

TO KNOW WHO WE ARE AND WHAT WE CAN DO¹

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Early in 2013, in the midst of interviews conducted by several upstate bar associations reviewing candidates for a seat on the New York Court of Appeals, I sat down at lunch and met Sheila Abdus-Salaam. I was not in my element, and I'm sure she noticed that when she decided to sit next to me and introduce herself. Toward the end of our conversation, she said she hoped the Governor would select me for the pending vacancy on the Court of Appeals, and she said it with such sincerity that I was convinced she, not I, should be the Governor's selection. Happily, he saw it the same way, and she joined the court a month later. Sadly, her time on the court was far shorter than it should have been: a great loss for me personally, but a far greater loss for the people of New York.

The popular press and one-page summaries of her work mention her opinions establishing the parental rights of nonbiological same-sex partners;² granting undocumented defendants the right to be informed expressly that a plea of guilty will likely result in deportation upon release from prison;³ and recognizing the constitutional impropriety of striking jurors based on skin color, even if neither racial nor ethnic discrimination is involved.⁴ Those accounts are a bit off point because, so long as the judge randomly assigned to a case commands a majority, she will write the opinion, incorporating numerous suggestions from her colleagues. The key is not so much in the writing but in obtaining a majority, so insight into a judge's role is usually better discovered through her dissents than her majority opinions.

A few exemplary dissents help illuminate Judge Abdus-Salaam's place on the Court of Appeals: a careful crafter of opinions animated by the practical consequences of judicial decisionmaking, not just in the

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1. "To know who we are and what we can do" are Judge Abdus-Salaam's words, spoken at the end of a short interview with Project Brownstone. In the interview, Judge Abdus-Salaam describes the first book she ever owned as a child, a book of African fairy tales, and how it led her to research her family history and discover that she—who became the first African American woman to sit on the highest court in New York State—was the great-granddaughter of slaves. See Project Brownstone, Impact Videos; Sheila Abdus-Salaam at 1:46, YouTube (Feb. 7, 2014), http://www.youtube.com/watch?v=O_QCtvoqUjU (on file with the *Columbia Law Review*) ("So, all the way from Arrington, Virginia, where my family was the property of someone else, to my sitting on the highest court in the state of New York, is amazing and huge, and it tells you and me what it is to know who we are and what we can do.").

2. *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488 (N.Y. 2016).

3. *People v. Peque*, 3 N.E.3d 617 (N.Y. 2013).

4. *People v. Bridgeforth*, 69 N.E.3d 611 (N.Y. 2016).

case at bar, but with the future firmly in mind. In *People ex rel. Delia v. Munsey*, Judge Abdus-Salaam dissented from an “ominous and untenable” decision in which the majority held that “a mentally ill dangerous person must be automatically released, solely because the hospital, due to administrative oversight, failed to timely file an application seeking the patient’s further retention.”⁵ In *People v. Turner*, the majority reversed the conviction upon a plea of guilty by a defendant who, at her allocution, was not advised that her sentence would be followed by a term of post-release supervision.⁶ Judge Abdus-Salaam would have affirmed the conviction because, at sentencing, the defendant was advised of the term of post-release supervision, affirmed that she understood it, stated that she had discussed it with counsel, and said she wished to go forward with the sentence.⁷ Finally, in *Carver v. State*, the court held that the winner of a \$10,000 lottery was not subject to a statute authorizing the State to withhold up to fifty percent of the winnings to repay the State for public assistance he had received.⁸ The majority reached that result by using the Fair Labor Standards Act’s “economic reality” test, typically used to determine whether a person is an independent contractor or an employee and to construe the “workfare” services required as a condition of receiving public assistance as “employment” by the state. In *Carver*, the majority found the plaintiff was an “employee” entitled to receive minimum wage under federal law—which, in his case, would have been violated were he not allowed to retain his \$10,000 lottery winnings.⁹ Judge Abdus-Salaam summarized her dissent: “[T]he economic reality test . . . cannot be used as a mere device to skip over the glaring lack of any legislative support for the extension of the statute’s minimum wage provisions to public assistance or workfare recipients. . . . [T]he majority’s contrary holding . . . does not comport with any sort of reality, economic or otherwise.”¹⁰

Sheila Abdus-Salaam was a magnificent judge. I say that not because of her scholarship or erudition, knowledge, or diligence, but because of her empathy and deep understanding of the human condition. Her opinions, whether for the court or in dissent, were anchored in the realities of the workaday world. King Solomon’s judgment was not based on law books or statutes, but on his recognition that a true mother would rather give up her baby than see him cut in half.¹¹ There is a Japanese folktale¹² in which the fabled Judge Ooka resolves the same problem in a

5. 41 N.E.3d 1119, 1127 (N.Y. 2015) (Abdus-Salaam, J., dissenting).

6. 22 N.E.3d 179, 181–82 (N.Y. 2014).

7. *Id.* at 183 (Abdus-Salaam, J., dissenting).

8. 44 N.E.3d 154, 162 (N.Y. 2015).

9. *Id.*

10. *Id.* at 163 (Abdus-Salaam, J., dissenting).

11. 1 Kings 3:16–28.

12. Plays About Judge Oh-Oka, <http://www.folktales.net/pdf/webooka> [<http://perma.cc/M5GB-QP54>] (last visited Nov. 3, 2017).

similar way: He pretends to have the gift of prophecy and announces a vision in which the baby meets with an accident and his mother spends the rest of her life working in the rice paddies to support him. One woman immediately disclaims the baby; the other says the prophecy does not matter to her.

The pound of flesh in Shakespeare's *Merchant of Venice* is taken from a Moroccan folktale¹³ in which a young man makes a deal with a wealthy merchant: He borrows money for business purposes and promises to repay the debt with a pound of flesh if his business fails. When it fails and he is lamenting his fate outside the palace where he will be judged by the king, the princess learns of his plight, disguises herself as a lawyer, and argues to her father that the pound of flesh must be taken exactly—not more or less—in one stroke. When the merchant says he cannot possibly do so, the princess proposes that all will be better off if the merchant takes the young man to work for him, trains him in business, and allows the young man to repay the debt in that way. The king agrees and demands to know who the unfamiliar lawyer is. He is, at first, enraged that it is his daughter, but he later asks her to sit at his side and judge all cases with him, and, thereafter, “the kingdom was ruled with more kindness than justice required.”

Sheila possessed those legendary qualities in a superabundance. In every case—from the most wrenching criminal or family court cases to the driest commercial cases—she imagined herself in the positions of the parties, wrestled with their troubles as if they were her own, and when she spoke, softly, we all listened, carefully. Her empathy, sensitivity, and compassion pervaded all she did. As soon as I was nominated, she called me to say how excited she was to have me as her “little brother” on the Court of Appeals. After my very first court conference, when there were two cases in which it looked as if I would be the lone dissenter, she stopped into my chambers to ask if I was okay, saying that I had looked upset during conference. At the next court conference, when it was my first chance to deliver a case report to my colleagues, I had structured my report in a way suitable to a mystery novel. After about thirty seconds, Sheila burst into laughter and said, “Rowan, you have to tell us right away what you think we should do!” Without the laughter, it might have sounded like a reprimand, but coming from Sheila, it was like your big sister teaching you to ride a bike. After I circulated my first draft dissent, she again visited me to tell me she thought it was very persuasive, and although she was not going to change her vote, she was going to write separately as a way of encouraging future litigants to take a run at the issue I had raised.

Sheila cared deeply not just for the litigants and her colleagues, but for everyone—from the court staff to total strangers. On the day I was sworn in, she and my oldest daughter had a lengthy discussion about my

13. Sharon Creeden, *Fair Is Fair: World Folktales of Justice* 53–57 (1994).

daughter's college applications and Sheila's college experiences, during the course of which Sheila learned the date my daughter would hear from NYU. When that day came, court was in session. Sheila called me after oral arguments had concluded to ask if my daughter had heard from NYU; I was so busy with work that I had forgotten to call home to find out, but Sheila had remembered, and she then sent my daughter a lovely note.

Last February, Judge Abdus-Salaam hosted diversity day at the court, for all court employees, at which volunteers could tell the assembled group something about their surnames, given names, or even middle names. What struck me was how similar the stories were, in that they almost always referenced the point at which some ancestor came to America, the struggles he or she faced, and how, in some cases, the name mutated or was given. Each story captured a proud family history. I suspect she knew that asking people at "diversity day" to talk about their names would expose the underlying commonness we all share, as human beings who are part of a community and who owe each other something: courtesy, respect, understanding, and maybe even aid.

Fundamentally, Sheila was a great judge because she was a great person. There is a sense in which Sheila's prodigious gifts were innate and "droppeth as the gentle rain from heaven."¹⁴ However, even if we, now without her, must strain to approach her extraordinary measure of kindness, thoughtfulness, and compassion, we should periodically remind ourselves that it costs us very little to be concerned about others and doing so "blesseth him that gives and him that takes."¹⁵

Yes, we will continue to benefit from Judge Abdus-Salaam's judicial opinions—whether majority opinions establishing new rights or dissents chiding us for insufficient attention to the practical—but in the end, for those of us who spent even the briefest time with her, those writings are secondary. Maya Angelou said, "I've learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel."¹⁶ What Sheila would encourage us to do, I think, is to live our lives in a way that makes others remember we made them feel wonderful, as she did for us.

14. William Shakespeare, *Merchant of Venice* act 4, sc. 1.

15. *Id.*

16. Lindsay Deutsch, 13 of Maya Angelou's Best Quotes, *USA Today* (May 28, 2014), <http://www.usatoday.com/story/news/nation-now/2014/05/28/maya-angelou-quotes/9663257/> [<http://perma.cc/EXD5-WMFR>].