

Promoting Diversity in the Courts: Judge Anthony Cannataro and Justice Joanne Winslow

John Caher: Welcome to Amici, news and insight from the New York Courts. I'm John Caher.

For this Pride Month edition of Diversity Dialogues, we are fortunate to have not one but two pioneering judges as guests: the Honorable Anthony Cannataro of New York's highest court, the Court of Appeals, and Justice Joanne Winslow of the Appellate Division Fourth Department. Together the judges co-chair the Richard C. Failla LGBTQ Commission of the New York Courts.

Judge Cannataro, only the second openly LGBTQ judge on the high court, is, in addition to celebrating Pride Month, celebrating his one-year anniversary on the Court of Appeals. Justice Winslow just marked her fifth anniversary on the Appellate Division, Fourth Department. Recently, because the Court of Appeals was shorthanded, the Court brought in Justice Winslow to join the panel and sit on a case argued April 19th. That day marked the first time *ever* when two openly LGBTQ judges sat together in the state's highest court. It was also the day when the portrait of the late Paul Feinman, the first openly gay judge in the Court of Appeals, was unveiled.

Judges, thank you for joining me. Justice Winslow, you were admitted in 1987. Judge Cannataro you came a little bit later, in 1997. But both of you came of age at a time when being gay or lesbian was viewed as shameful or deviant, certainly not *prideful*. So I'd like to ask each of you when you came to terms with your own sexuality and how easy or difficult that was. Let's start with you, Justice Winslow.

Justice Winslow: All right. Well, I would say I fully realized who my authentic self was when I was 19 years old.

John Caher: Wow!

Justice Winslow: And it was many years later when I felt safe enough to live my life as my authentic self fully. And it didn't happen all at once. It sort of happened in pieces. The first major piece occurred back in 1993 when I went to the March on Washington, and it was really very affirming to be in the midst of, I think the estimated size of the crowd was as high as 700,000 people, who were either LGBTQ persons or allies. And then when I came back and returned to work, that sort of gave me the impetus to begin to open up more. And so the people that I most closely trusted—I was at the DA's office at the time—the people that I most closely trusted and had lunch

with on a regular basis, I started to open up and be my full self with them. And it wasn't really until, oh, several years later that I was open about my identity fully at the DA's office. And that was where I had spent my first 22 years. So it was probably a good 10 or 12 years in before I was my authentic self at the DA's office.

Then when I ran for election in 2008, I didn't try to hide my sexual identity, but I also didn't put it on my palm cards that I handed out. And then once I took the bench, it became much easier to be fully my authentic self and not really have to worry about it, thanks to the great State of New York.

John Caher: What was life like before you became 19, before you came to terms with things?

Justice Winslow: You know, it was really a lot of questioning. I had had some experiences that made me wonder what my direction would be. And it was tough because, as you said, back in those days it was considered devious. It was considered even illegal in some places. And people could get fired from their jobs, evicted from their homes. I mean, just horrible things could happen. But I came to realize that it was who I was. And to me that meant I had to be who I was. I just had to tread carefully in the very early years.

John Caher: That's too bad you had to tread carefully. Judge Cannataro, what's your story?

Judge Cannataro: So, I am a child of the seventies and a teenager of the eighties. And while I always knew I was gay from a fairly early age, my entry into adulthood sort of coincided with the AIDS epidemic. And my journey was such that rather than deny it or hide it, at least to myself, I embraced my identity and used the activism that was going on around AIDS at the time to sort of justify my self-identification as a gay person. I was in New York City, which was kind of the epicenter of AIDS advocacy.

In the early days, I went to ACT UP meetings and just got really involved with the community. So there was always a public facing aspect of my identity from the very earliest days that coincided with my sexual identity. But like Judge Winslow, my coming out process was staggered, the way it was for so many of us.

I was out to friends in the beginning and then out to friends and certain family. My parents were the very last to be formally informed, and that didn't happen until quite late in the game. I was already admitted to the

bar when that happened. But I don't think it came as much of a shock to them by that point because I was at least 30 years old when I came out to my parents.

But unlike Judge Winslow—this might be geographic as well as something to having to do with the changing times—when I ran for my first judgeship in 2011, I was aggressively out and proud. The district I ran in was actually Chelsea and Hell's Kitchen. So it was not just tolerated, it was actively embraced by the community that I was running as the only LGBTQ candidate in the race. So as far as my public life, professional life, is concerned. I've always been very much identified with this aspect of who I am.

John Caher: What's interesting to me is you basically are 10 years apart, but your stories are quite a bit different. And let me ask you, honestly, when you were in high school, college, law school, did you really see the day coming when same-sex marriage was not only constitutionally protected in this country, but widely accepted?

Justice Winslow: I absolutely did not expect to have the right to marry in my lifetime. In fact, I attended the wedding of the last boy that I dated and went with my mother. And she, and unfortunately the groom, saw me weeping during the course of the wedding. And they both thought it was because I wasn't the bride. And that really had nothing at all to do with it. The reason I was weepy was because as I watched the wedding and the ceremony and the reception, all I kept thinking about was how I would never have one of these. I would never get to do this. And it was very distressing to me. I certainly never thought that my ability to get married would be constitutionally protected or widely accepted—but I'll disclose to you that Lin and I are getting married in August!

John Caher: Congratulations!

Judge Cannataro: Congratulations!

John Caher: Now you were both attorneys well into your career in 2006 when the Court of Appeals, where you now sit, Judge Cannataro, upheld the ban on gay marriage over a very powerful dissent by Chief Judge Kaye. What was your feeling when the court did that?

Judge Cannataro: That was a disappointment, obviously. It would've been extraordinary for the community and for anyone who works in the law or works as a judge to see New York's highest court take the lead. I understand, and I even understand more so now that I'm at the Court, the many dynamics that

go into decision making, and I think I have a better understanding of why that Court could not at that time make a holding, or at least a constitutionally-based holding, that affirmed a lesbian and gay couple's right to marry.

I was actually working at the Court around the beginning of the millennium, in 2000 through 2003 or so, when a line of cases, a very odious line of cases, involving non adoptive, non-biologically related parents and their rights to have custody and/or visitation with their children was going through. We used to call it the "Alison D." line of cases. [See *Alison D. v. Virginia M.*, 77 NY2d 651 (1991)]. The Court had been presented with multiple opportunities since the time *Alison D.* was decided to overrule their holding.

There are a lot of factors that go into the decision, not just what the holding of the court is going to be, but also whether to grant leave on a particular issue or not. And one of the factors always has to be, "Well, is it time to grant leave?" In other words, you don't want to take the risk that you can get an even worse holding out of the court of last resort by granting leave on something too early and where the community at large is not ready or the individual judges of the court are not yet ready to take that next step in the evolution of the law.

So, while it was very personally disappointing for me to see an issue that was of such great importance to the LGBTQ community not get reviewed and possibly reversed from a decision, which I think we all know has since been reversed, I learned a lot about the way the law works, especially at this level. It's all in the timing. You have to bring the cases at the right time, when the community's ready and when the court is ready. So I understand *Rodriguez* in its context, but of course it would've been nice to see it go a different way.

John Caher: Now, we've come a long way. Some of the change has been through the democratic, political, legislative branches. Some of it's been through the courts. How have the courts been an agent for change?

Justice Winslow: Well, I think that the courts and the law have been an agent for change by making the law reflect that society has changed. Sometimes the law takes a while to catch up with society. But you look at cases over the years. You look at *Lawrence v. Texas*, the Kansas law criminalizing gay or lesbian sex, was unconstitutional and finding that there was a constitutional liberty and privacy that was consistent with due process. That was 2003. [See *Lawrence v. Texas*, 539 U.S. 556, (2003)]. And that was just three years before the case we just spoke of. Then, *United States*

v. Windsor [See *United States v. Windsor*, 570 U.S. 744 (2013)], that was in 2013, and that basically overturned the DOMA [Defense of Marriage Act]. And then *Obergefell v. Hodges* in 2015 [See *Obergefell v. Hodges*, 576 U.S. 644 (2015)], that certainly made my earlier belief wrong, which I was very happy about. And that was really life changing for a lot of people, clearly in the community. And I think again, it reflected where society already was.

John Caher: That kind of goes back to what Judge Cannataro said about the law being a progression.

Justice Winslow: Yes.

John Caher: One step leads to the next and leads to the next and leads to the next. Rather than big leaps, maybe there are more often baby steps on major constitutional issues. Would you agree with that?

Judge Cannataro: I do. "Progressive" is a such a loaded word right now because it's been adopted by a particular political movement, but I think at its core, "progressive" just speaks to the evolutionary nature of societies. And our society, American society, has been steadily progressing through its history to what we all hope is a better and more equal appreciation of all of its members.

All the developments in the law that Judge Winslow spoke about I would hope just reflects the health of our democracy and the evolution of our society towards a better understanding. I mean, I'm going to misquote Martin Luther King now, but he said: "The arc of the moral universe bends towards justice." [Actual quote: "The arc of the moral universe is long, but it bends toward justice."] I just ruined his quote, but he was right that, in time in a healthy community, in a healthy society, we hope that all of us are appreciated and understood and have our rightful place among our peers.

John Caher: I'd like to ask each of you what led you to the study, the practice, of law?

Justice Winslow: Well, for me, it was really two things. One, my dad had always wanted to be a lawyer. he was in college in 1929 when the stock market crashed. And his aunt who had raised him... His parents were in the circus. My grandparents were in the circus, and they didn't want him raised in the circus. So he was raised by an aunt who was wealthy by the times' definition. She lost all of her money in the stock market crash, and so he had to leave college and go home and go to work and take care of her as she had done for him all those years. And he never got back to law

school. And so that was a dream he never realized, and we sort of knew that growing up. And I think that partially made it appealing to us to be able to do something that he found important, that he wanted to achieve and never got to.

And then I think also it was an outcropping really of what my experience had been growing up as a gay woman in Upstate New York in the seventies, in the sixties. Fairness and equality were the guiding principles of my life, and I really felt as though going into the law would allow me to live that, not just believe in it, but live it. And so that was why I went.

John Caher: When you were at Springfield College, was law something in the front or the back of your mind?

Justice Winslow: Yeah, it was actually part of my long-range plan. I was a secondary education history, social studies major. My plan was to teach in a high school for a number of years and then go to law school after I had some real-life experience in a high school. But when I got out in 1981, there were no tenure track positions available and law school tuition just kept mounting and mounting and mounting, and so I decided it was time to go.

John Caher: Okay. Judge Cannataro, why did you become a lawyer?

Judge Cannataro: Well, I won't say that it was my goal to become a lawyer throughout my entire life and that I conceived of it when I was just a little boy.

I'm the child of immigrants. My parents both came to this country from Italy. They were old enough when they came here that they weren't formally educated in American schools. So although my mother did subsequently get a GED and go to college, and she actually became a teacher, when they first got here they were looking for more opportunities for their children and for their families. So it was very important to them that I find a good solid career, not withstanding my desire as a young gay man to, I don't know, become an actor or do something more creative with my life.

I was a classics major in college. And by the time I had gotten my degree, I would've been very content with the life just studying Aeschylus and reading Greek and Latin texts. But, again, it was very important to my parents even then that I pursue something that they thought would keep me in good stead throughout my professional life.

And at that point, I knew enough about the law to understand that you could do a lot of things with a law degree and that maybe I could bring my love for whatever was my passion at the time to bear somehow through the law. That turned out, obviously not to be the case, because being a judge has very little to do with studying Latin or Greek, although I know what *habeas corpus* means better than most people, I suppose. So, it didn't really work out that way, but that's not to say that I didn't find something I love. And I am a testament to the idea that you should be open to whatever life brings you, because looking back on my career in the law now and my time in the judiciary, I wouldn't have it any other way.

John Caher: Let me segue into the Failla Commission, which you two co-chair. In 2016, I believe it was, Chief Judge DiFiore created the first court-based commission in the nation dedicated to addressing issues facing the LGBTQ community. What was the significance of that action by the Chief Judge at that time?

Justice Winslow: Well, I think it was of great significance. The mere fact that it was the first in the nation shows the Chief Judge's commitment to equality and fairness and to her ability to be ahead of the curve and be able to provide a model for the entire nation.

On a practical level, she had the vision to establish a commission that works to see that all users of the courts—be they judges, clerks, court officers, attorneys, litigants, witnesses, jurors—everybody who walks through the doors of the courthouse for any reason are treated with dignity and respect and equality, and that they're not made to feel like they're less than or that their difference is a negative factor. And to me, that's huge and I'm very appreciative that she did so.

John Caher: Now Justice Cannataro, Justice Winslow just said that Judge DiFiore was ahead of the curve. Well, that curve was in 2016. Should that curve have come a whole lot sooner?

Judge Cannataro: I don't think the curve was not there prior to the Chief's Judge's ascendancy to her current position. I think what the Chief Judge has done time and time again with the Failla Commission, with her recent efforts in equal justice in the courts and making it not just a priority, but a top level urgency for the courts, is expressed her innermost sense that in order for the courts to operate the way they should, in order to deliver justice equally to all members of our community, the courts have to be all those things that Judge Winslow was just saying. They have to be fair. They have to be equal. They have to be respectful of all its members. And I just

think that our current Chief Judge recognizes that truth so fundamentally that she cannot abide any inequality existing in our court system.

We're just so lucky to have someone who takes those issues seriously, because in a big busy court system like ours, it's just very easy to get distracted with the mundane day-to-day frustrations of what we do and the sheer volume of work that we have to do. It's to her credit that she looks past all of that and says, yes, but in order to do that volume of work the way it needs to be done and with excellence, which was her original initiative, we have to provide a fair and safe space for everyone to come and bring their disputes and expect and respect the process that they're involved in. So, I appreciate her greatly.

John Caher: And I'm sure she appreciates you as well.

Now, you are both appellate judges, so I'd like to ask you what difference does it make, or does it make any difference, to have an LGBTQ judge on the court? Is this just a matter of pride, or do judges of different backgrounds bring different perspectives to cases?

Justice Winslow: Well, I think inclusion is very important. I don't think it's just a matter of pride, although certainly those of us who are there are prideful that we're there and are happy to be there. For the same reason it's important to see women judges or judges that are racially and ethnically diverse, it's important to recognize and accept differences. It helps make the court users feel welcome when they see people like them in a courtroom and in a role such as a judge. Like I said earlier, not that long ago LGBTQ persons were evicted from their homes because they were gay or banned from serving in the military or denied access to their partners in hospitals, things like that. So, I do think it's very important. And we do bring a different perspective, as any judge brings a different perspective because of their own life experiences.

Judge Cannataro: I second all of that. I completely agree with Judge Winslow's statement that we're all different. We all bring unique experiences. And it's not so much that we belong to a particular category that makes the judiciary better, but I do believe very much so that part of the success of the courts has to do with the trust that is placed in them by the community. And it is easier to have trust of the entire community when the communities can look at the court and see themselves in it.

And that's not an argument for why there should be LGBTQ judges on the bench. That's an argument for why there should be all different kinds of

judges on the bench, people from every social, ethnic, religious background possible.

We're all trying to do the same thing—we're trying to deliver justice through the American legal system. And we're all well-educated and we understand how that works. But how we approach it is different. And certainly how the public views us is greatly changed when there are different members of the community on the bench. And I just want to say, if there's anybody listening to this podcast who's thinking about a career in the judiciary, we need a trans judge in the New York State courts. We need a transgender judge in the New York State courts for that very reason.

John Caher: We don't have one?

Judge Cannataro: We don't have one that I know of. And you know, it would be wonderful for that community to see one of their members on the bench.

Justice Winslow: I concur. Well said, Judge Cannataro.

John Caher: And finally on April 19th, a historic day, how did you each feel when you sat there together in the highest court in the state on the day that the portrait of Judge Feinman was unveiled? Did you look over at each other and wink or smile? What was it like up there that day?

Justice Winslow: Well, I was part of the first all-woman panel here at the Fourth Department, and it was great to have that happen. We took note of it at the time. We didn't ahead of time recognize it, but at the moment that it happened, or the morning that it was going to happen, we were aware of it and we made note of it. But then once we went into court and the work kicked in, it was a fleeting moment really, and we did get asked about it a few times afterwards, but it still was important.

April 19th was similar, but bigger, for me. It certainly was a first. It was a milestone in LGBTQ legal history, I suppose. But for me, it had a dual effect of being the pinnacle of my entire career, being able to sit on a case at the Court of Appeals that day. It was special because of the unveiling of the Judge Feinman portrait and all that he had contributed to the legal profession and in particular to his position at the Court of Appeals. And so on many levels, it was a very, very special day, and I felt very fortunate to be a part of that day.

Judge Cannataro: Yeah. Yeah. I feel similarly. I filled Judge Feinman's vacancy. So, Judge Feinman's legacy and his symbolic meaning both to the courts and to the

LGBTQ community is sometimes a weight that I carry with me because it's just a lot to live up to. But Paul was an amazingly gracious and kind person in addition to being intelligent and hardworking and just a fantastic judge. A good friend of his expressed to me once when I mentioned that sometimes I fear the massiveness of his legacy, said to me that I should think of Paul as sort of being on my shoulder and guiding me. And that makes it all much better. So to see his smiling face in that beautiful portrait that was unveiled on April 19th, I don't have to imagine Paul over my shoulder helping me. I just have to look over onto the wall next to where I sit and I can see Paul just above my shoulder smiling down on me. So that's great.

Like when Judge Winslow sat at the Fourth Department for the first all-female panel, it didn't occur to me on the morning of April 19th or any time before that that we were going to have two openly gay judges sitting on the New York State Court of Appeals for the first time in history. I just woke up and thought, oh, my friend Joanne is going to be here today. So it's great, I guess, that we as a culture have come to a point where even for me that momentous occasion didn't register until I saw us both together in the courtroom. It was great having her there, and I certainly look forward to the next full-time member on the community sitting on the bench with me.

John Caher: Judge Cannataro and Justice Winslow, thank you for your time and your service. And happy Pride Month!

Judge Cannataro: Happy Pride!

Justice Winslow: Happy Pride!