collision." *Id.*

29. *See id.* at 356 (discussing *Noble v. Smith*, 2 Johns. 395 (N.Y. Sup. Ct. 1807)).

30. *See id.*

31. *See id.*

32. Hughes, *supra* note 3, at 357 (quoting Letter from James Kent to William Johnson (1820)).



reporting opinions has simplified the judging process for state and federal judges around the country.<sup>33</sup> Less obvious, but very significant, was Kent's contribution to the principle of judicial independence—his devotion to assuring that this country did not, as its predecessor had, establish a judiciary beholden to the King or to any branch of government. Similarly significant was his establishment in the decision of *Yates v. Lansing*<sup>34</sup> of the principle of judicial immunity, necessary he said to prevent the “licentious . . . [from] traml[ing] upon every thing sacred in society, and . . . [from] overturn[ing] those institutions which have hitherto been deemed the best guardians of civil liberty.”<sup>35</sup>

While these remarks have intentionally focused on Kent's legacy as it effects today's judges, in doing so I have also remarked quite frequently on his effect on justice. That topic should not be closed without a final comment: a recognition of Kent's effect on preserving the sanctity of the jury system and preventing the court from unduly encroaching on the obligations of jurors. It was Kent who asserted in *New York Firemen Insurance Co. v. Walden*,<sup>36</sup> an opinion from the Court of Errors, that judges were not authorized to direct the jury on questions of fact, but that juries must be left free to ascertain the facts from the evidence.<sup>37</sup>

And so it is an accomplished life to which you pay tribute today. Every judge would relish receiving the tribute paid to Kent some one hundred years after his life. Though this tribute was offered on the anniversary of the centennial of his return to Columbia University, careful attention to its contents convince me that Kent's legacy would have been just as great had he ascended the bench in 1998 rather than 1798:

Who is more entitled to honor than the incorruptible, learned, industrious, impartial judge? Amid the play of favoritism, the abuses of administrative discretion, the compromises of legislative halls, amid chicanery and dishonesty, disrespect of law and efforts to subvert its enforcement, he stands forth, dependable and steadfast, alike to the rich and poor, weak and strong, the righteous and courageous judges, the fit representative of democracy commanding its best talent for the performance of its highest function.

33. See Langbein, *supra* note 12, at 571-78.

34. 5 Johns. 282 (N.Y. Sup. Ct. 1810), *aff'd*, 9 Johns. 395 (N.Y. 1811).

35. *Id.* at 298.

36. 12 Johns. 513 (N.Y. 1815).

37. See *id.* at 519.

It was his character which ennobled the offices which he held, which enabled him to accomplish his great tasks, and which will cause to be held in fadeless honor his name and service.<sup>38</sup>

38. Hughes, *supra* note 3, at 359.