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Government, Law and Policy Journal

A Publication of the New York State Bar Association
Committee on Attorneys in Public Service, produced in cooperation with the
Government Law Center at Albany Law School

Chief Judge Judith S. Kaye

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Message from the Chair

By Patricia E. Salkin

Leader, mentor and visionary are the first three words that come to mind when I think of Chief Judge Judith Kaye. She has been a remarkable Chief Judge and when court historians study the legacy that she leaves, there is no doubt that Chief Judge Kaye will be described as the Chief Judge with the courage to recommend and implement meaningful reform measures to enhance the services, efficiency and the administration of justice for all New Yorkers. In 2007, this Committee recognized Chief Judge Kaye with our Excellence in Public Service Award, where she was described as the "government lawyer's lawyer." No doubt she sets the bar high on honesty and integrity, but she has been engaged, throughout her entire tenure in the New York court system, as a principled change agent. Her actions as Chief Judge will undoubtedly earn her a reputation as a person who cared enough to make a difference. As the pages in this issue of the *Government, Law and Policy Journal* will reveal, her success is nothing short of remarkable. On behalf of the Committee on Attorneys Public Service and the Editorial Board of the *Government, Law and Policy Journal*, special thanks and appreciation to Judge Jonathan Lippman for his leadership and direction as Guest Editor of this issue.

"As the pages in this issue of the Government, Law and Policy Journal *will reveal, her success is nothing short of remarkable."*

In January 2009, the Committee will once again convene in New York City during the Annual Meeting of the New York State Bar Association for our highly sought after CLE program. On the morning of Tuesday, January 27th, *The Supreme Court and the Election Returns,* the popular Supreme Court in Review Update, will be presented by Brooklyn Law School Professors Susan Hermann and Jason Mazzone. This session will discuss significant Supreme Court decisions of the October 2007 term and significant cases pending in the 2008 term, and address the theme of change. How might the Supreme Court change in light of the result of the November elections? Does the Supreme Court itself "follow the election returns" by moderating its own conduct in light of public reactions? The afternoon will feature *Judith Kaye as Chief Judge: Reinventing Judicial Leadership*, a special panel discussion on the impact of Chief Judge Kaye on the courts and community. The CLE sessions will be followed by the annual Excellence in Public Service Awards reception. Special thanks to Committee members Donna Case, Donna Giliberto, Anthony Cartusciello, Robert Freeman and the members of their subcommittees for putting together what promises to be an outstanding day of education and celebration. More information about these programs is contained elsewhere in this *Journal*.

In my last column I updated members on some of the ethics issues that the Committee has been working on. Discussions are continuing with ethics counsel to ensure that all government lawyers are afforded appropriate opportunities to be actively engaged in the activities of the State Bar Association—including active participation as members and participation as speakers and authors for Association sponsored programs. In addition, in cooperation with the Municipal Law Section and the Committee on Continuing Legal Education, the Committee on Attorneys in Public Service is sponsoring a three-part CLE this Fall on ethics for government lawyers. Special thanks to Committee Coordinator Spencer Fisher for his leadership in helping to shape these programs.

In the coming year, the Committee on Attorneys in Public Service will continue to look for ways to interest more government lawyers in membership in our Association. We have already started to work more closely with sections, such as the Environmental Law Section and the Municipal Law Section, and we will begin outreach in a more formal way to other State Bar entities. We also hope to publish a new edition of our now out-of-print ethics book and we are exploring a publication on disaster preparedness for government lawyers. Robert Freeman and Camille Jobin-Davis of the Committee on Open Government have agreed to serve as co-guest editors for the Spring 2009 issue of the *Government, Law and Policy Journal* which will examine access to government issues. We invite your interest, suggestions and more active participation as a member of one of our subcommittees (all State Bar members are welcome to join one of our subcommittees).

Best wishes for a happy and healthy holiday season. I look forward to seeing many of you in January at our Annual Meeting.

Editor's Foreword

By Rose Mary Bailly

It has been a privilege to be involved in the preparation of this issue celebrating and honoring Chief Judge Judith Kaye.

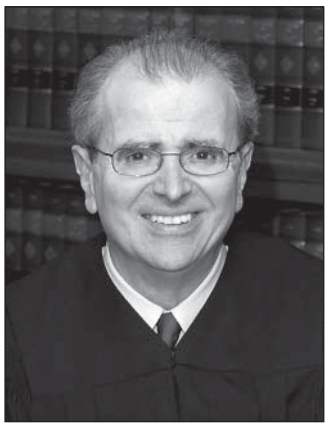
We are delighted and grateful that the Honorable Jonathan Lippman, Presiding Justice of the Appellate Division, First Department, our guest editor, has provided his leadership and enthusiasm in assembling this issue.

I also want to extend my thanks to the authors and everyone behind the scenes whose hard work and diligence have made this a successful issue. In particular, I would like to thank Anthony E. Galvao, Esq., Special Counsel to the Administrative Judge, for all his help. Our Board of Editors always provides support and encouragement. Our student editorial staff, once again, has risen admirably to the occasion. Special thanks are in order to our new student Executive Editor for 2008-2009, Lauren DiPace. Albany Law School, Class of 09. She and her colleagues from Albany Law School Class of '09, Christopher Clark, Samantha David, Cecilia Faleski, Ruth Green, Kevin Hines, Daniel Katz, and Jessica Vaughn, did outstanding work in reviewing the articles. As always the talent and expertise of the staff of the New York State Bar Association, Pat Wood, Lyn Curtis and Wendy Harbour, made the preparation of this issue smooth sailing. And last, but most certainly not least, my thanks to Patty Salkin for her unstinting support.

Finally, any flaws, mistakes, oversights or shortcomings in these pages fall on my shoulders. Your comments and suggestions are always welcome at rbail@albanylaw.edu or at Government Law Center, 80 New Scotland Avenue, Albany, New York 12208.

Chief Judge Judith S. Kaye: A Legacy of Visionary Leadership

By Hon. Jonathan Lippman



Judith S. Kaye has admirably served our state as a judge of the Court of Appeals for the past quarter century, including almost 16 years as Chief Judge of the State of New York. As a jurist, her legal scholarship and erudition have inspired state and national legal trends. As the leader of the New York courts, she has presided over a long and sustained period of reform and innovation unique in the history of our state. Indeed, the 12 eloquent tributes to Chief Judge Kaye in this special *Journal* issue merely hint at the full breadth and depth of her remarkable legacy, from her influential jurisprudence to her visionary stewardship of New York's judicial branch of government.

"It would take at least several volumes of this Journal *to adequately accord Chief Judge Kaye's legacy the respect it is due, but the articles in this issue illuminate the scope and importance of her jurisprudence and attest to the visionary leadership that has literally transformed the New York State courts."*

In 1983, Governor Mario Cuomo appointed Judith Kaye, an accomplished commercial litigator, to the Court of Appeals as an associate judge. A decade later, in 1993, Governor Cuomo selected her to serve as New York's Chief Judge, making her not only the first woman ever to serve on our state's highest court but also the first to be accorded the awesome responsibility of leading New York's vast and complex court system. In addition to the demanding duties of hearing appeals and writing decisions on the state's highest court, the Chief Judge is charged with leading a court system with a current annual budget of approximately $2.5 billion, as well as 3,600 judges and 17,000 non-judicial personnel who together handle over 4.5 million filings yearly in hundreds of courthouses throughout the state.

In 1993, Chief Judge Kaye inherited a court system that in many ways was conducting its business as it had in the 1950s. The courts were struggling to keep pace with the needs and expectations of a rapidly changing society. The examples were everywhere: an antiquated jury system that New Yorkers viewed with the same dread as a tax audit or a root canal; family court and criminal court processes that moved cases along without addressing the underlying problems that repeatedly brought litigants back to court again and again; a civil justice system marked by delay and disdained by the business sector; physically deteriorating courthouses, and a failure to embrace the most commonplace technological advances. By the sheer force of her vision and leadership, Chief Judge Kaye revitalized our court system and brought it into the Twenty-First Century.

I am honored that the *Journal* invited me to serve as guest editor and write the introductory article for this tribute issue. It certainly was a privilege for me to accept her appointment to serve as Chief Administrative Judge of the New York State courts in January 1996. For the next 11½ years, I had the opportunity to work hand-in-hand with her on the monumental reforms covered in this issue: overhauling the jury system, introducing hundreds of drug treatment, domestic violence and other problem-solving courts, improving the quality of justice for children and families, promoting public trust and confidence in the judicial elective process, increasing access to justice, fostering commercial courts and, most recently, reforming the town and village justice system, to list but a few.

It would take at least several volumes of this *Journal* to adequately accord Chief Judge Kaye's legacy the respect it is due, but the articles in this issue illuminate the scope and importance of her jurisprudence and attest to the visionary leadership that has literally transformed the New York State courts. Throughout her tenure, Chief Judge Kaye set a very high bar for all of us involved in the courts and the justice system. Her vision has always been to improve the experience of every single citizen who sets foot in a courthouse. She has communicated and pursued that vision with a passion and single-minded focus that have inspired thousands of judges, lawyers and court staff over the years. She has led by example, always visible and involved, and by her willingness to roll up her sleeves and get the job done. Indeed, the articles in this issue are replete with instances when her personal determination and hands-on involvement were key to effecting positive change.

In extending its pages to honor Chief Judge Kaye, the *Journal* has chosen its authors wisely. Her esteemed former Court of Appeals colleague and fellow constitutional

historian, Albert M. Rosenblatt, highlights a jurisprudence marked by an overarching concern for the "human implications that a judicial policy or decision will have on those who need the courts" and the paramount role of our state's Constitution in fashioning practical and effective legal remedies that respond to the challenges presented by today's complex society.[1] While the cases decided by the Court of Appeals span the universe of legal issues facing citizens today—multimillion dollar commercial and insurance matters, criminal offenses, landlord/tenant disputes, family law issues, etc.—Judge Rosenblatt makes clear that Chief Judge Kaye's judicial philosophy is firmly rooted in finding a fair and just result for the parties. The final inquiry on the facts presented and applicable law is always: "Does it make sense?"

This same humanism has motivated Chief Judge Kaye's extraordinary efforts to improve the quality of justice provided to the youngest and most vulnerable of our citizens. Another eminent former Court of Appeals colleague and fellow advocate for children, Howard A. Levine, identifies some of the court-sponsored legislative and administrative programs and best practices that have vastly improved New York's family justice system.[2] In the process, he reveals some of Chief Judge Kaye's more remarkable leadership qualities—her absolute resolve, her creativity and compassion, and her ability to work collaboratively with government and the private sector to forge comprehensive solutions to the staggering challenges faced by the family justice system. These are the qualities that have produced the innovative reforms that are being replicated around the country and have earned her numerous national awards for her groundbreaking work on behalf of children.

Dean Ellen Schall and Professor Sheryl Dicker describe how the judiciary became a vital policy actor in the family justice area thanks to Chief Judge Kaye's ability, in neutral and appropriate ways, to bring the unique expertise of family court judges and staff to the policymaking table to implement change for the public good.[3] As both Chair and Co-Chair of the Permanent Judicial Commission on Justice for Children, a role she relished like no other, Chief Judge Kaye spearheaded the process that brought New York into compliance with federal mandates on early intervention programs for infants and toddlers with developmental delays. It was also in that role that the authors observed her "bias to action" and "ability to create change and deliver results," including establishing safe and nurturing care centers for children whose parents/caregivers must attend to court business. Today, there are children's centers located in 32 courthouses around the state serving more than 54,000 children every year.

Staying with the theme of families and children, Jacqueline W. Silbermann, Deputy Chief Administrative Judge for Matrimonial Matters, charts the course of Chief Judge Kaye's continuous campaign to improve New York's matrimonial process.[4] Unafraid to wade into uncharted waters or tackle the most intractable problems, Chief Judge Kaye piloted a host of new programs aimed at reducing the cost and delay of divorce, while minimizing trauma to children and families. Special protocols to insulate and protect children and the introduction of the one-family/one-judge paradigm are examples of these reform efforts.

"While the cases decided by the Court of Appeals span the universe of legal issues facing citizens today—multimillion dollar commercial and insurance matters, criminal offenses, landlord/tenant disputes, family law issues, etc.—Judge Rosenblatt makes clear that Chief Judge Kaye's judicial philosophy is firmly rooted in finding a fair and just result for the parties."

Greg Berman, Director of the Center for Court Innovation and a founder of the Midtown Community Court, the first "problem-solving" court in the nation, recounts Chief Judge Kaye's pivotal pioneering role in the problem-solving justice revolution that has swept the nation's courts since the early 1990s.[5] By combining punishment and rigorous court monitoring with essential services like drug treatment, counseling and job training, problem-solving courts have successfully re-engineered how courts respond to societal dysfunction, especially low-level, nonviolent crime. These courts have a demonstrated record of reducing recidivism and forging better outcomes for offenders, victims and communities. Mr. Berman's article provides historical perspective on how Chief Judge Kaye's early leadership and support were critical to the development of hundreds of drug treatment and other problem-solving courts in New York, and to their eventual acceptance and national and international exportation.

Judge Judy Harris Kluger relates the process by which Chief Judge Kaye made sure that the early problem-solving court principles and successes were quickly integrated into the fabric and daily work of the New York State courts.[6] Judge Kluger identifies the wide spectrum of problem-solving courts established throughout the state, including drug treatment courts, mental health courts, domestic violence courts, sex offense courts, youthful offender domestic violence courts, and integrated youth courts for juveniles. Judge Kluger rightly attributes the resounding success of these courts to the innovative blend of judicial monitoring and mandated services championed by Chief Judge Kaye.

Federal District Court Judge Colleen McMahon, Chair of The Jury Project, provides an insightful history of one of Chief Judge Kaye's signature accomplishments—the complete overhaul of New York's jury system.[7] Judge McMahon recalls how most judges, jury commissioners and court insiders initially regarded serious jury reform as a pipe dream, but as she aptly notes, "they had not reckoned on Judge Kaye." After appointing The Jury Project, a blue ribbon commission of distinguished New Yorkers from all walks of life, Chief Judge Kaye pursued its recommendations with unprecedented but characteristic resolve and perseverance. Though it took the better part of a decade, she accomplished the impossible: all automatic exemptions were eliminated, the average term of service was cut in half, a one day/one trial system was implemented across the state, juror call-back intervals were increased to a minimum of six years, juror compensation was increased, mandatory jury sequestration was eliminated, juror facilities were upgraded around the state, and automated call-in systems were implemented. These and many other reforms markedly increased citizen satisfaction and participation in the system, improved public attitudes toward the courts and positioned New York as a model for national jury-reform efforts.

"Chief Judge Kaye's legacy demonstrates that she is one of the most influential jurists of her generation."

As Deputy Chief Administrative Judge Juanita Bing Newton makes clear, Chief Judge Kaye has worked tirelessly to expand access to justice and ensure that the legal needs of the poor are being met. This kind of visible, high-level commitment has contributed to major progress in many areas, including strengthening the delivery of civil legal services and permanent funding sources, improving the provision of criminal indigent defense services, increasing the availability of pro bono services, addressing the needs of self-represented litigants, and community outreach.[8]

As Chief Judge Kaye has stated on many occasions, "without public confidence, the judicial branch could not function."[9] From their perspectives as Chair and Counsel of the Commission to Promote Public Confidence in Judicial Elections, Professor John Feerick and Michael J. D. Sweeney write about Chief Judge Kaye's unremitting efforts to ensure that the judicial branch holds itself accountable to our partners in government and the public we serve.[10] Her appointment of a blue-ribbon commission to study how New York's system for the election of judges could be improved is perhaps the best known of these endeavors (the Commission on Fiduciary Appointments is another), and it has indeed altered the landscape for judicial elections in New York. Today, independent panels of lawyers and non-lawyers, appointed by the Chief Judge, presiding justices and state and local bar associations, operate statewide to screen candidates for judicial office; judicial candidates provide expanded financial disclosures accessible to voters over the Internet; online voter guides for judicial races are available to educate voters about the candidates; and, a campaign ethics resource center has been established for judicial candidates, to list just a few of the reforms promoted by Chief Judge Kaye.

Authors Fern Schair and Daniel Weitz survey the dramatic progress made in introducing Alternative Dispute Resolution (ADR) methods to the New York courts under Chief Judge Kaye's leadership.[11] As in so many other areas, New York went from overlooking the vast potential of alternatives to litigation to serving as national leaders in the use of ADR techniques to deliver justice more efficiently and effectively, particularly in family justice matters.

Commercial practitioner Robert L. Haig tells a similar story of transformation.[12] He describes the frustration that commercial litigants and practitioners once felt with an overburdened civil justice system that often struggled to handle complex commercial litigation. Barely 15 years later, commercial lawyers and the business community regard New York's specialized business courts—the Commercial Division—as the "premier forum for litigating complex commercial disputes." By this point, readers will not be the least surprised by Mr. Haig's description of an engaged, hands-on Chief Judge who "attended every minute of every meeting," and "made key decisions" about the future of New York's Commercial Division.

Despite all her extraordinary achievements, Chief Judge Kaye would be the first to admit that there have been disappointments and that much remains undone. In 2007, she appointed the Special Commission on the Future of the New York State Courts, and named Carey R. Dunne its Chair, to develop a proposal to streamline and modernize the "most archaic and bizarrely convoluted court structure in the country."[13] Mr. Dunne praises Chief Judge Kaye's initiatives, against the longest of odds, to revitalize "an inefficient and wasteful system" that is hurting all New Yorkers, and describes how Chief Judge Kaye embraced this cause as her "personal mission." He details her support for the landmark work and recommendations of the Special Commission, which now await action by the legislative and executive branches. Mr. Dunne further narrates her strong response to the problems of New York's Town and Village Justice System, long plagued by pervasive under-funding and structural flaws.

Chief Judge Kaye's legacy demonstrates that she is one of the most influential jurists of her generation. A brilliant legal scholar with a distinctive, clear writing style, she has grappled with the most significant, complex legal issues facing our modern society, and, in the process, contributed her singular humanity and erudition to the evolution of the common law and state constitutional-

ism. It is indeed a tribute to Chief Judge Kaye that New Yorkers today can enter their courthouses either in person or by electronically navigating court sites to file or obtain legal documents; they can telephone a central number to determine whether a trip to the courthouse for jury duty is required and, if so, serve for a limited period with a diverse cross-section of the population; they can have their cases heard by "problem-solving" courts that not only adjudicate their cases but craft lasting solutions to their underlying problems; they can appear before Family Court Judges who have the up-to-date tools and information they need to make sound decisions that are in the best interests of children and family members; and, they can vote with the knowledge that the judicial candidates who appear on the ballot have been rigorously and independently screened. In short, New Yorkers have Judith S. Kaye to thank for a twenty-first century court system that is fair and accessible, efficient and accountable, and responsive to their needs and expectations. And for this we express our heartfelt gratitude to Chief Judge Kaye for her courage and commitment to the ideal of justice. Her record of exceptional leadership is, by any standard, unmatched in the history of our state's judiciary.

"New Yorkers have Judith S. Kaye to thank for a twenty-first century court system that is fair and accessible, efficient and accountable, and responsive to their needs and expectations."

Endnotes

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The Jurisprudence of Judith S. Kaye: A Legacy of Humanism

By Hon. Albert M. Rosenblatt

It is dangerous, I know, to try to find themes in the writings of judges, let alone assign labels. Judges resist labeling, and many of the judiciary's most predictable dogmatists would recoil at being typed. What, me, an activist? Or conservative? Or liberal?

By calling Judge Kaye a "humanist" I refer to no particular philosophical or theological school. Secular humanism, religious humanism, educational humanism, and other isms are creeds that we may encounter in intellectual discourse. By humanism, I mean nothing more—and I emphasize, nothing less—than Judge Kaye's overriding concern for the human implications that a judicial policy or decision will have on those who need the courts.

"No judge cares more about the welfare of the passengers; not just those in the litigation or in high places but the countless other human beings, many of whom would not know the first thing about lawyers and lawsuits."

Judith Kaye's judicial writings span a quarter century, from 1983 through 2008. For the edition minded, about 50 volumes bear her stamp, from 60 N.Y.2d through 10 N.Y.3d. For some very good judges, reaching a decision has a kind of mathematical dimension: read the cases, weigh the arguments, shepardize carefully, and count precedent. Obey the rules of the road: proceed with prudence, do not race around corners, and if you are putting on the brakes do not do it in a way that will throw the passengers out of the car. Judge Kaye is a first-class driver. Her logic is impeccable and her prose matchless. In addition, what sets her apart is a humanity that comes of being a good person. No judge cares more about the welfare of the passengers; not just those in the litigation or in high places but the countless other human beings, many of whom would not know the first thing about lawyers and lawsuits.

Judge Kaye carries with her a sensitivity, knowing that lofty pronouncements from Eagle Street find their way into every corner of society, some dark, some well lit. Thoughtful judges know this; Judge Kaye lives it. She examines how a case will play out from the boardroom to the boiler room, from the CEOs to the unemployed.

How appropriate it is that Judge Kaye entitled one of her first law review articles "The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern."[1] She wrote it shortly into her 25-year tenure on the court. In her own words: "Judicial policy making cannot be a freewheeling exercise. If appellate decision making is not a cold, scientific process of affixing precedent to facts found below, neither is it a free-form exercise in imposing a judge's personal beliefs about what would be a nice result in a particular case." She concluded, "The danger is not that judges will bring the full measure of their experience, their moral core, their every human capacity to bear in the difficult process of deciding cases before them. It seems to me that a far greater danger exists if they do not."[2]

I. A Champion of the State Constitution

Let us start with the constitution, our older state one, that is, the one that preceded the federal Constitution by a decade. The drafters of the federal Constitution met in Philadelphia in 1787, and the ratification debates took place among the fledgling states in 1788.[3] When creating the blueprint for the federal Constitution, the framers looked to New York's Constitution, which by then had 10 years on the books and could in some ways serve as a model.[4] Judge Kaye will eagerly reveal this to anyone who is the least bit interested, and has enjoyed writing about it,[5] but she has spent more of her time as a judge than as a history commentator, and in the realm of state constitutional interpretation Judge Kaye has played a leading role, nationally.

To most New Yorkers a phrase like "constitutional guarantees" means the provisions in the federal Bill of Rights, the first 10 amendments, ratified in 1791. Time and again Judge Kaye has reminded readers that our state Constitution is not only older but more protective of civil liberties. How can this be? Isn't the federal Constitution supreme? Yes and no. It is supreme in the sense that no state may weaken its provisions. If the federal Constitution as interpreted by the Supreme Court grants certain rights, no state may compromise them. If, for example, under federal Constitutional law the government must permit various forms of free expression, no state may allow less. In that sense the states, and of course their judiciaries, must comply with federal criteria. The converse is different: a state, through its own constitution, may en-

dow its citizens with rights broader than those accorded under the federal Constitution. The U.S. Supreme Court has often recognized this facet of federalism,[6] and Judge Kaye has repeatedly reminded readers of it.[7]

States act through their executive and legislative branches, but the judicial branch is unique in its interpretive role. Whether a state court should fall into lockstep with federal constitutional law or fashion its own standards by according the citizens more, and the government less, power is at the heart of a state court's constitutional decision making.[8]

Considering that state constitutions typically have provisions that parallel those in the U.S. Constitution's Bill of Rights, state judges may look to either. If the state's action violates the federal Constitution, that would normally be the end of the matter, as there is no point in discussing the state charter except for academic or historical purposes.[9] A state constitutional interpretation is a nullity if it accords the citizen less than the federal constitutional "floor."

More than any judge in the state's history, Judge Kaye has invoked the New York Constitution when dealing with fundamental rights and with restrictions against the government.[10] Judge Kaye's humanism has made her a champion of the state Constitution. On occasion, she has ruled that an act or omission violated both constitutions,[11] and in other instances that it violated neither.[12]

There is nothing remarkable about either of those groupings, but disagreement sometimes arises when a judge concludes that state conduct would satisfy the federal Constitution but not the state Constitution, even though both use similar or identical language to safeguard the right or restriction in question.

In her own words:

> Perhaps more than any other issue, the State constitutional law cases over the past decade have seemed to fracture the Court. On a Court where more often than not there is consensus, in State constitutional law cases—civil as well as criminal—we have been uncommonly divided . . . . Whether this is a consequence of the "new" judicial federalism and a process of hammering out approaches and methodologies to accommodate it, or the consequence of other factors, is a subject for fuller discourse elsewhere.
>
> What is pertinent to the present case, and significant, is that at least four Judges (not always the same four) in these cases invariably have perceived something distinctive about New York State, or about the particular case, that called upon the Court to differ from the United States Supreme Court.[13]

This is rough terrain. Former Court of Appeals Judge Richard D. Simons remembers the debate. When writing for the majority, he sometimes sided with Judge Kaye that state constitutional rights outdistanced the Federal Bill of Rights.[14] At other times he disagreed.[15] This division always produced intellectual fervor but never rancor.[16] Judge Simons recalls the "battles" that way. He and Judge Kaye never lost their enduring friendship, and she has publicly and privately praised him, as we all did, for his leadership as Acting Chief Judge before she was appointed and his many years of service on the New York State bench.

Judge Stewart F. Hancock often agreed with Judge Kaye on issues of federalism.[17] Their warm friendship was cemented by his occasional notes to her signed "Y.A.A.T.G." at the bottom.[18]

II. Making the Case

When state courts invoke their own constitutions in preference to the federal Constitution, it is more often than not in criminal cases, frequently involving search and seizure. Judge Kaye's initiation in that arena came early in her judicial career when she authored *People v. Class*, 63 N.Y.2d 491 (1984), one of her first criminal appeals. Writing for the majority, she found the challenged search illegal, citing both the state and federal constitutional provisions against illegal searches.[19] The Supreme Court declared the search valid under the Fourth Amendment and remanded the case to the New York Court of Appeals[20]—which promptly ruled the search invalid on independent state constitutional grounds. At last count, *Class* has been cited in 19 law review articles and five treatises, a case study in federalism.

In another search and seizure case, *People v. Capolongo*, 85 N.Y.2d 151 (1995), Judge Kaye noted that New York attempted to regulate wiretapping and other forms of electronic eavesdropping as early as 1895 and "created a state constitutional privacy interest in electronic communications long before Federal recognition that the Fourth Amendment protects against electronic eavesdropping."[21]

Like other judges on a court marked by collegiality, Judge Kaye has reserved dissent for cases that, for her, count for a lot, particularly in her ardor for the state Constitution. In *People v. Hernandez*, 75 N.Y.2d 350, 360 (1990), she dissented, stating that the *Batson* issue should be decided on state constitutional grounds, involving equal protection in jury selection.[22] The Supreme Court affirmed in a plurality opinion.[23]

Judge Kaye's most vigorous support for the state Constitution has been in right-to-counsel cases. In *People v. Rosen*, 81 N.Y.2d 237 (1993), she noted that "unlike the federal right to self-representation, which is only implicit

in the Sixth Amendment . . . the State constitutional right is explicit and unambiguous. . . [T]he explicit right to "appear and defend in person" was added in 1846 (N.Y. Const, art. I, § 6) to our constitution and has been retained in ever since."[24]

In *People v. Caban*, 5 N.Y.3d 143, (2005), dealing with a claim of ineffective assistance of counsel, she pointed out the difference between federal and state standards, noting that the federal test requires a showing of prejudice, whereas "under our State Constitution, even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still warrant reversal whenever a defendant is deprived of a fair trial."[25]

Caban was a unanimous writing, but in two other right-to-counsel cases, Judge Kaye dissented on State constitutional grounds. In *People v. Enrique*, 80 N.Y.2d 869 (1992), she stated that a two-hour luncheon recess during which the defendant was denied all access to counsel "ran afoul of greater protections afforded by New York's right to counsel clause."[26]

Judge Kaye's reliance on state constitutional primacy of course goes beyond the criminal law realm. In *Immuno Ag. v. Moor-Jankowski*, 77 N.Y.2d 235 (1991), one of her most stirring writings, Judge Kaye explained why, in a libel case, the Court should adjudicate the claim not on federal First Amendment law but on the broader state constitutional basis. Her reasoning is worth quoting at length:

> It has long been recognized that matters of free expression in books, movies and the arts generally, are particularly suited to resolution as a matter of State common law and State constitutional law, the Supreme Court under the Federal Constitution fixing only the minimum standards applicable throughout the Nation, and the State courts supplementing those standards to meet local needs and expectations. Indeed, striking an appropriate balance "between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech," is consistent with the traditional role of State courts in applying privileges, including the opinion privilege, which have their roots in the common law.
>
> This State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas. That tradition is embodied in the free speech guarantee of the New York State Constitution, beginning with the ringing declaration that "every citizen may freely speak, write and publish *** sentiments on all subjects. Those words, unchanged since the adoption of the constitutional provision in 1821, reflect the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment, ratified 30 years earlier, but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms (citations omitted).[27]

These observations echo those she made earlier in her concurrence in *O'Neill v. Oakgrove Constr.*, 71 N.Y.2d 521 (1988), in which the Court recognized a journalist's privilege in non-confidential information:

> I cannot understand—or join—the decision to premise the qualified privilege we now adopt on the Federal Constitution in addition to the State Constitution. The fact that Federal law remains unsettled leads me particularly to question why we would deliberately choose to surround our new privilege with any of the uncertainty that presently accompanies the Federal law, when we could very respectably resolve the issue with clarity and finality for the citizens of this State under the State Constitution.[28]

Another moving example of her reliance on the state Constitution was in *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893 (2003), dealing with whether the legislature was adequately financing New York City Schools. As she worded the issue:

> We begin with a unanimous recognition of the importance of education in our democracy. The fundamental value of education is embedded in the Education Article of the New York State Constitution by this simple sentence: "The Legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." Plaintiffs claim that the State has violated this mandate by establishing an education financing system that fails to afford New York City's public schoolchildren the opportunity guaranteed by the Constitution.[29]

Concluding that the funding was inadequate—as against the claim that school financing is strictly a legislative responsibility—she stressed the importance of the court in matters of constitutional interpretation:

> Courts are, of course, well suited to adjudicate civil and criminal cases and

> extrapolate legislative intent. . . . They are, however, also well suited to interpret and safeguard constitutional rights and review challenged acts of our co-equal branches of government—not in order to make policy but in order to assure the protection of constitutional rights. That is what we have been called upon to do by litigants seeking to enforce the State Constitution's Education Article. The task began with . . . the constitutional right to a sound basic education.[30]

III. An Uncommon Appreciation of the Common Law

When they pause to think about it, most judges and lawyers know the difference between common law and statutory law. It is one of the basic distinctions between state and federal court jurisdiction. State courts began as common law tribunals and, over the last two centuries, have necessarily and increasingly taken on more statutory interpretation. Like parents who buy new clothing for growing children, lawyers can attest to the growth by shelf space. Volumes of statutes that used to occupy X linear feet of shelf space now require 3X.

Judge Kaye has pointedly recognized that common law judges carry out duties very different from those applying or interpreting statutes.[31] In statutory interpretation, the judge discerns the legislative intent and applies it. Sometimes it is easy, as where the enactment and purpose are clear; at other times harder, when the statute is ambiguous or, if applied literally, irrational.[32]

We see Judge Kaye's common law sensibilities most visibly in dealing with whether to allow a new cause of action or limit an established one—the epitome of common law judging. In *Tebbutt v. Virostek*, 65 N.Y.2d 931 (1985), the Court followed an established line of authority holding that in the absence of a showing of independent injury to her, a mother may not recover damages for emotional harm when medical malpractice causes a miscarriage or stillbirth.

Judge Kaye dissented in language that was as brief as it was cogent:

> Dismissal of plaintiff's complaint in this instance leaves no one who can recover for alleged wrongdoing, and frees defendant from responsibility. Defendant performed the complained-of acts on a person in his care. Were the child born alive, a remedy would lie against defendant (*see Woods v. Lancet*, 303 N.Y. 349). An arguably more grievous injury while the child was *in utero*, resulting in a stillbirth, should not go unredressed. Where the law declares that the stillborn child is not a person who can bring suit, then it must follow in the eyes of the law that any injury here was done to the mother.[33]

That is all she said and all she needed to say. Her humanism was clothed in the plainest logic. The case endured for two decades and in 2004 was overruled when the Court said that:

> *Tebbutt* reflected our longstanding reluctance to recognize causes of action for negligent infliction of emotional distress, especially in cases where the plaintiff suffered no independent physical or economic injury. Its holding was in keeping with our view that tort liability is not a panacea capable of redressing every substantial wrong. Although these concerns weigh heavily on us today, we are no longer able to defend *Tebbutt's* logic or reasoning.[34]

Judge Kaye has also recognized the other side of the equation—that causes of action should not be freely created or extended lest they lead to unlimited liability. In *532 Madison Ave. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280 (2001), the Court dealt with the aftermath of a collapsed office tower that caused damage and disruption to people and businesses extending over many city blocks. In denying a retailer's claim for damages resulting from the disaster, Judge Kaye observed that "[a]t its foundation, the common law of torts is a means of apportioning risks and allocating the burden of loss. In drawing lines defining actionable duty, courts must therefore always be mindful of the consequential, and precedential, effects of their decisions.[35]

In addition to carrying out the day-to-day duties of common law decision-making, Judge Kaye has elucidated the relationship between common law judges and the legislature. In state courts, there can be a partnership between the judiciary and the legislature—a sort of dialogue. Judge Kaye explained this in a law review article[36] using two cases as illustrations: *DiMichel v. South Buffalo Railway Co.*, 80 N.Y.2d 184 (1992) and *Tai Tran v. New Rochelle Hosp. Med. Ctr.*, 99 N.Y.2d 383 (2003). In *DiMichel*, the Court held that a personal injury plaintiff could gain pre-trial access to surveillance videos only after having submitted to depositions. The Legislature then amended CPLR 3101(i)'s wording, making it unmistakably clear that the defense must turn over videotape evidence on demand, with no limitation as to timing. A noted commentator caustically criticized the amendment as a "one-sidedly pro-plaintiff statute" that "seems to be unabashed promotion of total disclosure of all surveillance materials. . . ."[37]

Even though the Legislature undid what the Court regarded as an even-handed, judicially crafted approach,

Judge Kaye described the process without a hint of irritation. Instead, she put it in a historical context that underscores the realities of checks and balances:

> The video surveillance issue is a recent example of a familiar process of lawmaking today in which courts, either through common law adjudication or statutory interpretation, propound a rule and legislation is enacted that somehow responds to the decisional law. Other examples of New York cases that stimulate legislation include *People v. Rosario*, which held that criminal defendants have the right to examine prior statements by the People's witnesses, a right now codified at section 240.45 of New York Criminal Procedure Law; *Dole v. Dow Chemical Co.*, which set forth the comparative fault principle now codified at CPLR 1411; and *Steinhardt v. Johns-Manville Corp.*, which held that the limitations period for a personal injury claim based on exposure to asbestos began to run at the time of exposure rather than discovery, prompting the Legislature to enact the more humane discovery rule now set forth in CPLR 214-c (citations omitted).[38]

IV. Getting to the Heart of the Matter

Humanism can take many forms, but none more poignant than Judge Kaye's writings that deal with real people in wrenching lawsuits involving personal or family relationships. In *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), a lesbian couple raised a child following artificial insemination of one of the partners. When the couple broke up, the non-birth mother petitioned for visitation. In a *per curiam* decision, the Court of Appeals ruled that despite her close relationship with the child, she was not a "parent" within the meaning of Domestic Relations Law § 70. In a sole dissent Judge Kaye disagreed:

> The majority insists, however, that, the word "parent" in this case can only be read to mean biological parent; the response "one fit parent" now forecloses all inquiry into the child's best interest, even in visitation proceedings. We have not previously taken such a hard line in these matters, but in the absence of express legislative direction have attempted to read otherwise undefined words of the statute so as to effectuate the legislative purposes. The Legislature has made plain an objective in section 70 to promote "the best interest of the child" and the child's "welfare and happiness." Those words should not be ignored by us in defining standing for visitation purposes—they have not been in prior case law.

Four years later, however, in *Matter of Jacob*, 72 N.Y.2d 657, 659 and *Matter of Dana*, 86 N.Y.2d 651 (1995) she wrote for the majority in a closely divided Court in an appeal involving a similar theme: whether an unmarried partner (in one case heterosexual and in the other case homosexual) who is raising a child along with the biological parent can become the child's second parent through adoption. In allowing the parenthood by adoption, Judge Kaye observed:

> Even more important, however, is the emotional security of knowing that in the event of the biological parent's death or disability, the other parent will have presumptive custody, and the children's relationship with their parents, siblings and other relatives will continue should the co-parents separate. Indeed, viewed from the children's perspective, permitting the adoptions allows the children to achieve a measure of permanency with both parent figures and avoids the sort of disruptive visitation battle we faced in *Matter of Alison D. v. Virginia M.*[39]

Judge Joseph W. Bellacosa wrote in dissent. It was, as with many other divisions on the Court, a difference of opinion that did not alter the friendship between the two, much the same as Judge Kaye's differences with Judge Simons did not affect their abiding affection for one another. In Judge Bellacosa's words:

> As a judicial colleague, Judith Kaye added for me the joy of judging. For the people affected and governed by the Judicial Process, she added a body of rigorously intelligent work whose hallmarks are: compassionate understanding of the human condition; clarity of style for understanding by all; a beautiful devotion to institutional values, never losing sight of the practical impact on real people; and finally, a purity of purpose that elevated the work of the Court of Appeals to the highest levels of public service.[40]

For Judge Kaye, no decision was more painful than the one she wrote, for a unanimous Court *In re: Joyce T.*, 65 N.Y.2d 39 (1985), that the parental rights of a minor child must be terminated and the child given over for adoption because of the parents' mental retardation. The record supported the finding that the parents could not properly care for the child or provide a suitable environment in which she could thrive, but Judge Kaye's writing reveals how difficult the ruling was. In a footnote, she tells us that the Social Services Department assured the Court that the

child's parents and brother would be able to visit the child after adoption.[41]

That was more than 20 years ago. In the interim, and as Chief Judge, she has reshaped the world of children's permanency planning.[42] In that endeavor, she has had many allies and partners, none more devoted than Judge Howard A. Levine, with whom she shares a particular dedication to issues involving children, in addition to all the other values that distinguish them both.

V. Defending Fundamental Liberties

Observers were not surprised by Judge Kaye's vote in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), dealing with the constitutionality of a ban on same-sex marriage. The Court sustained the limitation of marriage to opposite-sex couples. In dissent, Judge Kaye said this:

> Plaintiffs . . . are 44 same-sex couples who wish to marry. They include a doctor, a police officer, a public school teacher, a nurse, an artist and a state legislator. Ranging in age from under 30 to 68, plaintiffs reflect a diversity of races, religions and ethnicities. . . . Many have been together in committed relationships for decades, and many are raising children—from toddlers to teenagers. . . . In short, plaintiffs represent a cross-section of New Yorkers who want only to live full lives, raise their children, better their communities and be good neighbors.
>
> For most of us, leading a full life includes establishing a family. Indeed, most New Yorkers can look back on, or forward to, their wedding as among the most significant events in their lives. They, like plaintiffs, grew up hoping to find that one person with whom they would share their future, eager to express their mutual lifetime pledge through civil marriage. Solely because of their sexual orientation, however—that is, because of who they love—plaintiffs are denied the rights and responsibilities of civil marriage.[43]

She went on to state her core position:

> Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them. . . . It is uniquely the function of the Judicial Branch to safeguard individual liberties guaranteed by the New York State Constitution, and to order redress for their violation. The Court's duty to protect constitutional rights is an imperative of the separation of powers, not its enemy.[44]

The issue has been divisive, but even those who disagree with Judge Kaye—including the judges in the majority—do not question her intellectual honesty or her passion, and have only praise for the eloquence of her expression.

Could Judge Kaye's stature have been predicted in 1983 when she joined the Court? Former Chief Judge Sol Wachtler recalls her arrival:

> [W]hen we were sitting temporarily as a six judge Court, a case was argued which found the Court split by a 3-3 vote. Because we wanted the newly appointed judge to participate in the ultimate decision, we scheduled reargument. Judith had been appointed and heard the reargument, read the briefs, listened attentively to the other six judges as to our diverse opinions, and then stated her position. She demonstrated a complete and comprehensive understanding of the arguments advanced on behalf of both parties. When she stated her position, the rest of us all agreed, so that the ultimate decision was unanimous. It was her unique ability to listen to, comprehend, and actively participate in the deliberative process that set her apart from many other judges.[45]

VI. Beyond the Written Opinions

Judge Kaye's towering legacy as a jurist and humanist goes beyond her decisional law writings. She has been a tireless advocate bringing luster and accomplishment to every facet of the judicial system since she was sworn in on September 12, 1983, the first woman judge of the New York Court of Appeals, and on March 23, 1993, the first woman Chief Judge of the State of New York.[46]

More than any judge in New York history—and undoubtedly anywhere else—she has moved the judiciary from the courtroom to the community. Historically, the Third Branch has been a reactive institution, stolid and stationary, awaiting litigants to come to it for answers to pre-formulated law questions. Judge Kaye has changed that by a proactive stance in which the courts go beyond their traditional role. She created the problem-solving courts in New York where, in community courts, low-level offenses are treated with punishment as only one of several approaches that include treatment, essential services and ongoing supervision.[47]

The same humanistic approach fostered her innovations in drug courts, where the lawyers are not traditional combatants. The forum is designed for remediation.[48] She has established courts that deal with domestic violence, designed to change patterns of behavior rather than continue in the same cycle of violence.[49] Driving many of

these initiatives is Judge Kaye's commitment to families and children whose needs fall within the court system.[50]

These concerns, however, have not eclipsed Judge Kaye's role in the administrative realm. During her chief judgeship, and with the assistance of three successive skilled Chief Administrative Judges, E. Leo Milonas, Jonathan Lippman and Ann Pfau, as well as John Feinblatt of the Center for Court Innovation, Judge Kaye has brought about improvement in the jury system,[51] courthouse facilities, access to justice, court consolidation, the town and village court system, and case management.[52]

When asked about which of Judge Kaye's innovations came first to mind, Judge George Bundy Smith, her friend and Court of Appeals colleague, had a ready answer: community courts, he said, were of special value. The concept has been replicated throughout the nation, and even abroad.[53]

Judge Kaye accomplished none of this at the expense of other, traditional court functions. As a former commercial litigator, she has recognized that as the world's financial center, New York deserves a state forum in which complex commercial cases can be tried before experienced judges. She has overseen the growth of the New York's Commercial Division of the Supreme Court, which specializes in complicated commercial disputes in a setting of advanced technology.[54]

VII. The Judicial *Erie* Canal from Foley Square to Albany

Erie R.R. v. Tompkins, 304 US 64 (1938) has come of age. A proverbial three score and ten, it has reached a contented maturity in New York. In *Erie*, the Supreme Court held that Federal courts were no longer free to develop their own common law. *Swift v. Tyson*, 41 US 1 (1842) had reigned for almost a century, struggling vainly to create a uniform national common law. It resulted instead in forum-shopping and disorder. Since *Erie*, federal courts must apply the law of the state in which the court sits, except in matters governed by the U.S. Constitution or statutes.

From 1938, for about half a century, the Federal judges in New York tried to divine, as best they could, how the New York Court of Appeals would rule on a particular state statute or common law issue. But to divine is not to know for sure, and things changed when the state amended its constitution and the two courts of appeal—the New York State Court of Appeals and the federal Court of Appeals for the Second Circuit—promulgated rules for the certification of law questions by the latter to the former. It is no longer necessary to make educated guesses, or, as the late Judge Henry J. Friendly of the Second Circuit might have said, to determine what the New York courts would think, on an issue about which neither the circuit court nor the New York Court of Appeals has thought.[55]

Now, all you have to do is ask.[56] Of course, the figurative certification voyage from Foley Square to Albany takes two captains. Without both in accord, nothing happens. The Circuit can ask questions of a state sphinx. Conversely, a state court might be eager to respond to questions never asked by the Circuit.

No one has been more supportive of the certification process than Judge Kaye. On the federal side, her enthusiasm her been matched by Second Circuit Chief Judges John M. Walker, Jr. and Dennis Jacobs, along with the concept's premier booster, Judge Guido Calabresi.[57]

The only judge to have been on both sides of the process is Judge Kaye's friend and former colleague, Judge Richard C. Wesley. When he served on the New York Court of Appeals, he was a staunch advocate of certification. Now, as a judge of the Second Circuit Court of Appeals, the estimable Richard Wesley often certifies questions to Albany.[58]

Looking back on New York's Chief Judges, Jewett was the first, Denio, Comstock, and Selden had their N.Y. reports, Peckham and Hunt went on to the Supreme Court, Parker ran for President of the United States, and Cardozo . . . was Cardozo.

It takes nothing away from any of them to say that there has never been a more stellar Chief than Judith Kaye. At recent meeting of the Association of the Conference of Chief Justices, an organization in which she has served as president, Randy Shepard, the Chief Justice of Indiana rose to pay her a spontaneous tribute. He said that:

> No one has contributed more to improving state courts in this country than Judith. Judith redefined the role of Chief Justice in New York and because of her charismatic leadership, redefined it nationally. Almost every innovation of the past decade and more, every new focus of attention, be it children in our courts or jury service, bears Judith's stamp.

His remarks drew a standing ovation, an outward recognition of our deep respect for all that Chief Judge Judith S. Kaye has done.

Indeed.

Endnotes

1. Judith S. Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 CORNELL L. REV. 1004, 1014, 1015 (1988).
2. *Id.* at 1014.
3. New York ratified the United States Constitution in July 1788, in Poughkeepsie. S*ee generally*, John P. Kaminski, et al., The Documentary History of the Ratification of the Constitution, 10–24 (1976–2003); Stephen L. Schechter, The Reluctant Pillar, New York and the Adoption of the Federal Constitution (1985).

4. John P. Kaminski, *A Reign in Government: New York's Constitution of 1777 and the Bill of Rights of 1787*, 1 NY Legal Hist. 7, 9 (2005).

5. Judith S. Kaye, *Constitutions of the State Constitutional Law to the Third Century of American Federalism*, 13 Vt. L. Rev. 49, 53 (1988); Judith S. Kaye, *State Constitutional Adjudication Enjoys Clear Historical Foundation*, N.Y.L.J. (May 1, 1987); Judith S. Kaye, *Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights,* 23 Rutgers L.J. 727, 731 (1991–1992); Judith S. Kaye, Associate Judge of the Court of Appeals of the State of New York, Dual Constitutionalism in Practice and Principle, Lecture delivered before the Association of the Bar of the City of New York (February 26, 1987) *in* 62 Rec. A.B City NY 3; Judith S. Kaye, *Federalism's Other Tier*, Constitution Magazine, Winter, 1990–1991, at 48.

6. *See, e.g.*, *Michigan v. Long*, 463 U.S. 1032, 1040 (1983); *Pruneyard Shopping Center. v. Robins et al*., 447 U.S. 74 (1980); *Cooper v. California*, 386 US 58, 62 (1967); *Oregon v. Haas*, 420 US 714, 719 (1975); *Minnesota v. National Tea Co. et al.*, 309 US 551 (1940); *Murdock v. City of Memphis*, 87 US 590 (1875); *Fox Film Corp. v. Muller*, 296 US 207 (1935); *Herb v. Pitcairn et al.*, 324 US 117, 125 (1945). As the Court stated in *Pruneyard*, a state may exercise its "sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal constitution." *Pruneyard Shopping Center v. Robins et al*., 447 U.S. 74, 81 (1980).

7. Judge Kaye has often credited Justice William J. Brennan's 1977 article, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977), with having inspired her interest in state constitutionalism. Justice Brennan lamented what he saw as a retreat from the Warren Court decisions of the previous decade or two. He advocated that the retreat could not only be stemmed but also reversed by state courts willing to invoke their own state constitutional provisions. If a state court bases its ruling on an adequate and independent state ground, i.e. its own state constitution, the ruling is unreviewable by the Supreme Court, (*see* note 6, *supra*).

8. There are dozens of informative articles on this subject. Justin Long's *Intermittent State Constitutionalism*, 34 Pepp. L. Rev. 41 (2006), is particularly incisive.

9. *See Hynes v. Tomei,* 92 N.Y.2d 613, 630 (1998) (stating that "given our conclusion under the Federal Constitution, we do not reach [defendant's] arguments under the New York State Constitution").

10. Kaye has extolled State constitutional law in several articles: Judith S. Kaye, *The Supreme Court: State Constitutional Law*, 25 TRIAL Magazine 67 (Dec. 1989); Judith S. Kaye, *A Midpoint Perspective on Directions in State Constitutional Law*, Emerging Issues in State Constitutional Law 1988 (Nat'l Ass'n of Attorneys General); Judith S. Kaye, *State Courts in our Federal System: The Contribution of the New York Court of Appeals*, 46 Syracuse. L. Rev. 217 (1995); Symposium: Judith S. Kaye, *Chief Justices Discuss State Courts and State Constitutional Law in the 21st Century*, 70 Alb. L. Rev. 8 25 (2007); *See also supra* note 5.

11. *E.g.*, *People v. Hicks*, 68 N.Y.2d 234 (1986) [search and seizure, N.Y. Const. Art. I § 12, U.S. Const. amend. IV]; *County of Nassau v. Canavan*, 1 N.Y.3d 134 (2003) [excessive fines, N.Y. Const. Art. I, § 5; U.S. Const. amend. VIII]; *People v. Bennett*, 79 N.Y.2d 464 (1992) [self incrimination, N.Y. Const. Art. I, § 6; U.S. Const. amend. V]; *General Motors Corp.-Delco Prods. Div. v. Rosa*, 82 N.Y.2d 183, 188 (1993) [due process N.Y. Const., Art. I, § 6, U.S. Const. amend. XIV, § 1].

12. *E.g., People v. Johnson*, 1 N.Y.3d 302 (2003) [confrontation clause N.Y. Const., Art. I, § 6]; *People v. Garcia*, 92 N.Y.2d 726 (1999) [right to counsel N.Y. Const. Art. I, § 6; U.S. Const. amends. VI, XIV]; *Gordon v. Brown*, 84 N.Y.2d 574 (1994) [confrontation N.Y. Const. Art. I, § 6; U.S. Const. amend. VI, and due process]; *People v. Latham*, 83 N.Y.2d 233 (1994) [double jeopardy, N.Y. Const., Art. I, § 6, U.S. Const. amends. V, XV]; *People v. Jacobs*, 6 N.Y.3d 188 (2005) [effective assistance of counsel N.Y. Const., Art. I, § 6, U.S. Const. Amend. VI]; *In the matter of* K.L., 1 N.Y.3d 362 (2004) [search and seizure, N.Y. Const. Art. I, § 12, U.S. Const. amend. IV].

13. *People v. Scott*, 79 N.Y.2d 474, 503 (1992).

14. *E.g., People v. P. J. Video*, 68 N.Y.2d 296 (1986); *People v. Harris*, 77 N.Y.2d 434 (1991); *People v. Johnson*, 66 N.Y.2d 398.

15. *E.g., Immuno A. G. v. Moor Jankowski*, 77 N.Y.2d 235 (1991) [libel].

16. I do not mean to suggest that the Court of Appeals, as a tribunal, has been unsupportive of rights (sometimes enhanced rights) bestowed by the state Constitution. On the contrary, the Court's reliance on the rights provisions of the New York Constitution goes back to its parent court, the Court for the Trial of Impeachment and Correction of Errors, which existed from 1777 to 1847. As early as 1809, the Court made reference to state due process. *Thorn v. Blanchard*, 5 Johns. 508 (1809); *See also Taylor v. Porter*, 4 Hill 140, 146 (1846). *See generally* R. Emery, *New York's Statutory Bill of Rights: A Constitutional Coelacanth*, 19 Touro L. Rev. 363 (2003). Most recently the Court struck down a provision of New York's death penalty statute on state constitutional due process grounds. *People v. LaValle*, 3 N.Y.3d 88 (2004).

17. *See* Stewart F. Hancock, Jr., *The State Constitution, a Criminal Lawyer's First Line of Defense*, 57 Alb. L. Rev 271 (1993).

18. This in Hancockian parlance stands for "You Are a True Genius."

19. N.Y. Const. Art I § 12; U.S. Const. amend. 4.

20. *New York v. Class*, 475 U.S. 106 (1986).

21. *People v. Capolongo*, 85 N.Y.2d 151, 158 (1995).

22. *See also People v. Petralia*, 62 N.Y.2d 47 (1984) (Kaye, dissenting).

23. *Hernandez v. New York*, 500 U.S. 352 (1991).

24. *People v. Rosen*, 81 N.Y.2d 237, 243, note (1993).

25. *People v. Caban*, 5 N.Y.3d 143, 155–56 (2005).

26. *People v. Enrique*, 80 N.Y.2d 869, 870 (1992) *See also People v. Bing*, 76 N.Y.2d 331 (1990).

27. *Immuno Ag. v. Moor-Jankowski*, 77 N.Y.2d 235, 248-49 (1991). Judge Kaye's writing drew huge applause from Anthony Lewis in his book, Make No Law, 118–119 (1992).

28. *O'Neill v. Oakgrove Constr.*, 71 N.Y.2d 521, 531 (1988) (Kaye, concurring), *See also* Judge Kaye's majority opinion in *People v. Combest*, 4 N.Y.3d 341 (2005) (confirming that "our state constitutional guarantee of freedom of the press requires the protection of a qualified privilege when a party to a civil lawsuit seeks non-confidential information from a news organization"); *Hope v. Perales*, 83 N.Y.2d 563 (1994) (invoking the state Constitution in another civil case where she said that the fundamental right of reproductive choice, inherent in the due process liberty right guaranteed by our state Constitution, is at least as extensive as the federal constitutional right).

29. *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 901–02 (2003).

30. *Id.* at 931.

31. *See* Judge Kaye's 1995 Brennan Lecture, *Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. Rev. 1 (1995); *see also* Marcia B. Smith, *State Constitutional Commentary: High Court Study: New York's Court of Appeals: Judith S. Kaye: Progressive Decision making Rooted in the Common Law*, 59 Alb. L. Rev.1763 (1996).

32. Judge Kaye made the point in *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 386 (2003), and *Jones v. Bill*, 10 N.Y.3d 550, 555 (2008).

33. *Tebbutt v. Virostek*, 65 N.Y.2d 931, 940 (1985) (Kaye, dissenting).

34. *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 153 (2004).

35. *532 Madison Ave. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 289 (2001); *See also Lauer v. City of New York*, 95 N.Y.2d 95 (2000) (measuring the scope of a medical examiner's duty as against the prospect of limitless liability); *Eisman v. State*, 70 N.Y.2d 175, 188 (1987).

36. Judith S. Kaye and Matthew J. Morris, *A Lesson in the Development of the Law*, 72 Fordham L. Rev. 1 (2003).

37. David Siegel, 1993 Supp Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3101:50, 2003 Pocket Part, at 36–37).

38. Judith S. Kaye and Matthew J. Morris, *A Lesson in the Development of the Law*, 72 FORDHAM L. REV. 1, 8 (2003).

39. *In re Jacob and In re Dana*, 86 N.Y.2d 651, 658 (1995).

40. Letter from Honorable Joseph W. Bellacosa, on file with author.

41. *In re Joyce T.*, 65 N.Y.2d 39, 46 n. 2 (1985).

42. Two examples: For close to two decades, Judge Kaye has chaired the Permanent Judicial Commission on Justice for Children, which has spearheaded many reforms in the courts' handling of foster-care cases. For her promotion of adoption reform to speed permanency for children, the U.S. Department of Health and Human Services awarded her an Adoption Excellence Award in 2006.

43. *Hernandez v. Robles*, 7 N.Y.3d 338, 380 (2006).

44. *Id*. at 382, 396.

45. Letter from Honorable Joseph W. Bellacosa.

46. *See* Judith S. Kaye, *Woman Chiefs: Shaping the Third Branch*, 36 U. TOL. L. REV. 899 (2005).

47. *See* Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV 125 (2004); Judith S. Kaye, *Problem Solving Courts: From Adversarial Litigation to Innovative Jurisprudence: Eleventh Annual Symposium on Contemporary Urban Challenges*, 29 FORDHAM URB. L. J. 1925 (2002); Judith S. Kaye, *Making the Case for Hands-On Courts*, Newsweek, October 11, 1999, at 13; Judith S. Kaye, *Problem Solving Courts: The New York Experience,* Relational Justice Bull., Sept. 2002, revised, Jan. 2003.

48. *See* Judith S. Kaye, *Lawyering for a New Age*, 67 FORDHAM L. REV. 1, 4 (1998) (stating that in drug treatment courts, "the lawyers also have new roles. The prosecution and defense are not sparring champions, they are members of a team with a common goal: getting the defendant off drugs. When this goal is attained, everyone wins. Defendants win dismissal of their charges—not to mention improvement of their lives—while the public wins safer streets and deduced recidivism."); *see also* N.Y. STATE COMM'N ON DRUGS AND THE COURTS, CONFRONTING THE CYCLE OF ADDICTION AND RECIDIVISM: A REPORT TO CHIEF JUDGE JUDITH S. KAYE 10 (2000) *available at* http://www.nycourts.gov/reports; Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 L. & POL'Y 125, 128 (2001), *available at* http://www.courtinnovation.org; *see also* Katherine E. Finkelstein, *New York to Offer Most Addicts Treatment Instead of Jail Terms*, N.Y. TIMES, June 23, 2000, at A1.

49. *See* Judith S. Kaye and Susan K. Knipps, *Judicial Response to Domestic Violence: The Case for a Problem Solving Approach*, 27 W. ST. U. L. REV. 1 (1999-2000).

50. *See generally* Judith S. Kaye, *All in the Family Court; Children Deserve Better than an Overburdened, Understaffed System*, THE POST-STANDARD, Feb. 10, 2005, at A12; (In 1998 Judge Kaye pioneered this innovation, creating Manhattan's Family Treatment Court.); E. Mitchell Tupper, *Children Lost in the Drug War: A Call for Drug Policy Reform to Address the Comprehensive Needs of Family*, 12 GEO. J. ON POVERTY L. & POL'Y 325 (Summer 2005); Matrimonial Commission of the State of New York (Feb. 2006), chaired by Hon. Sondra Miller (www.nycourts.gov/reports/matrimonialcommissionreport.pdf); Judith S. Kaye, *Seizing the Opportunity to Make Good on Our Promises to At-Risk Youth*, 45 FAM. CT. REV. 361, 363 (2007); Anthony J. Sciolino, *Symposium: Advocating for Change: The Status & Future of America's Child Welfare System 30 Years After Capta: The Changing Role of the Family Court Judge: New Ways of Stemming the Tide*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 395, 409 (Apr. 2005) (stating that in 1991, Judge Kaye established The New York State Permanent Commission on Justice for Children to address problems of children whose lives are affected by New York State Courts. Its membership includes not only judges and advocates, but also physicians, social workers, legislators, and state and local officials.).

51. *See* Colleen McMahon and David L. Kornblau, *Chief Judge Judith S. Kaye's Program of Jury Reform in New York*, 10 ST. JOHN'S J. L. COMM. 263 (Spring, 1995); Judith S. Kaye, *A Judge's Perspective on Jury Reform from the Other Side of the Jury Box*, GPSOLO, Sept. 1998, *available at* hhtp://www.abanet.org/genpractice/magazine/1998/sep/kaye.html; Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 483–85 (2006) (describing Chief Judge Kaye's leadership in bringing about jury reform in New York); Judith S. Kaye and Judge Albert M. Rosenblatt, *Introduction to Special Edition on Juries*, 73 N.Y.S. B. J. 8 (2001) (noting that "throughout the centuries our prized right to trial by jury—guaranteed by both state and federal constitutions—has inspired passionate prose: 'the cornerstone of judicial process,' 'a bulwark of democracy,' 'courthouse democracy,' 'the lamp of liberty,' 'the voice of the people'"). Her jury reforms include improved facilities, automated call-in systems, eliminating routine sequestration, and abolition of automatic exemptions.

52. Judith S. Kaye, *Rethinking Traditional Approaches*, 62 ALB. L. REV. 1491 (1999); Judith S. Kaye, *Strategies and Need for Systems Change: Improving Court Practice for the Millenium*, 38 Fam. & Conciliations Court Rev. 159 (2000); Judith S. Kaye, *Refinement or Reinvention? The State of Reform in New York: The Courts*, 69 ALB. L. REV. 831, 837 (2006); Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 HASTINGS L. J. 851, 855-56 (1997) (arguing the conventional court system does not address recidivism); Richard C. Wesley, *Hugh Jones and Modern Courts: The Pursuit of Justice Then and Now*, 65 ALB. L. REV. 1123 (2002); Joan B. Carey, *Court Reform: Consolidation of the State's Courts: Judge Kaye's Proposal*, 4 CITY LAW 25, March/April 1998; Quintin Johnstone, *New York State Courts: Their Structure, Administration and Reform Possibilities*, 43 N.Y. L. SCH. L. REV. 915 (1999/2000); Access to Justice Conference September 11, 2001: Remarks: The Honorable Judith S. Kaye, 29 FORDHAM URB. L. J. 1081 (Feb. 2002).

53. Judith S. Kaye, State of Judiciary, 2006, at 14–15; 2001, at 9–10; *see also* Symposium: *Rethinking Traditional Approaches*, 62 ALB. L. REV. 1491 (1999). In writing this piece, I did a computer search for articles using her name along with problem-solving courts, domestic violence courts, drug courts, or community courts. It drew 178 hits.

54. *See* Commercial Division, a Brief History, http://www.nycourts.gov/courts/comdiv/history/shtml; JUDITH S. KAYE, COMMERCIAL LITIGATION IN NEW YORK STATE COURTS 4–7 (Robert L. Haig ed., 2d ed. 2005); Barbara Franklin, *Commercial Parts Open*, N.Y.L.J. Dec. 31, 1992, at 5.

55. *See Nolan v. Transocean Air Lines*, 276 F. 2d 280 (2d Cir. 1960).

56. N.Y. Ct. R. 500.17(a); N.Y. Const. art. VI, 3(b). *See also* Section 0.27 of the Second Circuit's Local Rules Relating to the Organization of the Court.

57. Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293 (2003).

58. The harmony that always existed between the two courts is greater now than ever, given the certification process and the informal gatherings of the judges of both courts. At one such get-together, Judge Kaye distributed t-shirts to the judges, containing the official seals of both courts, reading "Court of Appeals of the State of New York for the Second Circuit." Only Judge Wesley can wear the blended title literally.

Hon. Albert M. Rosenblatt served as an Associate Justice of the New York State Court of Appeals from 1999-2006. Judge Rosenblatt is Of Counsel to McCabe & Mack in Poughkeepsie, New York.

Chief Judge Judith S. Kaye: Historical Leadership in Focusing the Court System on Our Most Vulnerable Children and Families

By Hon. Howard A. Levine

In May 1993, just a few months after she became Chief Judge of the State of New York and its Court of Appeals, Judge Kaye gave the principal address at the annual dinner of the American Law Institute's Annual Meeting. In this speech, Judge Kaye foreshadowed what would become a primary focus of her tenure—the plight of children and opportunities for improvements in the myriad areas in which the law interacts with their lives. Her remarks focused on "the burgeoning numbers of cases involving children" before the courts, and she made the argument that this area of law, "too often denigrated within the judicial system, too often ignored and debased by others," deserved the attention and interest of the bar.[1] She urged her colleagues to "visibly, openly, in every way possible, demonstrate respect for enormous contributions to the law and to society that are made today by family law and the family courts," and admonished the audience to "seize [the] opportunity" to make things better for children.[2] Her speech also foreshadowed the complicated and cutting-edge family law issues she would encounter in her judicial decision making. As Judge Kaye noted, family law "is at the very frontier of defining rights of individuals, rights to form families, rights to conduct family life."[3]

Judge Kaye's 25 years as a Judge on the New York Court of Appeals (10 as an Associate Judge, and her 15 years as Chief Judge and effectively as the chief executive of the New York court system) have demonstrated her commitment to focusing public attention on the problems of families and children in our legal system, especially those most disadvantaged, and providing ways that the legal system can improve their lives. One of the most significant of these administrative reforms has been the development and expansion of specialized, problem-solving courts. These include: The Integrated Domestic Violence Courts, which operate as "one family-one judge" courts to bring together before a single judge all aspects of a troubled family's legal matters—criminal, family law, and matrimonial—that may flow from a domestic violence situation;[4] the Youthful Offender Domestic Violence Courts that serve as specialized courts for domestic violence criminal offenses involving young defendants (16-19 years old); the Family Treatment Courts, a collaborative effort among judges, prosecutors, defense attorneys, treatment providers and court staff who work together to link addicted offenders to treatment services and provide intensive monitoring to help substance abusers establish a drug-free life; the Youth Courts, in which young people who have committed minor offenses have their cases handled by peers, who serve as jurors, judges and attorneys, with the goal of having the youth pay back the community and receive assistance to avoid further involvement in the justice system, and Mental Health Courts, in which mental health needs and community safety are addressed by focusing on treatment, linking offenders to long-term community-based treatment, and providing ongoing judicial monitoring.[5]

"Judge Kaye's 25 years as a Judge on the New York Court of Appeals (10 as an Associate Judge, and her 15 years as Chief Judge and effectively as the chief executive of the New York court system) have demonstrated her commitment to focusing public attention on the problems of families and children in our legal system, especially those most disadvantaged, and providing ways that the legal system can improve their lives."

These problem-solving courts are characterized by a number of common principles: they recognize that crime and other anti-social behavior are often cyclical, and their long-term goal is to end the cycles of deviance; their primary method is to provide treatment and incentives for offenders to turn their lives around; they closely monitor them to assure compliance with court orders and treatment plans, and they link them to resources that include social services, health services, job training, and housing.[6] What began as pilot projects have proliferated across the State and to other jurisdictions as a permanent part of the judicial structure.[7]

Another key administrative program initiated by Judge Kaye was establishing a uniform procedure for the use of Court Appointed Advocates for Children (CASA)

volunteers in New York family courts. In 2004, she convened a task force to assess and make recommendations regarding the use of CASA volunteers in the courts, which this writer had the privilege of chairing. The recommendations of the CASA Task Force were put into place by the Office of Court Administration, including establishing a program of government financial support for CASA programs and the adoption of court rules that establish standards for CASA appointments in the courts.[8]

Typical of Chief Judge Kaye's reformist methodology was the adoption of the New York State Parent Education and Awareness Program, to teach divorcing and separating parents of the devastating effects upon children of being placed in the middle of full-scale warfare over custody and visitation issues.[9] First, a multi-disciplinary Advisory Board was created in 2001, supported by an Administrative Order of the Chief Administrative Judge, to recommend standards and guidelines for establishing the program.[10] The Board's recommendations were adopted.[11] Certified parent education programs were then set up, accessible in all 62 counties of the state, by court referral or self-referral. By October 2007, nearly 8,000 parents had participated in the program statewide.[12]

One of Judge Kaye's newest administrative reforms in the area of family law focuses on improvements in matrimonial and child custody cases. In 2004, Judge Kaye established a multi-disciplinary Matrimonial Commission, chaired by Judge Sondra Miller. After nearly two years of public hearings, research and discussion, the Commission issued a lengthy report recommending changes in the matrimonial and custody systems, including changes in language (parenting time for "visitation" and attorney for "law guardian"), administrative reforms to reduce trauma, cost, and delay (streamlined model orders, early intervention services, parity between supreme and family courts), and legislative proposals.[13] Some of the Commission's recommendations have already been adopted.[14]

Judge Kaye has also focused on children, and delivered real results as Chair of the Permanent Judicial Commission on Justice for Children. Judge Kaye has chaired (or co-chaired) the Commission from its inception in 1991. Under Judge Kaye's leadership, the Commission has been responsible for numerous meaningful reforms in the courts. These include the creation of Children's Centers in courthouses, safe, nurturing physical settings for children who accompany their caregivers to court that also provide outreach and resource referrals for the parents,[15] and implementation of the federal State Court Improvement Project, which has resulted in improved case-management practices in family courts throughout the state. The Commission has also initiated statewide programs that focus on the well-being of the state's most vulnerable children in foster care—the Healthy Development Initiative and the Babies Can't Wait project. No doubt due in large part to Judge Kaye's leadership and tireless resolve, many of the Commission's reforms, especially those focusing on improving permanency for foster children, have been adopted in state and federal legislation, standardizing these best practices and making them available and enforceable throughout the state. [16]

Judge Kaye's and the Commission's work has had an impact beyond New York State. Federal legislative reforms have improved outcomes for children throughout the country, and on the administrative level, other states have replicated family court reforms that began in New York. Judge Kaye has also brought New York's successful approach of promoting collaborative initiatives for children and families nationwide. As a member of the Conference of Chief Justices, Judge Kaye spearheaded efforts to create a national summit at which judicial leaders and child welfare agency leaders from every state came together to focus attention and share innovative ideas to better protect abused and neglected children in the court system. The first national summit for sharing ideas for reforms among children and family advocates and courts, and to bring national attention to these issues, was held in Minnesota in 2005, and the second summit was held in New York City in 2007.[17]

Recognizing early on that the court system could not institute meaningful reforms in foster care and adoption alone, Judge Kaye has also spearheaded important cross-agency collaborative efforts for children. Judge Kaye asked to meet with the commissioners of the New York State Office of Children and Family Services (OCFS) and the New York City Administration for Children (ACS) to examine ways that these agencies and courts could work together to develop and implement changes to the foster care and adoption systems. This collaborative effort continues today; key staff members of the Unified Court System, the family courts, OCFS, and ACS meet regularly as members of the Permanency Now Workgroup (formerly known as the Adoption Now Workgroup) and work together to target problems and institute improvements in the foster care and adoption systems. Judge Kaye also continues to meet personally with the agency commissioners and their executive staff to ensure that these important collaborative efforts continue.

Judge Kaye's impact as a leading judicial advocate for children and families has not been confined to her administrative role as head of the New York judicial system. She has made equally important contributions to family law as an author, both in her judicial decisions and in her prolific extra-judicial writings. She has written numerous law review articles to explain and advocate for the many administrative and legislative family court reforms she has championed.[18] Thanks to her determination to focus attention on children and families, the New York State Bar Association has dedicated two special issues of its *Journal* to this topic, the first in 1992 and the second just this year.[19]

Judge Kaye's judicial opinions on the state's highest court also reflect both her determined focus on bettering the lives of vulnerable children and her conviction that it is the responsibility of the court system to use all of its available powers toward this end. For example, in *In re Jamie M.*,[20] Judge Kaye, writing for the court, interpreted a provision of the Social Services Law as requiring the Department of Social Services to assist impoverished parents with services that will enable them to gain financial security and the ability to provide a suitable home before terminating parental rights.[21] Judge Kaye has authored numerous decisions that reflect her commitment to protecting children and their relationship with the parents.[22]

Judge Kaye's forward-thinking views in family law did not always capture a majority of the Court, and some of her most influential writings in this area have been her dissents. These decisions in particular reflect her willingness to extend the law forward to fit new realities of family life—always guided by the question of what is in the child's best interests. One such early dissent was in *Alison D. v. Virgina M.*,[23] a case in which the Court denied standing to the former lesbian partner of a biological mother to seek visitation of the child that the women had planned for and raised together. While the Court's majority recognized that Alison D. had "nurtured a close and loving relationship with the child," its decision rested on a constrained reading of the term "parent" in the Domestic Relations Law.[24] Because Alison D. was a "biological stranger" to the child and not a legal parent by adoption, the child's biological mother had the right to deny her visitation without interference from the courts.[25]

Pointing to evidence that many families today do not include two biological parents, Judge Kaye noted that "the impact of [the Court's] decision falls hardest on the children of those relationships, limiting their opportunity to maintain bonds that may be crucial to their development."[26] Judge Kaye chastised the majority for deeming the Court powerless to consider the best interests of the child.[27] She concluded that Supreme Court's equitable powers and its *parens patriae* power to consider the best interests of the child provided a sufficient basis for the Court to develop an appropriately broad definition of "parent" that recognizes the "modern-day realities" of family life.[28]

This view carried the day just four years later, when the Court was confronted with the issue whether the lesbian partner of a child's biological mother and an unmarried heterosexual partner of a child's mother could adopt the child. Writing for the Court in *Walter Jacob and Dana G.M.*, Chief Judge Kaye concluded that interpreting the governing statutes to permit such adoptions was consistent both with legislative intent, as evidenced by modern-day amendments to the adoption statutes, and the primary purpose of the adoption scheme, which is to serve the child's best interests.[29] Her focus on reaching a decision that would protect the interests of the children in securing a stable, loving family is evident. "To rule otherwise," she stated, "would mean that thousands of New York children actually being raised in homes headed by two unmarried persons could have only one legal parent, not the two who want them."[30]

One aspect of Judge Kaye's analysis in *Jacob and Dana* was rejected when directly presented to a differently constituted Court some years later. In *Jacob and Dana,* the Court expressed its concern that construing the adoption statutes narrowly to deprive children of gay and lesbian parents, who could not legally marry, the benefit of having as parents the two individuals who have assumed that role might raise constitutional concerns.[31] However, in *Hernandez v. Robles*,[32] a differently constituted Court rejected an interpretation of the Domestic Relations Law that would permit gay and lesbian couples to marry. In her cogent dissent, Chief Judge Kaye forcefully made the case that denying same-sex couples the right to marry unconstitutionally denied them the fundamental due process right to marry and equal protection of the laws.[33] Once again, Judge Kaye considered the effect of the Court's decision on the children of these families. In rejecting the majority's reliance on the rationale that limiting marriage to heterosexual couples furthers the state's interest in promoting procreation within marriage, Judge Kaye noted that excluding same-sex couples from marriage undermines the state's interest in the welfare of children. "Depriving these children of the benefits and protections available to children of opposite-sex couples is antithetical to their welfare."[34] Although this view did not garner a majority of votes on the New York Court of Appeals, the California Supreme Court relied on Judge Kaye's decision in its decision finding the exclusion of gay and lesbian couples from the right to marry unconstitutional.[35] Whether or not one agrees with her view that a statutory ban on same-sex marriage is unconstitutional, it cannot be denied that the Kaye dissent in *Robles* represents modern judicial opinion-writing at its best, in terms of craftsmanship, succinct eloquence and analytical reasoning.

Judge Kaye's willingness to develop the law to accommodate changing notions of family, her recognition that "family law today is clearly an essential part of our struggle toward a better society," and her willingness to be part of that struggle, are exemplified in both her administrative and judicial contributions to family law. The people of this state, especially its less fortunate children and families, were most fortunate that when Chief Judge Kaye accepted the reins as the leader of the Court of Appeals and the New York Unified Court System more than 15 years ago, she determined to focus her interests "on families[, and] the fate of children in our society and how we can improve it.[36] Her constitutionally mandated retirement at the end of this, the year of her 70th birthday, will be an incalculable loss. But she leaves a rich legacy that will survive for many, many years to come.

Endnotes

1. Judith S. Kaye, *Proceedings of the 70th Annual Dinner, American Law Institute Annual Meeting: Remarks and Addresses*, 56 (1993).
2. *Id*. at 58. Sadly, some members of the American Law Institute found Judge Kaye's focus on family law issues disappointing. Rita Henley Jensen, *Kaye Urges ALI to Accord More Respect to Family Law*, N.Y.L.J., vol. 209, No. 93, at 1 (May 1993) (noting that "some female ALI members expressed regret that Judge Kaye chose to speak on a topic traditionally thought to be a women's issue to a male-dominated organization.").
3. Judith S. Kaye, *Proceedings of the 70th Annual Dinner, American Law Institute Annual Meeting: Remarks and Addresses*, 56–57 (1993).
4. It is with great pride that I note that the writer's daughter, the late New York City Criminal Court Judge Ruth Levine Sussman, presided over the highest successful introduction of the Integrated Domestic Violence Court in New York City, in Bronx County.
5. Descriptions of the Integrated Domestic Violence Courts, Youthful Offender Domestic Violence Courts, and the Mental Health Courts are found on the New York Unified Court System Web site at http://www.courts.state.ny.us/courts/problem_solving/. A Youth Court demonstration project is described on the Web site of the Center for Court Innovation, the research arm of the New York State Unified Court System. *See* http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPage&PageID=581&currentTopTier2=true.
6. Judith S. Kaye, *Symposium: Refinement or Reinvention: the State of Reform in New York: The Courts*, 69 Alb. L. Rev. 831, 837 (2006); *see also* Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 Yale L. & Pol'y Rev. 125 (2004).
7. *Id*. at 838.
8. Information on the CASA program and rules is derived from the New York Courts official Web site. *See* http://www.nycourts.gov/ip/casa/AboutUS.shtml.
9. *See* E. Frazee & S. Pollet, *The New York State Parent Education and Awareness Program*, N.Y. St. B.J., vol. 80, at 26 (July/Aug. 2008).
10. *Id*.
11. *Id*. at 27–28.
12. *Id*. at 28.
13. Hon. Sondra Miller, The Commission's Process and Recommendations, 27 Pace Law Rev. 551 (2007). The Commission's report is reprinted at 27 Pace L. Rev. 987 (2007), and is also available at http://www.courts.state.ny.us/reports/matrimonialcommissionreport.pdf.
14. 27 Pace Law Rev. at 554.
15. *See* Judith S. Kaye, *Children's Centers in the Courts: A Service to Children, Families and the Judicial System*, N.Y. St. B.J., vol. 67, at 6 (Oct. 1995).
16. This description of the activities and accomplishments of the Permanent Judicial Commission on Justice for Children is taken from the Commission's 15-Year Report.
17. These national summits produced written recommendations. The National Judicial Leadership Summit on the Protection of Children, *Justice for Children: Changing Lives by Changing Systems. A National Call to Action* (2006). The publication is available at http://www.ncsconline.org/WC/Publications/CallToActionInside.pdf.
18. Among the many articles on family law and children's issues, and the roles that courts play in these matters, that Judge Kaye has authored are the following: Hon. Judith S. Kaye, *Seizing the Opportunity to Make Good on Our Promises to At-Risk Youth*, 45 Fam. Ct. Rev. 361 (2007); Hon. Judith S. Kaye, *The Disproportionate Number of Minority Youth in the Family and Criminal Court Systems: Introduction*, 15 J.L. & Pol'y 905 (2007); Hon. Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 Yale L. & Pol'y Rev. 125 (2004); Hon. Judith S. Kaye & Susan K. Knipps, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach*, 27 W. St. U. L. Rev. 1 (1999-2000); Hon. Judith S. Kaye & Hon. Jonathan Lippman, *New York State Unified Court System: Family Justice Program*, 36 Fam. & Conciliation Courts Rev. 144 (1998); Hon. Judith S. Kaye, *Children's Centers in the Courts: A Service to Children, Families and the Judicial System*, N.Y. St. B.J, vol. 67, at 6 (Oct. 1995).
19. *See* Hon. Judith S. Kaye, *Issue Editor's Introduction*, N.Y. St. B.J., vol. 80, at 11 (Jan. 2008).
20. 63 N.Y.2d 388 (1984).
21. The statute at issue required the Department of Social Services to exercise diligent efforts to encourage and strengthen the parental relationship before terminating the parents' rights in a permanent neglect proceeding. The Court found that employment and financial security prevented the parents from establishing a suitable home for their child and that the Department had not sought to help the parents address these basic issues before concluding that the parents did not have a means of support or suitable home for their child. 63 N.Y.2d at 394–95.
22. For example, in *People v. Carroll*, 93 N.Y.2d 564 (1999), she interpreted a statute defining the crime of endangering the welfare of a child to include the wife of a non-custodial father whom the child was visiting on the theory that the stepmother was functioning at that time as the equivalent of a parent. In *Nicholson v. Scoppetta*, 3 N.Y.2d 357 (2004), she insisted on a stringent reading of the abuse-and-neglect statutes to reject New York City's policy of removing children from their homes based solely on their exposure to domestic violence against a caretaker.
23. 77 N.Y.2d 651 (1991).
24. *Id*. at 655.
25. *Id*. at 654–55, 656–57.
26. 77 N.Y.2d at 658 (Kaye, J., dissenting).
27. *Id*. (Kaye, J., dissenting).
28. *Id*. at 660-61 (Kaye, J., dissenting).
29. 86 N.Y.2d 651, 658, 662, 666-67 (1995).
30. *Id*. at 656. Judge Kaye's concern with serving the best interests of the children is evident throughout the decision. *See, e.g., id*. at 657–58 ("[T]he adoption statute must be applied in harmony with the humanitarian principle that adoption is a means of securing the best possible home for a child."); *id.* at 665 ("The ambiguity [in the adoption statutes] should be resolved in the children's favor.").
31. 86 N.Y.2d at 667–68.
32. 7 N.Y.3d 338 (2006).
33. *Id*. at 380-86.
34. *Id.* at 393 (Kaye, C.J., dissenting).
35. *In re Marriage* Cases, 76 Cal.Rptr.3d 683, 183 P.3d 384, 438 n.57, 441 n.60, 451 (2008).
36. Hon. Judith S. Kaye, *2003 Symposium: Acceptance of "Most Influential Woman in the Law" Award*, *9* Cardozo Women's L.J. 673, 677 (2003).

Hon. Howard A. Levine served as an Associate Judge on the New York Court of Appeals from 1993-2002. Following his retirement from the Court, he was named the Robert H. Jackson Distinguished Professor at Albany Law School, the first to serve in that newly endowed seat. Judge Levine is Senior Counsel at Whiteman Osterman and Hanna in Albany, New York.

A "Boundless Enterprise": The Legacy of the Permanent Judicial Commission on Justice for Children and Judith Kaye

By Ellen Schall and Sheryl Dicker

Ellen Schall

This journal pays tribute to the multiple contributions of Chief Judge Judith Kaye and alerts us all to one of the negative consequences of mandatory retirement—losing talent such as hers. Our goal in this particular piece is to highlight one of the most extraordinary and unexpected of Judith Kaye's multiple contributions: the ways in which she reshaped both the New York State and the national landscape for children whose lives were touched by the court system.

Judith Kaye didn't come to the practice of law or to the bench with any predilection to help children, other than as a committed mother of three. She spent most of her career as a commercial litigator. But in 1983, Governor Cuomo surprised many, including Judith herself, by naming her the first woman judge of the New York Court of Appeals and, in l993, its first woman Chief Judge. She went from practicing lawyer to appellate judge overnight, and even more remarkably to Chief Judge responsible for the leadership of the entire court system.

This role would have daunted many. And has. It would have been understandable for Judith Kaye to focus on her role as the senior judge on New York's highest court, the New York Court of Appeals. She was and is a scholar of the New York State Constitution. She loves the law. She cares about legal precedent and argument and is completely committed to the rule of law. And she had no experience managing a complicated bureaucracy or negotiating the pathways of Albany. But Judith Kaye was not, and is not, easily daunted. So she started in, on both roles. She led the Court and she led the courts.

We are honored to join others in celebrating Judith Kaye's accomplishments across the range of her roles. We have no claim to impartiality, but do have the experience of working closely with Chief Judge Judith Kaye in the creation and growth of what—in the 2006 report describing the 15 years of accomplishment of the Permanent Judicial Commission on Justice for Children (Commission)—she referred to as a "boundless enterprise of justice for children." One of us (Ellen Schall) became the Co-Chair of the Commission with Judith Kaye; the other (Sheryl Dicker) the Executive Director of the commission, and it is from that perspective we write.[1]

Sheryl Dicker

Reforms, Not Reports

We want to suggest that this decision in 1991 to co-chair the Commission was pivotal for Judith Kaye and for the role of the courts in New York State and beyond. The commission made the decision, as the Chief Judge has often said, to produce reforms, not reports. That bias to action, that ability to create change and deliver results, has set the groundwork for both the policy and programmatic innovations throughout Judith Kaye's tenure. Whether it is the reform of the jury system, which won the 2008 Public Service Innovation Award from the Citizens Budget Commission, or establishment of the new commercial courts, the legacy of Judith Kaye, at least on the administrative side, lies in changed lives, in new practice, in the court system expanding its boundaries in ways never imagined.

The reforms Judith Kaye spearheaded through the Commission, recognized by the National Center for State Courts' award to her of the William H. Rehnquist Award for Judicial Excellence, are path-breaking and their impact felt nationwide. As a lifelong scholar of the New York State Constitution and of state constitutional law, Judith Kaye knew well the traditional boundaries among the branches of government. But again, as a scholar of the constitution, she could see the possibilities. We believe that her contribution in re-envisioning the role of the courts, particularly the family courts, will remain among her greatest accomplishments. Many citizens, and even lawyers and judges, hold the courts as a key branch of government, but as the most passive branch. The courts, in this image, remain in reserve, available to resolve controversies once presented, but not as active shapers of the policy and practice worlds. Judith Kaye called the courts into action. She saw their capacity, still within constitutional bounds, to step up to their full potential. She encouraged judges to reflect on what they learned on the bench to inform policy decisions. She reached beyond the courtroom to partner with other branches of governments

and with agencies in the non-profit sector to bring about change. She spurred changes in practice both within the courts and beyond. And she mobilized resources way beyond the courts to create innovations on behalf of children.

The Court as a Policy Actor

In 1991, the Commission began formulating its agenda by interviewing key informants—people knowledgeable about young children in the courts. Many raised concerns about the lack of services for young children displaying serious developmental delays and voiced dismay at New York's failure to implement the federal Infant and Toddler Early Intervention program for children with developmental delays, now known as Part C under the Individuals with Disabilities Education Act.[2] Unlike any other state in the nation, New York had a system that required the family court, under section 236 of the Family Court Act, to enter orders for pre-school special education services. The State and counties split the costs of these services, with no federal reimbursement. Under Judith Kaye's leadership, the Commission conducted a study of the family court order program that revealed a seriously flawed system operating differently throughout the state. No court rules or case law governed the process. Hearings, rarely, if ever, were held on petitions that all too often looked identical.

In an unprecedented undertaking, the Commission co-sponsored two legislative hearings focused on the existing system and legislation proposed to implement the federal program. The Commission presided over two days of hearings at which parents, providers and advocates testified. It was clear to Judith Kaye that judges needed to voice concerns about the inadequacy of the process at the legislative hearings. With Judith Kaye's encouragement, a family court judge from New York City and one from Rochester testified about the failures of the family court order process and the need to implement the federal law at the legislative hearings.

The Commission then entered into protracted discussions with the Legislature. On the very last day of the session, New York passed the Early Intervention Law of l992 and brought New York State into compliance with the federal law. Not only was the Commission invited to participate in Governor Cuomo's formal signing ceremony, but, at Judith Kaye's urging, every Commission member received a pen certificate signifying their pivotal role in the passage of the new law. As we recognized that passage of the law was just the beginning, the Commission became involved in implementation efforts. Again, without precedent, we served on the rate reimbursement and regulatory drafting committees.

By bringing the front-line knowledge of the courts to the policy-making table, we were able to help create an entitlement program for children with developmental delay or disabilities to ensure that they had access to a comprehensive system of educational, therapeutic and family support services. These cases no longer pass through family court and the court's dockets were thus reduced by more than 15,000 cases. Most importantly, thousands more children and their families throughout New York State now receive individually tailored services, thus enhancing their lives and life chances. During Judith Kaye's tenure, bringing the court's experience and information to the policy-making table became a routine part of the business of the Commission and, ultimately, the court system. The passage of the comprehensive Permanency Act of 2005 is the latest example of this tradition.[3] Thanks to Judith Kaye, it is now axiomatic in New York State to tap the extensive knowledge of the court system in the policy-making process.

The Court as an Active Partner

Our early intervention work was premised on a new relationship with the other branches of government: an active, not passive, relationship working together on systemic issues (but never on individual cases, of course). That early effort sowed the seeds for partnerships in the coming years. Our most notable partnership helped to solve a problem within the court system itself.

"During Judith Kaye's tenure, bringing the court's experience and information to the policy-making table became a routine part of the business of the Commission and, ultimately, the court system."

As part of our initial key informant process, we learned that every day hundreds of young children were brought to New York State's courthouses because their caregivers with court appearances had nowhere else to leave them. The presence of children in the waiting rooms, hallways and courtrooms was having an enormous, and negative, impact on the functioning of the court system by precluding the full participation of caregivers in important judicial proceedings, jeopardizing the well-being of children and compromising orderly, efficient court operations. To provide a safe haven for children in the courts, the Commission proposed the development of a statewide system of Children's Centers in the courts. But, the Commission and the courts could not create a new child care option alone—we needed partners in the executive and legislative branch. In l993, during her confirmation process for Chief Judge, Judith Kaye shared with legislators our plans. In fact, a murder in a crowded courthouse waiting room with children present, just weeks after her confirmation, would expedite those efforts. Immediately after that murder, Judith Kaye urged us to tap our legislative allies to find funds to begin to build the Children's Centers in the courts. The legislative alliances forged dur-

ing the early intervention battle gave us unprecedented access to the budget process and helped us uncover unspent federal child care block grant funds that could provide a foundation for this new system. But, finding the resources and actually creating a new service were two different things. We knew that we had to forge a partnership with the then New York State Department of Social Services that oversaw the child-care system. Together we developed a set of minimum requirements for the centers and shaped a Request for Proposal that was issued in the fall of 1993. In another groundbreaking move, we entered into a Memorandum of Understanding—the first such document between the court system and an executive agency. As a result of Judith Kaye's persistence, by early l994 six new centers had opened.

"Today, through a partnership with the non-profit but federally funded Reading Is Fundamental (RIF) program, more than 25,000 new books are distributed to children at selected Centers, aided by donations from new partners, including judges and lawyers, that provide the critical matching funds."

There are today 32 centers in New York State's network of Children's Centers in the courts, serving more than 54,000 children annually. The Children's Centers provide a two-pronged service: quality drop-in child-care services while caregivers attend to court business, and a site—possibly the only place until a child enters school—where families can learn about and gain access to vital services. Based on the success of these centers, the Commission obtained executive branch state and federal funding for the start-up and enhancement of Children's Centers in the courts throughout New York State. Our updated Memorandum of Understanding obligated the courts to fund the ongoing operations of the centers and provide critical oversight. This unique funding partnership has continued for more than 13 years and serves as the foundation for the centers.

This partnership has enabled the Commission to forge new relationships with other agencies and even non-profits, to ensure that the children who pass through the centers are enrolled in vital services. Judith Kaye's commitment to partnerships facilitated a wide range of new efforts—from center staff being deputized to begin the enrollment process for the Women, Infants and Children Program and NYNEX Lifeline telephone service to the out-stationing of Head Start and Child Health Plus to place children in vital services. As a result of this variety of approaches, many of New York's most vulnerable children have been enrolled in essential programs.

When Judith Kaye learned that low-income families are eight times more likely to read to and share books with their young children when provided with books and encouragement, she seized another opportunity to enhance the lives of the children touched by the court system. She launched the Children's Center Literacy Project, which creates a literacy-rich environment in the centers. The program features the gift of a new, age-appropriate book for every child who visits the center and a literacy-enhanced curriculum that promotes activities focused on reading readiness. Judith Kaye herself solicited the first books by getting Golden Books Family Entertainment to donate 40,000 books during our first year of operation. Today, through a partnership with the non-profit but federally funded Reading Is Fundamental (RIF) program, more than 25,000 new books are distributed to children at selected centers, aided by donations from new partners, including judges and lawyers, that provide the critical matching funds.

Once Judith Kaye began to tap the promise of partnerships to create new programs, that methodology became central to the Commission and the court system's operation.

New Partnership

In 1993, Congress provided funding to the highest court of each state to assess and improve foster care, termination of parental rights and adoption proceedings. Pursuant to federal legislation, New York's highest court, the Court of Appeals, designated the Commission to carry out the State Court Improvement Project (CIP) in New York. In authorizing these funds, Congress recognized that significant improvements in the child welfare system also depended on improvements in the court process. While most states conducted studies and trainings (and we did, too), New York took a more proactive role in conducting the Court Improvement Project. Based on our previous work, we knew that the court system could not reform child welfare alone—it needed partners. Collaboration with the child welfare system became our central strategy for the Court Improvement Project success.

Our effort in Erie County, later replicated statewide, built on the success of the centers to bring together the Supervising Judge and the Department of Social Services commissioner. They co-chaired a county-wide stakeholders group composed of all the key players in Erie County, and together they developed projects to address their local concerns within the confines of the Court Improvement Project. Their first effort—an expedited adoption project called *Spring Into Permanency*—resulted in more than 750 adoptions and laid the groundwork for the creation of a court designated as a national model court, at Judith Kaye's urging, by the National Council of Juvenile and Family Court Judges.

As more of these local partnerships emerged, the Commission deepened its relationship with the state child welfare agency now called the Office of Children and Families. At Judith Kaye's urging, we worked with the Office of Family and Children Services after it received negative Health and Human Service federal reviews under the Child and Family Services Review (CFSR). Commission staff actively participated in the development of the Program Improvement Plan (PIP), further strengthening our collaboration. In September 2003, the Commission partnered with the Office of Family and Children Services to create the Sharing Success Conference, the first conference in New York to bring together family court judges, local and state commissioners, attorneys, and Department of Social Services staff. The conference showcased collaborations between courts and child welfare throughout New York State and the nation. Judith Kaye was the keynote speaker at the conference and urged New Yorkers to seize the mantle of partnership to create needed reforms. Every year since 2003, an annual Sharing Success Conference, developed and funded by the courts and the Office of Family and Children Services, has occurred. At each of those six conferences, Judith Kaye opened the two-day event by urging further efforts on behalf of New York's most vulnerable children.

The Court as a Shaper of Practice

The Court Improvement Project partnerships also led the Commission to underscore the needs of the children involved in the child welfare system. Our research found few court orders for services for children in foster care, little indication in court records or proceedings that services were being provided to them, and only rare inquiries about their health or developmental status. Yet, we knew of the fragile health and high propensity for developmental delay among this population. Judith Kaye insisted we find a way to address the health needs of these children.

At her urging, we searched for a path. The Children's Centers offered a model. At the suggestion of a pediatrician member of the Commission, we developed the Healthy Development Checklist—a tool for judges, lawyer and child welfare professionals. This simple 10-question tool would enable the court to gather and review vital information about the health-care needs of children who came before the court in foster-care proceedings and, if necessary, fill in the gaps through court orders. The checklist was based on the requirements of the law and the standards of the American Academy of Pediatrics and the Child Welfare League of America. Judith Kaye unveiled the checklist and its accompanying booklet at her l999 Millennium Address in Washington, D.C., at a conference sponsored by the U.S. Department of Health and Human Services, the Office of Juvenile Justice and Delinquency Prevention, and the National Council of Juvenile and Family Court Judges. The presence of the checklist changed practice—providing a new and vital role to Court Appointed Special Advocates (CASAs) and reframing the role of children's counsel and counsel for parents by getting everyone involved in proceedings to focus on children's health. It resulted in children receiving required comprehensive exams, up-to-date immunizations, screenings for vision, hearing, development, and communicable diseases and, most important, receiving treatment, whether eyeglasses or specialized services, for identified conditions. This new practice became so integrated into child welfare proceedings that it was institutionalized through the 2005 Permanency Act, and now all permanency hearing reports must contain information about a child's health and well-being.[4]

This focus on children's well-being led the Commission to initiate a more targeted effort that focused on the thousands of infants—children under age 1—who entered New York's foster-care system each year. That project, called *Babies Can't Wait,* would build on the healthy development work and the partnership forged with New York City's Administration for Children's Services in the Court Improvement Project efforts. Originally based in the Bronx, the project created new tools to promote the healthy development and permanency of infants in foster care. It, too, developed a checklist for judges, lawyers, Court Appointed Special Advocates and child-welfare professionals to guide their efforts. It further strengthened Court Appointed Special Advocates (Judith Kaye would later establish an ongoing funding and oversight mechanism and court rules for Court Appointed Special Advocates) and led to an automatic referral system to early intervention, resulting in thousands of foster children receiving early intervention services.

These practice changes—focusing on the well-being of children and particularly infants—have reverberated throughout the courtrooms of our state and the meetings and offices of all who touch the lives of children in foster care.

The Court as a Generator of New Resources

Early in the Commission's history, it became clear that resources would be needed to build these innovations. First, we tapped state and federal funds for the Children's Centers but quickly found that those funds were not enough to match our ambitions. Following the lead of executive branch agencies such as the New York State Department of Health and New York City Department of Juvenile Justice, we determined that we needed our own supporting organization to raise funds. No other court system had ever ventured into this terrain. Under Judith Kaye's leadership, New York created a separate nonprofit, the Permanent Judicial Commission on Justice for Children Fund, to receive private philanthropy in support of the new initiatives. The Robert Wood Johnson Foundation quickly embraced our idea for the *Babies Can't Wait* project and the New York Community Trust eagerly sup-

ported its replication throughout New York City. When the PEW Charitable Trusts embarked on child welfare reform, it sought out New York because of Judith Kaye's leadership, the presence of the Commission and the availability of the Permanent Judicial Commission on Justice for Children Fund. The presence of the fund allowed the Commission to seize opportunities for new projects and to build pilots that would later become integral parts of the court system.

"While most think of activist judges in terms of their court decisions, Judith Kaye invented a new way for the courts to have a lasting and active impact on people's lives."

National Impact

So far, this is a story very much about New York, but this is not a story only about New York. Judith Kaye's work became known nationally. She was elected Chair of the Association of Chief Judges. Under her leadership, children were a priority and courts were encouraged to take an activist role in the administration of justice. She even got the Chiefs to pass a resolution urging the creation of Children's Centers in the Courts. Florida created its own Children's Centers and many states, such as Texas and Minnesota, created their own children's commissions. In fact, under her leadership, the Association of Chief Judges held its own Sharing Success conference bringing together court and child welfare officials to forge partnerships to reform the child welfare system.

Conclusion

While to some Judith Kaye's legacy may seem to lie in an array of specific innovations, we see them as a whole and tied together by a common theme—of creating a new role for the court. Under Judith Kaye's view, first exemplified at the Commission, if your life touches the courts, the courts have a role to play to enhance your life. This is a new, broad and activist view of the courts. While most think of activist judges in terms of their court decisions, Judith Kaye invented a new way for the courts to have a lasting and active impact on people's lives. This role has huge implications. It is the true lasting impact of Judith Kaye.

Endnotes

1. We adapt much of what follows from the Accomplishments: 15 Year Report, published by the PJCJC in 2006 (www.nycourts.gov/ip/justice for children).
2. Efforts to implement the federal law in New York had stalled.
3. Indeed, when former Governor Spitzer appointed his Children's Cabinet, it was taken for granted that Judith Kaye would become a member, and the commission staff would serve on its subcommittees.
4. New York Laws of 2005.

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An Advocate for Healthy Families

By Hon. Jacqueline W. Silbermann

In my many years and various capacities within the judicial system, I have viewed divorce proceedings from several unique vantage points: as a matrimonial trial judge, as Administrative Judge at 60 Centre Street in Manhattan and as the Statewide Deputy Chief Administrative Judge for Matrimonial Matters. In all of these positions, I have been very fortunate to have the support of the best Chief Judge our state has ever had. I speak, of course, of Chief Judge Judith S. Kaye, who is truly a visionary and who has made changes—not for the sake of change, but for the sake of making the system better.[1]

Indeed, Chief Judge Kaye's involvement in matrimonial-reform efforts began even before she became Chief Judge, when she served on then-Chief Judge Sol Wachtler's Committee to Examine Lawyer Conduct in Matrimonial Actions, chaired by Justice E. Leo Milonas. The mandate of the Milonas Committee was to study the role of attorneys in matrimonial actions with the objectives of improving the attorney-client relationship and enhancing the court's ability to handle matrimonial and custody matters. The Committee met with experts in the field of matrimonial law to investigate criticisms of the matrimonial courts and attorneys. A three-day public hearing was held in New York City and Albany to identify these concerns. After carefully considering the voice of the public, the Milonas Committee made recommendations to the courts and to the matrimonial bar for more efficient case management procedures in domestic relations law. From the work of that committee emerged the "New Matrimonial Rules," designed to streamline the divorce process. These rules were introduced by the newly appointed Chief Judge Kaye in November 2003.[2] As she has noted publicly, "For a brand new Chief Judge, it was truly a baptism by fire."[3] We are thankful that the Chief Judge has never been one to shy away from a challenge. Thus began an era of unprecedented reform that has revitalized the field of matrimonial law in our great state. These rules, which were designed to improve matrimonial litigation, a traditional source of complaint, have reduced the average time it takes to resolve a matrimonial case by more than half. Some of the case-management requirements have been so successful that they have been copied by other fields of litigation.

Never complacent, Chief Judge Kaye has noted, "but still divorce takes too long and costs too much—too much money, too much agony."[4] As a result, she appointed the Matrimonial Commission in 2004 to explore innovative methods to lessen litigation and address these concerns, especially the emotional toll that litigation takes on the family and the child. With the Chief Judge at the helm pointing the way, much has been accomplished.

I. Insulating the Children

THE PARENTING PLAN—Making the process less adversarial and formulating custody arrangements that give each parent a significant and responsible role in the lives of their children are major goals. The first step toward a good working relationship between divorcing parents and their children is to use clear language, and not negatively charged phrasing, in addressing their roles after the divorce. Historically, custody issues were framed in terms of possession of the child and the "non-custodial parent" was given some amount of time for "visitation." In 2005, we implemented the use by matrimonial judges statewide of a document entitled the *Parenting Plan*.[5]

The *Parenting Plan* intentionally uses neutral terms such as "parenting time" rather than "visitation," and "primary residence" instead of "physical custody" or "legal custody." One strategy embodied in the *Parenting Plan* is the establishment of "zones of decision making" rather than the awarding of all decision making to one parent, as an effective way to keep a parent from feeling invisible in his or her child's life. The *Parenting Plan* sets forth a proposed access schedule and separate proposals for day-to-day decisions and major decisions. In training seminars, the judges who hear custody cases are counseled to discourage parents from equating a good *Parenting Plan* with the number of hours or minutes they have with the child, and to help them acknowledge that, as in any family, children still need to have time with friends, time by themselves and time to do things away from both parents. A plan structured and mutually agreed to by the litigants is more likely to succeed. If the parties can agree on the terms, the document is signed by each of them and becomes their *Parenting Plan*, removing the uncertainty for both parents and, most importantly, for the child at the very earliest stage of court involvement.

FAMILY COUNSELING AND CASE ANALYSTS—In March 1999, with the encouragement of Chief Judge Kaye, a pilot program, utilizing social workers to assist families in custody, visitation and relocation disputes, was launched in the supreme courts of Kings, Nassau, Suffolk, Richmond, New York and Westchester counties. The position of Family Counseling and Case Analyst (FCCA) requires a Master's Degree in social work and/or counseling and additional professional training, experience and credentials, including, but not limited to, family therapy practice or other mediation credentials.

The FCCA receives custody case referrals directly from supreme court matrimonial judges and actively conferences the case with the parties, often in multiple sessions. As familiarity and confidence in the FCCA program and the individual social worker is established, these meetings may be conducted without legal counsel present upon the approval of both counsel.

Because divorce is a family crisis and situations can be complex, the FCCA acts as a liaison with other systems and professionals to integrate interaction with parties, their counsel, the court, the attorney for the child (formerly law guardian), drug and alcohol counselors, psychologists, psychiatrists, Child Protective Service caseworkers, school teachers, Court Appointed Special Advocates (CASA) or other supervised visitation programs, forensic evaluators and other extra-judicial resources. The FCCA works with the litigants to craft viable resolutions based on the family's unique needs, which counsel then reviews for incorporation into an overall settlement.

The success of this program over the past eight years has resulted in greater utilization of FCCAs by the matrimonial judges and the bar. In late 2006, Nassau, Tompkins and Erie counties were selected to participate in a new Model Custody Part called "Children Come First." These parts have a Family Services Coordinator to screen cases for their level of conflict and provide recommendations for various services, such as parent education programs, mediation, case conferencing, issue-focused evaluations and the development of a *Parenting Plan*. In Nassau County, the former FCCA has been elevated to Parenting Coordinator, utilizing her conflict resolution skills to help high-conflict couples adhere to court orders. Meanwhile, a new FCCA was hired in Nassau County to provide social work services to those litigants not selected for the Children Come First Part. Each of these programs resolves one of the most traumatic aspects of divorce at the inception of the case, avoiding antagonistic confrontation in open court and thereby reducing the potential for permanent damage to the children involved. Expansion of these programs to courts across the state has been supported by Chief Judge Kaye, who has a long and abiding interest in protecting children from the family crisis that often accompanies divorce.

II. Statutory and Education Reforms

MEDIATION/NEUTRAL EVALUATORS—Recently, Part 146 of the Rules of the Chief Administrative Judge established the first guidelines for the qualifications and training required of mediators and neutral evaluators seeking to be included on court rosters.[6] This is a recognition of the expanding use and value of these services to the court. In addition, court-sponsored initiatives using mediation to assist in resolving custody disputes have been implemented in various counties, including Nassau, Erie, Orange, Suffolk and New York. The goal of these pilot programs is to resolve issues involving children in a less adversarial fashion.

CERTIFICATION OF FORENSIC EXPERTS—Forensic evaluators often are appointed to assist the court in reaching custody determinations. As both a judge hearing custody trials and as Deputy Chief Administrative Judge, I have, from time to time, observed problems in the supreme court stemming from the use of unsophisticated forensic experts appointed to assist the courts in rendering custody decisions. Therefore, I am delighted that two of our presiding justices, Hon. A. Gail Prudenti of the Second Judicial Department and Hon. Jonathan Lippman of the First Judicial Department, have created a Mental Health Professionals Certification Committee to establish procedures and criteria for the appointment of applicants for membership on the panel of mental health professionals. The periodic re-evaluation of panel members, the training of panel members, the investigation of complaints made against panel members and, if necessary, the removal of mental health professionals from the panel will all be guided by this new Certification Committee.[7]

None of this would have been possible without the strong leadership and support from our reform-minded Chief Judge.

THE JUDICIARY—Fortunately for our state, Chief Judge Kaye believes in nothing short of excellence on the New York State judicial bench. Thus, funding and support has always been available, even in difficult economic times, to ensure that our judges are provided with the education and training they need to handle what can be some of the most difficult and emotionally draining cases in the court system. The training begins as soon as a judge is selected to hear these cases. An intense two-day training for all judges and court attorneys newly assigned to matrimonial cases introduces the basic practice skills that they will call upon in this new area of law.

Annual educational seminars for the judges, lawyers and clerks handling matrimonial cases, on such topics as psychological and developmental issues relevant to custody and parental access planning, are provided. This training introduces them to available diagnostic tools that can help them address the myriad of psychological, sociological and pharmacological issues relating to the mental health and well-being of the family—knowledge which is new to most lawyers and judges.

III. Serving the Public

PRO BONO—Volunteerism has been supported by the Chief Judge by allowing a participating pro bono attorney to receive CLE credit for service to the indigent party. In response to the Chief Judge's clarion call for more pro bono support for those in need, the New York County Women's Bar Association established a program to provide representation for indigent divorce litigants. Another pro bono initiative has proven successful in the Fifth Judicial District that utilizes local bar associations and provides a mixture of CLE credits and available funding to those who are willing to devote their time to the

representation of low-income litigants. Further pro bono expansion is being studied.

ASSIGNED COUNSEL PURSUANT TO JUDICIARY LAW § 35—The recognition that access to one's child is fundamental and paramount to the well-being of the child and each parent prompted the enactment of Judiciary Law § 35(8), which provides legal representation to either parent seeking custody or parental access, or defending against or prosecuting an order of protection, upon a finding of financial eligibility, where that party would have been entitled to such representation in family court.[8] Such access to effective legal representation for each parent in a custody dispute has long been utilized in family court, but has been missing in supreme court. Hopefully, this will reduce acrimony and litigation as the parties are better informed of their legal rights and responsibilities and better equipped to use court resources.

THE PARENT EDUCATION AND AWARENESS PROGRAM—In 2001, Chief Judge Kaye announced a statewide Parent Education and Awareness Program. Judge Kaye appointed a 19-member multi-disciplinary Parent Education Advisory Board. The Board, charged with developing a comprehensive approach to parent education in New York, developed a curriculum to provide parents with information and strategies to supplement and enhance their parenting skills; to create and maintain supportive parent-child relationships; to provide a stable, supportive home environment; to promote healthy parental functioning and psychological well-being; and, perhaps, most importantly, to protect children from ongoing conflict between parents. The courts now have discretion in cases involving children under 18 years of age to order parents in parental access, divorce, separation, annulment or child support actions or proceedings to attend certified Parent Education and Awareness Programs.[9] However, it must be noted that judges cannot order parents to attend parent education where there is any history, specific allegations or pleadings of domestic violence or other abuse involving the parents or their children. Certified programs, now located throughout the state, allow parents to gain a greater understanding of what their children are experiencing during the divorce process.

To educate the divorcing family, a video, entitled "Divorce in New York: What You Need to Know," provides information to the public of the divorce process in New York and is available through a cooperative effort of the court system and the New York State Bar Association.[10]

IV. The Law

Since Judge Kaye became Chief Judge, the Court of Appeals has issued more decisions than ever in the area of family law, including the *Cassano, Holterman* and *Mesholam* cases.[11] Perhaps most notable is the 2004 case of *Nicholson v. Scoppetta,*[12] in which a group of mothers brought an action pursuant to 42 USC § 1983 challenging the constitutionality of the New York City Administration for Children Services policy of removing children from a mother's custody solely on the grounds that the mother had failed to prevent her children from witnessing domestic violence perpetrated against her.

In response to three questions certified by the United States District Court for the Eastern District of New York, the Court of Appeals, with Chief Judge Kaye writing, found that evidence that a parent is a victim of domestic violence, and a child is a witness to domestic violence, is not alone a sufficient basis for a finding of neglect. The Court reasoned that for a finding of neglect sufficient to remove a child the trial court is required to do an in-depth analysis of all cases where neglect or custody issues are present and rely upon particularized evidence.[13] Chief Judge Kaye balanced the concern that punishing victims by separating them, further victimizing both mother and child, with the reality that continual exposure of a child to domestic violence might indeed cause emotional injury.

In *Dox v. Tynon,*[14] the Court of Appeals held that a wife did not implicitly waive her right to outstanding child support payments under a divorce decree by delaying enforcement for 11 years and by assuming responsibility for the children's support during the delay. Common sense dictates that a contrary result would reward the non-paying spouse who was presumptively well aware of his duty to pay support for his children. However, the lower court held that the wife had waived her right to collect arrears. Fortunately, Chief Judge Kaye used her keen mind and legal acumen to find a pragmatic solution to the problem.

Chief Judge Kaye authored another cutting-edge matrimonial decision, in *Kass v. Kass*, where a wife sought sole custody of five cryopreserved pre-zygotes produced during the parties' participation in an *in vitro* fertilization (IVF) program.[15] Addressing a matter of first impression, the Court of Appeals held:

> (1) agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them;[16] and
>
> (2) the informed consents signed by the parties unequivocally manifest their mutual intention that in the present circumstances the pre-zygotes be donated for research to the IVF program.[17]

Thus, the Chief Judge has also shaped matrimonial practice through her decisional legacy of thoughtful, well-balanced landmark opinions that continue to affect families during and after divorce.

V. Collaborative Family Law Center

In her 2007 "State of the Judiciary Address," Chief Judge Kaye announced an initiative so revolutionary that the nation, and perhaps the entire world, took notice.[18]

Thanks to the vision and perseverance of Chief Judge Kaye, New York State will soon have the Collaborative Family Law Center ("the Center"), a court-based initiative to provide collaborative law services in selected divorce cases in order to reduce time, cost and trauma to families who desire amicable settlements. In collaborative law, parties and their attorneys agree to use best efforts to resolve all issues relating to dissolution of marriage with minimum conflict and without litigation. The end result is a settlement agreement, which can be used to obtain a divorce.

This process may include experts with specialized training to act as a neutral third party to identify issues, clarify perceptions and explore options for a mutually acceptable outcome. During collaborative law there is a suspension of court intervention in the dispute while the parties are engaged in settlement discussions. The parameters of cases handled by the Center will encompass specific training and qualifications for attorneys seeking to participate, a roster of qualified attorneys, an agreement to comply with the rules of the Center, a time frame for the process, and an understanding that should the parties fail to reach an agreement for any reason the case will be returned to the Court, and the representation of the collaborative attorneys, which is limited in scope to non-litigation matters, must cease. If an agreement is reached through the collaborative-law process, as with any matrimonial action, the settlement may be incorporated into the divorce judgment.

A director for this new Center was recently hired and the construction of the site is under way. It is anticipated that the Center will open in the fall of this year, during Chief Judge Kaye's tenure, providing a truly fitting and tangible tribute to her unwavering commitment to shield children from the adversarial process of divorce.

Conclusion

Chief Judge Kaye leaves behind a legacy of tireless matrimonial reform that has made divorce litigation less contentious and has emphasized practical problem solving. She has received well-deserved recognition nationally and has had myriad honors bestowed upon her for her visionary approach to long existing problems in this area of law.

It has been among Chief Judge Kaye's highest priorities to remove children from the center of custody and parental-access litigation, to protect them to the fullest extent possible from the pernicious effect of such litigation and to reduce the level of hostility and aggression in custody disputes. Indeed, when you know Judith Kaye you know her true sense of priorities: programs are important and so are budgets; decisions on cases are meaningful and so is writing on the law, but of much more moment is her family and the families of others, including the woman who is a victim of abuse and the child who at 18 years of age is forced into a world without a support network. Judge Kaye is that rare and beautiful person who sees the value of all human beings, especially the most vulnerable, especially the children, and who understands the worth of each individual in this complex world. Judge Kaye's genuine commitment is evidenced by her 17 years as Chair of the Permanent Judicial Commission on Justice for Children and the positive changes effected under her leadership. Indeed, the core of her professional life has been to support initiatives that advance justice for children.

It has been my honor and privilege to have served with this fine jurist and respectful, warm, caring human being. The innovations outlined in this article have all been possible because the best Chief Judge our State has ever seen not only shared those goals, but actively participated to make them happen. I know I speak for those of us who handle these difficult cases when I say that we are truly fortunate to have had Chief Judge Kaye as our indefatigable leader for the past 15 years. The strides made during her tenure will long be recognized as nothing short of revolutionary.

Endnotes

1. Discussions contained in this article may have appeared previously in articles or speeches authored by Justice Silbermann.
2. N.Y. Comp. Codes R. & Regs. Tit. 22, § 202.16 (2008).
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4. Judith S. Kaye, *The State of the Judiciary 2006* at 7 of 24 (Jan. 13, 2006) (transcript *available at* http://www.courts.state.ny.us/admin/stateofjudiciary/soj2006.pdf).
5. The *Parenting Plan* and other forms mentioned in this article are *available at* http://www.courts.state.ny.gov/ip.matrimonial-matters/.
6. Part 146 of the Rules of the Chief Administrative Judge; Joel Stashenko, *Courts Establish First Guidelines for Mediators, Neutral Evaluators,* N.Y.L.J. p.1, col. 4 (July 24, 2008).
7. Admin. Order 0604/2008 (July 1, 2008).
8. N.Y. Judiciary Law § 35(8) (McKinney 2006).
9. N.Y. Comp. Codes R. & Regs. Tit. 22, § 144 (2006).
10. Video: Divorce in New York: What You Need to Know (Family Law Section of NYSBA 2005).
11. *Cassano v. Cassano*, 651 N.E.2d 878 (N.Y. 1995); *Holterman v. Holterman*, 892 N.E.2d 846 (N.Y. 2004); and *Mesholam v. Mesholam*, 892 N.E.2d 846 (N.Y. 2008).
12. *Nicholson v. Scoppetta*, 820 N.E.2d 840 (N.Y. 2004).
13. *Id*. at 844–47.
14. *Dox v. Tryon*, 681 N.E.2d 398 (N.Y. 1997).
15. *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998).
16. *Id.* at 180.
17. *Id.*
18. Judith S. Kaye, *The State of the Judiciary 2007* (Feb. 26, 2007) (transcript *available at* http:www.courts.state.ny.us/admin/stateofjudiciary/soj2007.pdf).

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Problem-Solving Justice in New York: Reflections on 15 Years of Judicial Reform

By Greg Berman[1]

New York's first problem-solving court—the Midtown Community Court—opened its doors in 1993. It is fair to say that the project, with its goal of re-engineering how courts respond to misdemeanor crime, was widely viewed as a radical experiment. There were many who expected it to fail—indeed, there were many who actively hoped it would go belly up.

Thankfully, Midtown has defied these dire expectations. Located just a few blocks from Times Square in the heart of Manhattan, the Midtown Court combines punishment and help, sentencing low-level offenders to visible community restitution projects (sweeping the streets, painting over graffiti, cleaning local parks) and linking them to on-site social services, including drug treatment, job training and counseling.

According to independent evaluators from the National Center for State Courts, Midtown has helped to reduce local street crime, improve compliance with court orders and enhance judicial access to information.[2] These results haven't been lost on local residents—a phone survey with Midtown residents revealed that two out of three were willing to pay additional taxes to support a community court. Nor have they been lost on local political leaders—according to New York City Mayor Michael Bloomberg, "Times Square [used to be] seen as the quality-of-life crime capital of the City. Today, it is the heart of New York with thriving commerce, clean streets and packed theaters. The Midtown Community Court brought justice to a problem area, and the results couldn't be clearer."[3]

Now well into its second decade, the Midtown Community Court continues to thrive. Each year, the Court is visited by hundreds of curious criminal justice officials, many of whom go on to adapt elements of the Midtown model when they return home. Indeed, at Midtown's 10th anniversary celebration the guest of honor was the lord chancellor of Britain, who came to announce that he was going to import the community court concept to England and Wales. ("We're taking a little more back to Britain from New York than some Christmas souvenirs," he declared.)[4]

I was fortunate to be part of the team that helped to plan and implement the Midtown Community Court.[5] Since then, from my perch as the director of the Center for Court Innovation, I have watched as the ideas that Midtown embodies—engaging new partners in the work of the courts, reaching out to the public in new ways, testing new approaches to crime problems—have spread across New York State and around the world.[6]

"Judge Kaye was one of the first public officials to adopt the expression 'problem-solving courts,' employing the term in an op-ed written for Newsweek *in 1999."*

The leadership of New York State Chief Judge Judith S. Kaye has been crucial to this process. In her first State of the Judiciary report in 1994, Judge Kaye articulated three themes for the New York Courts: 1) "the fair and efficient adjudication of cases," 2) "[reaching] out [to the public] in an attempt to address the fundamental areas of concern that touch the public most directly," and 3) "[working] to build and strengthen ties with the Executive and Legislative Branches." Judge Kaye went on to highlight the opening of the Midtown Community Court:

> Hopefully, the Community Court experiment will yield many benefits for the larger court system . . . [One] byproduct of the Community Court experiment is our commitment to further exploration of alternatives to incarceration for certain offenders. If the courts cannot prevent crime in the first instance, they can perhaps discourage its repetition through treatment, rehabilitation, employment, and education program referrals.[7]

Given these interests—in improving the operations of the courts, reaching out to the public, forging new links with government partners and testing alternatives to incarceration—it is little wonder that Judge Kaye became an early and vocal proponent of problem-solving justice. Indeed, Judge Kaye was one of the first public officials to adopt the expression "problem-solving courts," employing the term in an op-ed written for *Newsweek* in 1999.[8]

Today, New York has hundreds of problem-solving courts, with at least one in every county. In addition to community courts, New York's problem-solving courts

include drug courts, mental health courts, domestic violence courts and other specialized initiatives designed to improve court outcomes for victims, defendants and communities.

New York may be at the cutting edge of this judicial reform movement, but it is hardly alone. The concept of problem-solving justice has been endorsed by the Conference of Chief Justices, the Conference of State Court Administrators and the American Bar Association.[9] The U.S. Justice Department, under both President Clinton and President Bush, has also effectively endorsed the concept, providing seed grants and technical assistance to encourage states and localities to open problem-solving initiatives. Today there are literally thousands of problem-solving courts spread across the United States—with dozens more overseas.

"The concept of problem-solving justice has been endorsed by the Conference of Chief Justices, the Conference of State Court Administrators and the American Bar Association."

This essay seeks to take stock of these remarkable developments, all of which can be traced back, directly or indirectly, to Judith Kaye's commitment to rethinking business as usual in the courts. Along the way, I hope to answer two basic questions: Why have so many courts followed New York's lead and chosen to make a significant institutional investment in this new way of doing business? And what does the future hold for problem-solving justice?

The Traditional Approach Yields Unsatisfying Results

In less than a generation, the idea of problem-solving justice has come a long way—from a handful of experiments to broad replication and endorsement by some of the most important justice agencies in the country. What has driven this progress? The answer can be found by taking a look at the realities of how the criminal justice system works in this country rather than the idealized version that gets taught in civics classes.

For many people, the basic outlines of the American criminal court system can be found in the rights enshrined in the Sixth Amendment to the U.S. Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Translating these lofty goals into practice is no simple task. Compare the idealized vision of criminal case processing inscribed in the Constitution with Malcolm Feeley's description of "low-stakes, high-volume" American criminal courts from his seminal work: *The Process Is the Punishment*:

> In the lower courts trials are rare events, and even protracted plea bargaining is an exception. . . . These courts are chaotic and confusing; officials communicate in a verbal short-hand wholly unintelligible to accused and accuser alike . . . by conventional standards nearly all of the defendants are failures, both in life and in crime. They are poor, often unemployed, usually young and from broken homes. . . . A great many of them have come to rely on alcohol and drugs. . . . The solemnity that the words "crime" and "criminal court" imply aside, lower court officials—judges, prosecutors and public defenders alike—feel frustrated and belittled. Trained to practice law, they are confronted with the kinds of problems that social workers face.[10]

The movement towards problem-solving justice begins here, in the spirit of legal realism, with a long, hard look at the realities of life in American criminal courts. Judith Kaye takes up this baton when she writes:

> Let's face facts: many of the cases in state courts today are not complicated legal matters. But they do involve people with complicated lives. . . . In many of today's cases, the traditional approach yields unsatisfying results. The addict arrested for drug dealing is adjudicated, does time, then goes right back to dealing on the street. The battered wife obtains a protective order, goes home and is beaten again. Every legal right of the litigants is protected, all procedures followed, yet we aren't making a dent in the underlying problem. Not good for the parties involved. Not good for the community. Not good for the courts.[11]

What Judge Kaye is describing is something that many reformers have experienced—the moment when they realize that standard operating procedure in American criminal courts might be efficient, might dot all the "I"s and cross all the "T"s, but that it fails to see the big picture, to truly make a difference in the lives of the people it is supposed to serve.

This, in a nutshell, is why so many judges have begun to think of themselves as problem solvers and not just case processors. Judge Kaye describes the concept this way:

> Problem-solving courts are courts. They strive to ensure due process, to engage in neutral fact-finding, and to dispense fair and impartial justice. What is different is that these courts have developed a new architecture—including new technology, new staffing, and new linkages—to improve the effectiveness of court sanctions, particularly intermediate sanctions like drug treatment and community restitution.[12]

The tremendous growth of problem-solving courts has been driven by a relatively simple premise: that problem-solving courts have the potential to focus the energies of courts more effectively on both process (ensuring that the system is fair) and outcomes (helping protect victims, change the behavior of offenders and enhance public safety).

The Research

The research suggests that problem-solving courts have gone a long way towards realizing this potential. A growing body of evidence documents that drug courts reduce both substance abuse and recidivism. For example, researchers at the Center for Court Innovation examined six drug courts across New York State, including courts located in urban areas, rural jurisdictions and the suburbs. When comparing drug court participants to defendants who received conventional prosecution, they found statistically significant reductions in re-offending at all sites.[13] These results have been confirmed by numerous studies across the country, including several randomized trials, the so-called gold standard of social science research.

It is worth pausing a moment to highlight the stories behind these statistics. Drug court graduates are not just numbers on a page. They are formerly homeless individuals who now have stable housing. They are career criminals who have become solid employees and regular taxpayers. They are mothers who have re-connected with children lost to the foster care system.[14] These transformations have far-reaching implications not just for the individual families involved, but for the health and well-being of our society. Several studies have documented significant cost savings from drug courts, particularly in avoided jail and prison costs. But the human savings are literally beyond calculation. They include reductions in victimization, welfare cases, emergency room admissions—not to mention the damage done to children raised in broken homes.

While there are fewer studies investigating community courts, mental health courts, domestic violence courts and other models of problem-solving justice, here too there is encouraging news to report. The available research suggests that community courts are capable of reducing neighborhood crime and improving public confidence in courts, that mental health courts can reduce hospitalizations and re-arrests among mentally ill defendants, and that domestic violence courts can improve not only victim satisfaction with the criminal justice process but access to services as well.

In analyzing these results, it is important to understand the political and intellectual context from which problem-solving courts have emerged. For at least a generation, if not longer, the politics of criminal justice have been dominated by concerns about "law and order." Plagued by crime and disorder, many American cities, including New York, were viewed as "ungovernable."[15] Starting in the 1960s and continuing up until fairly recently, local and national policymakers advanced a series of proposals that essentially sought to promote more punitive responses to crime (e.g., mandatory minimums, "three strikes and you're out" laws, the movement to abolish parole).

"Several studies have documented significant cost savings from drug courts, particularly in avoided jail and prison costs. But the human savings are literally beyond calculation."

At the same time, the intellectual climate had grown exceedingly skeptical, if not downright hostile, to the idea of rehabilitation. The signature moment here was the publication of sociologist Robert Martinson's influential 1974 article in *The Public Interest*, "What Works? Questions and Answers About Prison Reform." The essay is credited with popularizing the idea that "nothing works"—that all efforts to change the behavior of offenders, however well-intentioned, are essentially doomed to failure.

Problem-solving courts are, in many respects, a reaction against these two inter-related trends—on the one hand a political drive toward increasingly punitive solutions to crime and on the other a despairing social policy environment that offered little succor for those interested in advancing the rehabilitative ideal. By documenting that it is in fact possible to reduce crime and change the behavior of offenders, problem-solving courts have helped create space, both political and operational, for a balanced approach to justice that emphasizes both punishment and rehabilitation.[16] This represents a significant shift in the policy landscape that will reverberate for years to come.

Before leaving the subject of research and problem-solving courts, it is worth spending a moment on the question of fairness. Do problem-solving courts undermine the principle of fairness that is at the very heart of

the American legal system? In an effort to introduce some empirical evidence into this debate, researchers from the Center for Court Innovation surveyed hundreds of defendants at the Red Hook Community Justice Center, a community court in Brooklyn.[17] Eighty-six percent reported that their case was handled fairly. These results, which were consistent regardless of the race, gender or socio-economic status of the defendant, suggest that the problem-solving approach has the potential to improve the procedural fairness of criminal courts.

"[T]here is a need for a national push to expand the capacity of problem-solving courts and to spread the principles of problem-solving justice beyond specialized courtrooms."

The Future

So where does problem-solving justice go from here? It is clear by now that problem-solving justice cannot be dismissed as a fad that is going to go the way of the hula hoop or New Coke. Problem-solving courts have proven that they can outlive the initial cadre of judicial leaders who helped give them birth. They have proven that they can make the transition from one presidential administration to the next.[18] They have also thrived under multiple New York governors, both Republican and Democrat.

It remains an open question, however, whether problem-solving courts will fulfill their potential to transform the way that justice is administered not just in New York State but in the United States as a whole. A significant obstacle stands in the way. That obstacle is volume. The truth of the matter is that many potentially appropriate cases aren't making their way to problem-solving courts. This reality was highlighted by a recent report from the Urban Institute, which estimated that American taxpayers would save more than $46 billion if all of the estimated 1.5 million addicted defendants in the criminal justice system were linked to treatment instead of incarceration. As provocative as this conclusion may be, it is worth reading the small print of the report, which goes on to state that only three percent of arrested addicts currently find their way into drug court.[19]

Put simply, the next challenge for problem-solving courts is scale. How do we ensure that every litigant, every victim, and every community that might benefit from the problem-solving approach has access to it? In addition to addicted arrestees who do not receive drug treatment, there are still thousands of mentally ill offenders who would benefit from community-based counseling and strict judicial monitoring but do not have access to a mental health court. And there are still many families in crisis that find themselves shuttled from court to court and decision maker to decision maker without the benefit of an integrated domestic violence court, to cite another example.

In order to address this challenge, there is a need for a national push to expand the capacity of problem-solving courts and to spread the principles of problem-solving justice beyond specialized courtrooms. Here again, thanks to Judith Kaye, New York is at the cutting edge nationally. The New York State court system has made a commitment to helping drug courts reach new populations, conducting training sessions on expanding eligibility criteria and working with hard-to-serve clients. New York has also been a pioneer in attempting to uncouple problem-solving justice from court specialization, launching Bronx Community Solutions, an effort to spread the community court model to every judge and every criminal courtroom in the Bronx rather than simply working with a single judge and one neighborhood.

How this new emphasis on expanding the reach of problem-solving justice will play out is anybody's guess. But there are reasons to be optimistic about the chances of success. The conversation about justice in this country is markedly different today than it was when the Midtown Community Court started in the early 1990s. Crime reductions have taken a lot of the heat out of criminal justice policy debates at the national level. New York and other major urban areas are no longer viewed as ungovernable. The idea that "nothing works" has been thoroughly debunked.

Amidst all of these developments, two seemingly contradictory policy lessons seem to be emerging within the field of criminal justice. The first is the value of taking all criminal behavior seriously. The "broken windows" theory, first advanced by James Q. Wilson and George Kelling, posits that minor crime and disorder, if left unchecked, can encourage more serious offenses. This idea holds tremendous sway at the local level; hundreds of mayors and police chiefs have adopted "broken windows" as an effective crime-fighting strategy. At the same time, there is a growing movement of scholars, foundation executives, reporters and policymakers that looks at the exponential growth in the American prison population over the past few decades and argues that we need to re-think our reliance on incarceration.

Problem-solving justice is a ready-made solution capable of reconciling these two conflicting impulses. Problem-solving courts are, at the end of the day, a vehicle for offering a meaningful and proportionate response to criminal behavior that does not rely on incarceration as a default setting. While predicting the future is a fool's game, it is not difficult to imagine a growing demand, among the public and policymakers of all political stripes, for problem-solving justice in the years ahead.

If this comes to pass, there are signs that the judiciary will be ready. According to a recent survey of more than 1,000 trial court judges across the country, 76 percent of respondents approved of problem-solving methods of judging (only 10 percent disapproved).[20] This is a far cry from the early days of the Midtown Community Court, when it was difficult to find a judge to sit in the court because it was viewed as such a risky proposition.

It all adds up to a sea change, not just in how judges think of themselves, but in how courts work and how they are perceived by the public. It is fair to say that none of this would have been possible without the leadership and vision of Judith Kaye. This is a legacy that is not only worth celebrating today, but worth building upon in the days ahead.

Endnotes

1. This essay is adapted from GREG BERMAN, *Problem-Solving Justice and the Moment of Truth*, PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY? (Paul Higgins and Mitch Mackinem, eds., forthcoming).
2. Michele Sviridoff, et al., Dispensing Justice Locally, (Harwood Academic Publishers 2000).
3. Press Release, Office of the Mayor, Mayor Michael R. Bloomberg and New York Chief Judge Judith S. Kaye Celebrate the 10th Anniversary of the Midtown Community Court (Dec. 15, 2003), http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2003b%2Fpr360-03.html&cc=unused1978&rc=1194&ndi=1.
4. Susan Saulny, *A Dignitary Examines Community Court*, N.Y. TIMES, December 16, 2003.
5. The first presiding judge at the Midtown Community Court was Judy Harris Kluger. In her subsequent career as an administrative judge, she has gone on to play a key role in the spread of problem-solving justice across New York City and New York. The founding director of the Midtown Community Court was John Feinblatt. He too has gone on to play a key policymaking role as criminal justice coordinator of the City of New York.
6. Greg Berman & John Feinblatt, *Good Courts: The Case for Problem-Solving Justice* (The New Press 2005).
7. JUDITH S. KAYE, THE STATE OF THE JUDICIARY 1993, at 11-12. On file with the author.
8. Judith S. Kaye, *Making the Case for Hands-On Courts*, NEWSWEEK, Oct. 11, 1999.
9. It is worth noting here that Judith S. Kaye served as president of the Conference of Chief Justices in 2002 and 2003. Similarly, Jonathan Lippman, then chief administrative judge of the State of New York, served as president of the Conference of State Court Administrators in 2005-2006. It is also worth highlighting that several of the initial drug court judges in New York, including John Schwartz and Robert Russell, have served as chairs of the National Association of Drug Court Professionals. In these and myriad other ways, the judicial leadership of New York has helped influence the behavior of state courts across the country.
10. Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* 3-4 (Russell Sage Foundation 1992).
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12. Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 Yale L. & Pol'y Rev. 130 (2004).
13. Paul von Zielbauer, *Court Treatment System Is Found to Help Drug Offenders Stay Clean*, N.Y. TIMES, Nov. 9, 2003.
14. ROBERT V. WOLF AND GREG BERMAN, EDS., PERSONAL STORIES: NARRATIVES FROM ACROSS NEW YORK STATE (Center for Court Innovation 2007).
15. VINCENT CANNATO, THE UNGOVERNABLE CITY: JOHN LINDSAY'S NEW YORK AND THE CRISIS OF LIBERALISM (Basic Books 2001).
16. It is worth noting here that not all problem-solving courts see themselves as being in the business of rehabilitation. Certain problem-solving courts, including domestic violence courts, integrated domestic violence courts and sex offender management courts, are focused less on rehabilitation and more on strengthening the accountability of participants.
17. M. Somjen Frazer, *Examining Defendant Perceptions of Fairness in the Courtroom*, JUDICATURE, July-Aug. 2007, at 36–37.
18. The transition from Clinton to Bush was a particularly important one, given the visible leadership that Attorney General Janet Reno provided to the field.
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Problem-Solving Courts: Changing the Landscape of New York's Criminal Justice System

By Hon. Judy Harris Kluger

When Ms. T was arrested for the twentieth time, she might well have ended up with yet another short jail sentence and gone right back to a life of unemployment, prostitution and drug addiction. Instead, she was given the chance to make a change; at the Red Hook Community Justice Center, she was offered a year of residential drug treatment monitored by the court in lieu of jail. Upon successfully completing treatment, her case was dismissed. Now, she is drug free, working and in college.

Leslie, who was plagued by drug addiction and diagnosed with bipolar disorder, was facing a prison sentence as a predicate felony offender on a drug possession charge when she entered Mental Health Court in Monroe County. Under the jurisdiction of the Mental Health Court, Leslie was treated for her addiction and illness. Through a system of sanctions and rewards and close monitoring of treatment, she was able to work on her problems. At her graduation from Mental Health Court, Leslie had been sober for two years and was taking her medication regularly.

Susan endured more than a decade of abuse at the hands of her husband, including an incident where he made their young son videotape his verbal and physical violence. After a particularly brutal attack, Susan made the decision to take her children and leave. The resulting court cases involving the family—which included custody and divorce proceedings as well as a criminal case against her husband—were transferred to the Integrated Domestic Violence Court in Erie County. Had the cases not been transferred, they would have proceeded in separate courts with different judges. Instead, all of these cases were before one judge, well-versed in the dynamics of domestic violence, who had a complete picture of the complex issues facing the family.

These stories illustrate the impact of problem-solving courts in New York State, which look to the underlying issues that bring people into the court system, employ innovative approaches to address those issues, and seek to simplify the court process for litigants. Through intensive judicial monitoring, coordination with outside services, treatment where appropriate, the removal of barriers between courts and increased communication with stakeholders, these courts are able to change the way our system manages cases and responds to individuals, families and communities.

Under the leadership of Chief Judge Judith S. Kaye, problem-solving courts in New York State have become part of the fabric of our justice system. Although the first problem-solving court only dates back to 1993, through Judge Kaye's vision for our courts' potential, combined with her energy and practical approach to getting the job done, we have in just 15 years opened close to 300 of these courts.

Problem-solving courts take different forms depending on the problems they are designed to address. Drug and mental health courts focus on treatment and rehabilitation. Community Courts combine treatment, community responsibility, accountability, and support to both litigants and victims. Sex offense, domestic violence, and integrated domestic violence courts employ judicial monitoring and the use of mandated programs and probation to ensure compliance, facilitate access to services and remove artificial barriers between case types.

Problem-solving courts have not only expanded in geographical reach, they have solidified relationships with community stakeholders. Tens of thousands of litigants have come through their doors. They have improved procedural efficiency, secured the efficacy of judicial mandates and contributed to a decrease in recidivism.

The first problem-solving court in New York State and the nation's first community court, the Midtown Community Court, was established in 1993. The court was part of a revitalization of Manhattan's Times Square area; its focus on quality-of-life crimes, such as prostitution, vandalism and drug possession, helped to restore the neighborhood as a vibrant theater district, tourist destination, commercial center and community meeting place. It successfully applied the principles of problem-solving justice that Judge Kaye believed could give criminal defendants the structure and support that they needed to get their lives back on track.

The goal of the Midtown Community Court, and the community courts that have followed, is to combine conventional punishments with alternative sanctions and on-site treatment and training in an effort to end the cycle of crime. Community courts seek to craft remedies appropriate to the offense that emphasize community responsibility and restitution, such as community service. This practice involves offenders in the process of repairing the damage they have done to the community and increases their personal stake in their neighborhoods. Since the early 1990s, New York State has opened a total of eight community courts.

Like community courts, drug courts provide support and treatment to offenders. Drug courts are designed to halt the revolving door of addiction and arrest by linking non-violent, drug addicted offenders to court-supervised drug treatment and rigorous judicial monitoring. Drug courts take a collaborative approach to treatment: upon voluntary entry into court-supervised programs, appropriate non-violent addicted offenders become part of a dramatic intervention process. This process involves collaboration between the drug court judge, defense attorneys, prosecutors, treatment and education providers and law enforcement officials. Rules of participation are clearly defined in a contract agreed upon by the defendant, the defendant's attorney, the district attorney and the court. Upon successful completion of the program and compliance with all court orders, drug court participants earn dismissal or reduction of their charges. Drug court graduates attend a ceremony where audiences made up of family members, lawyers, court employees, prosecutors and other drug court participants sit side by side in a courtroom and congratulate those who have successfully completed treatment.

Research shows that drug court participants complete treatment at more than twice the rate of those who voluntarily enter treatment without court supervision.[1] Research further indicates that drug courts reduce recidivism and are cost effective.[2] By addressing the offender's underlying addiction, drug courts significantly lessen the need for criminal courts to use precious resources prosecuting, defending and incarcerating the same offenders. This not only results in more efficient case management within our criminal courts but also dramatically improves the lives of drug court participants and their families.

What began as a single drug treatment court in 1995 has now grown into nearly 200 operational drug courts statewide with more than 48,000 participants since the program's inception. More than 600 drug-free babies have been born to female drug court participants;[3] that is more than 600 new leases on life, not including the hundreds of children reunited with their parents who have achieved sobriety through participation in drug court and who can now provide their children with a safe and nurturing home.

Encouraged by the success of the drug courts, in 2005 Judge Kaye announced a plan to expand problem-solving techniques to other types of cases in our courts where criminal defendants were struggling with mental illness. Modeled on drug treatment courts, mental health courts seek to address the criminal behavior of mentally ill defendants by combining treatment, sanctions and alternative sentences. Mental health courts link defendants with ongoing long-term treatment, combined with intense court supervision. These courts seek to accomplish one or more of the following goals: to reduce the length of incarceration for offenders with mental illness; to improve the court's ability to identify, assess and monitor offenders with mental illness; to improve coordination between the mental health and criminal justice systems, and to link defendants to long-term care. There are currently 20 operational mental health courts in New York State and more than 2,500 cases have been handled by these courts.

In contrast to drug courts and mental health courts, domestic violence courts operate on an accountability model. These courts utilize conventional punishments and intensive judicial monitoring of offenders to enhance community safety and increase offender accountability for compliance with court mandates.

As with all of New York's problem-solving courts, collaboration with community stakeholders, such as departments of probation and parole, batterer intervention programs and other service providers, is key to the domestic violence courts' success. Developing close working relationships with stakeholders facilitates the timely transmission and receipt of reports regarding offender compliance with court-mandated programs, and ensures that in the event of non-compliance, the court's response can be swift and consistent.

In three counties, youthful offender domestic violence courts have been established, in addition to domestic violence courts, to specifically address the needs of offenders aged 16 through 19 accused of committing an act of domestic violence. One of the goals of the youthful offender domestic violence court is to address violent tendencies in teens early, before this behavior becomes an entrenched part of their relationships.

There are 31 domestic violence courts operating across New York State. Since the first domestic violence court was established in 1996, these courts have heard more than 117,000 cases.

In 2003, at a time when the New York State Domestic Violence Registry received its one-millionth filing on an order of protection, Judge Kaye recognized the need to make our courts more accessible for families and children and took the significant step of expanding a statewide program to hear domestic violence cases and all related proceedings. Building on the domestic violence court concept, integrated domestic violence courts use a "one family-one judge" model to bring before a single judge the multiple criminal, family and matrimonial cases for families where domestic violence is an underlying issue. Prior to the creation of integrated domestic violence courts in New York State, these case types were heard in separate courts before different judges, often in different parts of a county. As a result, families affected by domestic violence were left to navigate a complicated court structure that often resulted in inconsistent outcomes. Having their cases handled in this way cost them time and money, led to confusion and jeopardized their safety.

By placing all of these cases together before one judge, the integrated domestic violence court ensures consis-

tency in decision making and provides services to victims and their families in a comprehensive manner. Integrated domestic violence courts are staffed with judges trained in multiple areas of law and the dynamics of domestic violence. They incorporate ongoing judicial monitoring of offenders. Through coordination with victim advocates and a network of services and outside agencies, integrated domestic violence courts ensure that victims and families receive better information and support and increase their confidence in the system.

"As the result of Judge Kaye's willingness to rethink the way the court system works, problem-solving courts have given tens of thousands of people coming into our criminal justice system the opportunity to make positive changes in their lives."

Beginning with only a handful of pilot courts in 2001, there are now 40 integrated domestic violence courts statewide. These courts reach counties with 90% percent of New York State's population and have adjudicated more than 71,500 cases involving almost 14,000 families—that is an average of approximately five cases per family.

Like domestic violence courts, sex offense courts are accountability courts. They seek to enhance supervision of offenders by utilizing intensive post-disposition monitoring. Their goal is to hold offenders accountable, increase public safety and facilitate coordination and communication among relevant stakeholders. Sex offense courts collaborate with prosecutors, defense attorneys, probation departments and victim advocates to ensure a uniform approach to the management of convicted sex offenders. An important focus is the drafting of specialized probation conditions. Research conducted by the Center for Sex Offender Management has shown that the use of these conditions is an effective tool in sex offender management.[4]

There are currently eight operational sex offense courts in New York State and to date these courts have heard more than 1,700 cases.

Judge Kaye's newest problem-solving court initiative in New York State is the pilot integrated youth court in Westchester County. The integrated youth court hears cases involving adolescents who are both the defendant in a criminal case and the respondent in a Juvenile Delinquency or Person-In-Need-Of-Supervision case. This situation occurs, for example, when someone who committed an offense at age 15 and is charged in family court, then commits another offense at age 16 and is charged as an adult in criminal court. The judge in the integrated youth court has available the full array of family court and criminal court remedies and is able to take complementary approaches in resolving a young person's multiple cases.

Problem-solving courts in New York State have gone from the experimental and pilot stage to mainstream acceptance. As we continue to weave Judge Kaye's vision of problem-solving justice into our court system by identifying and addressing the underlying issues that are at the core of so many of the problems faced by litigants and their families, problem-solving courts have changed the way our criminal courts address drug use, mental illness, domestic violence and other problems that lead people into the justice system. These courts have successfully demonstrated that judges and lawyers can engage in problem solving, while at the same time preserving their ability to guard individual rights and make independent decisions. As the result of Judge Kaye's willingness to rethink the way the court system works, problem-solving courts have given tens of thousands of people coming into our criminal justice system the opportunity to make positive changes in their lives.

Endnotes

1. *See* Michael Rempel & Amanda B. Cissner, Center for Court Innovation, *The State of Drug Court Research: Moving Beyond 'Do They Work'*, 4–5 (2005), *available at* http://www.courtinnovation.org/_uploads/documents/state%20of%20dc%20research.pdf.
2. *See* U.S. Government Accountability Office, Report to Congressional Committees, Pub. No. GAO 05 219, *Adult Drug Courts: Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes* 5-7 (2005), *available at* http://www.gao.gov/new.items/d05219.pdf. *See generally* Michael Rempel et al., Center for Court Innovation, *The New York State Adult Drug Court Evaluation-Policies, Participants and Impacts* (2003), *available at* http://www.courtinnovation.org/_uploads/documents/drug_court_eval.pdf; Steve Aos et al., Washington State Institute for Public Policy, *The Comparative Costs and Benefits Programs to Reduce Crime* (2001), *available at* http://www.wsipp.wa.gov/rptfiles/costbenefit.pdf; John Roman & Christine DeStefano, *Drug Courts and the Quality of Existing Evidence, in* JUVENILE DRUG COURTS AND TEEN SUBSTANCE ABUSE (Jeffrey Butts & John Roman, eds., 2004); David B. Wilson et al., *A Systematic Review of Drug Court Effects on Recidivism*, 2 J. EXPERIMENTAL CRIMINOLOGY 459 (2006).
3. These include participants in criminal, family and juvenile drug treatment courts.
4. The Center for Sex Offender Management (CSOM) is a national project that seeks to support jurisdictions in the effective management of sex offenders through the latest research and recommended emerging practices. CSOM was established in 1997 and is sponsored by the Office of Justice Programs, U.S. Department of Justice, in collaboration with the National Institute of Corrections, State Justice Institute, and the American Probation and Parole Association. CSOM is administered through a cooperative agreement between the Office of Justice Programs and the Center for Effective Public Policy. *See* Center for Sex Offender Management Web site, http://www.csom.org/ (last visited Sept. 13, 2008).

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The Jury Project

By Hon. Colleen McMahon

Jury reform began in the summer of 1993 with the sound of a familiar voice on my office phone.

"Oh, Colleen . . . do you remember when you said you would do whatever you could to help me out?" asked the newly installed Chief Judge of the State of New York.

I had indeed made that ritual offer to my friend and role model, Judith Kaye, when Governor Cuomo had the good sense to make her the Chief. But we were just months into her first year in office. I never imagined I would have to make good on it so soon.

"I want to do something about jury duty. Everyone tells me it is so awful, and my next door neighbor wants to know why she has to serve every two years when no one else she knows ever gets a summons. I am going to form a task force to recommend reforms, and I want to you chair it . . . and get me a comprehensive report in nine months!"

The timing could not have been worse. I had just agreed to take over a major trial for an overburdened colleague. But when I consulted my partner Arthur Liman—the veteran of many such endeavors—he told me this was an offer I couldn't refuse.

That phone call was the first of many times during the next 15 years that Judith Kaye would make offers about jury reform that someone couldn't refuse: first to the members of The Jury Project, then to the organized Bar, the legislature and the governor, and the staffs of the various courts in New York's 62 counties, and then to the nation.

But as she pointed out in one of our earliest conversations, citizens don't have the option of saying no when they receive a summons—so why should the rest of us have the right to make the exercise of their civic responsibility more painful than inspirational?

For a decade and a half—her entire term as Chief Judge—Judith Kaye has been the impetus behind making the jury experience a palatable, even memorable, one for the hundreds of thousands of people (!) who are called to serve every year. She established four separate commissions to examine various aspects of jury service and found ways to put their recommendations—not all of which were politically palatable—into practice. She has been repeatedly and justifiably honored for making New York's jury system the model for the nation—and for exporting enthusiasm about jury reform to other states.

But without knowing a little history, Chief Judge Kaye's achievements in the realm of jury reform might seem less than Herculean.

Many of the recommendations of The Jury Project (the first of those commissions) were designed to bring practices in New York into line with the recommendations of The American Bar Association—and into line with what was going on elsewhere. Other states, notably Arizona, were far ahead of us in thinking about how jury service could be improved. New York was considered a backwater when it came to jury reform.

In fact, the Chief could not have selected a less promising area in which to try her hand at law reform.

The Jury Project was not the first try at addressing problems with jury service. Far from it. An article entitled "Proposed Legislation for Jury Reform in New York" appeared in the *Columbia Law Review* in 1930! There had been several previous blue ribbon commissions, with a report issued as recently as 1984. All made for interesting reading, but nothing had come of prior efforts.

As a result, while New York State had the most comprehensive pool of potential jurors of any jurisdiction, state or federal (estimated at 85% of the actual jury pool), only a small fraction of those potential jurors being pressed into service. For administrative convenience, jurors were not summoned from the master source list that included every registered voter, licensed driver and New York State taxpayer. Instead, the jury commissioners used lists consisting of persons who had previously been found qualified to serve—"permanent qualified lists"—which meant that the courts were unfairly tapping the same jurors over and over again, until those poor unfortunate souls moved, became otherwise disqualified, or died. No effort was being made to see if the factor that led someone to be disqualified when he or she was first summoned had dissipated, so those who were "fortunate" enough to be exempted once were effectively exempted forever—they were on what I liked to call the "permanent disqualified list." The use of the permanent qualified lists also meant that minorities, who had historically been underrepresented in *venire* panels, were not being called in numbers approximating their presence in our population.

Adding to the inherent unfairness of the permanent qualified list system, New York also had the longest list of occupational exemptions in the entire country. And that was just the tip of the iceberg. We alone among the 50 states forced jurors sitting on felony trials to spend nights in hotels at tremendous taxpayer expense, rather than allowing them to return to their homes after a difficult day

of deliberations. Lawyers conducted *voir dire* in civil cases without any judicial supervision at all, which gave them license to spend days selecting juries of six while discarding dozens of perfectly acceptable members of the *venire* panel for no good reason. Once selected, civil juries could wait days or even weeks for their trials to begin. Our level of juror compensation—$15 a day—did not even cover the cost of parking in downstate counties, yet jurors in some counties could find themselves returning to the courthouse for as long as two weeks. To add insult to injury, jurors reported to dilapidated facilities in almost every county, and (to put it as politely as I can) were often not treated as valued members of the litigation process.

And with all those failed efforts of reform to point to, most courthouse insiders—judges, lawyers, court personnel—were of the opinion that nothing could be done to change any of this.

They had not reckoned on Judith Kaye.

Part of Chief Judge Kaye's genius was her selection of members for The Jury Project. Of course, she ensured that voices would be heard from both upstate and downstate communities, that New York City would not be over-represented (although two out of every three jurors summoned each year were called in one of its five boroughs), that the attorney members were drawn from the criminal bar (prosecution and defense) and from civil practitioners who specialized in different kinds of civil cases, that members of minority communities were prominently represented, and that so-called "good government" types and Bar leaders who had long been advocates for reform did not predominate. But she cleverly "disarmed the enemy," so to speak, by including judges and jury commissioners who were convinced that jury reform was a pipe dream. And she added to the mix persons who had nothing whatsoever to do with the court system—except as jurors. These citizen-representatives acted as the conscience of the group, and made sure that jurors' voices were never silent during task force deliberations.

The Jury Project was tasked to think about how to achieve three objectives: how to create jury pools that were truly representative of their communities, how to structure an efficiently operated administrative "back office," and how to give citizens a positive experience when they arrived for jury duty. The Chief's instructions were clear: absolutely nothing was off the table, any idea with merit should be explored, and every recommendation we made would be taken seriously. We came up with 82 separate recommendations for reform. Because New York (unlike many other states and the federal courts) legislates so many aspects of jury service, many of our most important and controversial recommendations required changes to the state's Judiciary Law. Those changes were sure to be opposed by special interest groups, especially members of the organized Bar, lobbies for professions that enjoyed exemptions, and even the Court Officers' Union, whose members supplemented their less-than-adequate salaries with the overtime they were paid to keep criminal juries sequestered.

Chief Judge Kaye was undaunted. She gradually implemented most of the proposed reforms that were her prerogative as head of the Unified Court System. And if the most controversial aspects of jury reform required the cooperation of the Legislature, then to the Legislature she would go. She marshaled the press; she allied herself with the organized Bar and the good government groups; she lobbied key members personally. It is fair to say that she took the notoriously dysfunctional Legislature by storm. And she succeeded in achieving most of her reformist goals.

As I write this piece, I am sitting in front of a huge chart, 18 by 36 inches, prepared by the Office of Court Administration to explain the success of Chief Judge Kaye's jury-reform efforts. It is an astonishing document. It reveals, for example, that no fewer than 15 separate pieces of legislation were passed between 1995 and 2004 to implement various recommendations of The Jury Project and its successor task force, The Grand Jury Project. Among them are laws whose passage would have been labeled "incredible" when The Jury Project issued its report on March 31, 1994:

1. After a year-long experiment with discretionary sequestration in cases involving minor felonies yielded savings of more than $2 million without any increase in mistrials, judges were given discretion to sequester jurors during felony deliberations or to send them home at night. Multiply that by the 13 subsequent years and the elimination of mandatory sequestration in major felony cases, and the savings to both jurors and taxpayers have been substantial. Today it is virtually unheard of to send jurors to a hotel, even in serious or high-profile cases.

2. All automatic exemptions have been repealed—even for judges. This single reform increased the master list of eligible jurors by more than one million individuals. Jury commissioners now have discretion to grant temporary exemptions to citizens who absolutely cannot serve for some legitimate reason, but only for as long as is necessary—not forever. And one's occupation is never a reason for exemption. As a result, Chief Judge Kaye herself has answered the call to jury service, along with dozens of state and federal judges (including me!). Contrary to the supposition of those who thought they knew everything, a number of those judges were actually selected to serve on juries, and deliberated with their fellow citizens to verdict, in both criminal and civil cases.

3. New York's master jury pool was also supplemented by the addition of individuals receiving public assistance and unemployment compensation—another 500,000 names added to the list, many from communities that were perceived as being underrepresented in the master jury pool.

4. Juror compensation has gone up from $15 per day to $40 per day, bringing it into line with pay received by jurors in federal court.

5. Peremptory challenges in civil cases were reduced from three to two per side.

6. Jurors who serve on long trials (more than eight days) are not called again for eight years.

Equally impressive are the changes that were effected administratively:

1. The permanent qualified list system was abolished, with no discernible impact on back-office efficiency.

2. After a year-long pilot project revealed that judge-supervised *voir dire* in civil cases wasted far less jury time without unduly burdening judges, some form of judicial supervision was introduced in every county. Judicial hearing officers now monitor civil *voir dire* in high-volume counties, thereby dramatically reducing the time it takes to select a civil jury.

3. The State assumed responsibility for cleaning and repairing court facilities, which resulted in immediate and substantial upgrades. Coordinators were assigned to each courthouse; their primary responsibility was to make sure jury facilities were suitable to their purpose.

4. Telephonic notification about when to report dramatically lessened the amount of time jurors spent sitting around with nothing to do.

5. Institution of a juror hotline and ombudsman system ensured that complaints from jurors were heard, while training for court personnel resulted in more civil treatment of jurors.

6. Jury commissioners added toll-free lines and evening hours for jurors who had difficulty communicating during the workday. In New York City, jurors who call "311" can get information about their jury service.

7. Most important of all, 60 of the state's 62 counties achieved the "gold standard" of jury service—jurors now serve for one day if they are not selected for a trial or one trial if they are chosen as jurors. In New York and Bronx counties, the term has been reduced from two weeks to three days or one trial. Overall, the term of service for jurors has been reduced from a statewide average of 5.2 days in 1993 to 2.3 days a decade later.

They said it couldn't be done—none of it. But it was. And the difference between this attempt at jury reform and the ones that preceded it was Judith Kaye. Her genuine concern for jurors and her determination to accomplish reform meant that the report of The Jury Project did not join its predecessors in a file cabinet.

The Jury Project spawned three other commissions—The Grand Jury Project, The Jury Trial Project and the Commission on the Jury. As a result of The Grand Jury Project, the Legislature allowed grand jurors to receive written instructions about their responsibilities, while improvements in grand juror utilization led to reduced grand jury terms in 15 downstate counties. The Jury Trial Project has recommended a number of changes to the trial procedures, among them allowing jurors to take notes during the trial and providing them with a written copy of the charge (both of which are standard procedures in federal courts). Pilot projects—used successfully during The Jury Project to assess whether recommended changes would work—will assess the feasibility of these recommendations. At the same time, the Commission on the Jury is working on ways to improve juror utilization, so that a higher percentage of jurors summoned actually get to sit on a trial.

But the biggest change of all is that jury reform in New York is no longer dependent on the convening of these blue ribbon commissions. Jury commissioners and the court system have a whole new attitude about jury reform. Instead of resisting it, they are proactively looking for ways to make the jury experience easier to administer and more palatable for participants. Experiments with devices to assist jurors who have speech or language disabilities are ongoing. In some counties, use of the Internet is replacing the telephone, and Internet connections in jury rooms permit those summoned to work while waiting. Computer-interactive juror orientation programs will allow jurors to prepare for jury duty in the comfort of their homes.

Judith Kaye has exported her enthusiasm for jury reform throughout the country. In 2001, she convened the "Jury Summit," bringing more than 200 judges, lawyers, academics and citizen jurors from 45 states together for the first time to compare notes on jury reform. She co-chaired the ABA's American Jury Project and her energy and vision led to many of that commission's finest products—including the issuance of a commemorative stamp honoring jury duty!

At its August 2008 annual meeting, the American Bar Association gave Chief Judge Kaye its Jury System Impact Award that recognizes individuals who have made tremendous efforts toward the improvement and strengthening of the American jury system. A letter of nomination from G. Thomas Munsterman of the National Center for State Courts began with these words: "Based on her work to strengthen the American Jury System, I know of no one more deserving of this award."

To which I can only say: AMEN!

Hon. Colleen McMahon is a judge on the United States District Court for the Southern District of New York. In 1993-94, at the request of Chief Judge Kaye, she chaired The Jury Project, and is the author of the report that led to wholesale reform of the jury system in New York State.

Making Access to Justice a Reality

By Hon. Juanita Bing Newton

"However fine our courthouses, however well-defined our constitutional ideals, however refined our legal processes, they are of little significance unless people in need can enjoy their benefit."

—Chief Judge Judith S. Kaye

During the last decade, the bench and bar nationally have embraced their fundamental obligation to provide access to justice for those who are ordinarily unable to access the legal system. Throughout the country, court systems, bar associations, legal services providers, pro bono organizations and law schools are working to develop or have developed programs and policies to expand civil legal services funding, increase pro bono participation and address the needs of the self-represented.[1]

"Chief Judge Kaye has placed New York State at the forefront of the access-to-justice movement and, more importantly, changed the perspectives of the New York legal system at all levels with regard to the court's and profession's obligations to address the unmet needs of poor and low-income New Yorkers."

In New York, the emphasis on access to justice began years before the movement spread nationwide due to the commitment and vision of Chief Judge Judith S. Kaye. From the time of her appointment as Chief Judge in 1993, she has focused on ensuring that those without means have equal access to the courts and justice system. By so doing, Chief Judge Kaye has placed New York State at the forefront of the access-to-justice movement and, more importantly, changed the perspectives of the New York legal system at all levels with regard to the court's and profession's obligations to address the unmet needs of poor and low-income New Yorkers.

Access to Justice Accomplishments

Chief Judge Kaye's leadership has focused on five critical kinds of access-to-justice needs: (1) strengthening the delivery of civil legal services, including establishing a permanent funding source; (2) improving the provision of criminal indigent defense services; (3) increasing the provision of pro bono services; (4) addressing the needs of self-represented litigants by creating user-friendly courts; and, (5) increasing court visibility in the community in order to increase community awareness of the courts and of how they operate.

The Chief Judge's creation of the position of Deputy Chief Administrative Judge for Justice Initiatives was a crucial and unprecedented step that unequivocally reaffirmed the court system's commitment to eliminating disparities in accessing justice. With its mission to integrate the broad principles of access to justice into the core elements of court operations, the new position ensured statewide leadership and highly focused coordination of efforts to address access to justice concerns.[2]

The historic nature of this restructuring cannot be overstated. It was the first change in the organizational structure of the New York State courts since the court system was unified in 1978. The Deputy Chief Administrative Judge for Justice Initiatives was directed to develop a statewide focus and consensus regarding access-to-justice policies and to bring about specific changes in court operational procedures aimed at improving access to justice for the poor. Thus, the Chief Judge's program was more than just aspirational. Rather, ensuring access to justice became an integral part of the court system's administrative structure and courthouse operations. The author was appointed as the court system's first Deputy Chief Administrative Judge for Justice Initiatives. She was given a broad mandate: to improve and increase access to the legal system for all citizens by eliminating real and perceived barriers to justice across the five interrelated areas of access-to-justice needs described above.[3]

Strengthening the Delivery of Civil Legal Services

During the 1990s, as funding for civil legal services diminished and greater restrictions were placed on the use of limited funding, the unmet needs of the poor for civil legal services reached crisis proportions. To address this crisis, Chief Judge Kaye appointed the Legal Services Project in 1997, and charged it with the responsibility of identifying permanent and stable revenue sources for civil legal services.[4] In May 1998, the Project's unique Bar-business partnership produced a seminal report whose recommendations, while failing to win the support of the State Legislature, established a national precedent and

model for the way a state judiciary can spearhead efforts to address the civil legal services crisis.

With the appointment of the Deputy Chief Administrative Judge for Justice Initiatives (DCAJ-JI), Chief Judge Kaye recommitted the court system's effort to addressing unmet legal needs. Upon her appointment, the DCAJ-JI established the Legal Services Working Group, an advisory panel composed of key representatives from the legal services community. The group works with the court system to devise strategies and organize campaigns to increase funding and strengthen the civil legal services delivery system. Due to her relationship with the community, the DCAJ-JI was asked to serve on the New York State Planning Steering Committee, an entity formed to address, among other things, the restructuring of New York's legal services providers. Through concerted efforts of the numerous stakeholders—most importantly, the legal services providers—significant strides have been made in increasing awareness of the need for civil legal services, and broadening support for increased funding within state government. In 2004, the court system co-sponsored statewide open house events with civil legal services offices. Held at nine locations, the events provided an opportunity for legislators, judges, bar leaders, lawyers, community leaders and residents to learn about the work of civil legal services providers.

In 2005, Chief Judge Kaye organized the Partners in Justice Colloquium, a unique event that brought together judges, lawyers and clinical law professors to collaborate on how to address the unmet legal needs of poor and low-income New Yorkers who face civil collateral consequences of criminal convictions. The resounding success of the colloquium led Chief Judge Kaye to form a working group to find ways to continue the information-sharing that began at the colloquium. The Working Group, in partnership with the Lawyering in the Digital Age Clinic at Columbia University School of Law, developed an online collaborative forum on collateral consequences of criminal convictions.[5]

Additionally, the court system has taken a lead role in legislative efforts to increase funding for civil legal services. It strongly advocated for legislation that would have created a permanent funding source through monies recovered under the Abandoned Property Law.[6] It also worked closely with the legal services community for the enactment of legislation that created a small permanent fund for civil legal services[7] and, following enactment, worked to clarify the legislation in order to ensure that the optimal amount of this new source of funding would be available for civil legal services.

In 2007, Chief Judge Kaye was able to achieve the landmark inclusion of $5 million in the court system's budget for civil legal services.[8] Thereafter, the court system has worked closely with the executive branch, which for the first time also included civil legal services funding in its budget, to distribute the approximately $8 million of new funds. The hope is that this success will result in even greater levels of funding in years to come.

Strengthening the Indigent Defense Delivery System

Assigned-counsel rates for indigent defendants in New York State in the mid-1990s had become unconscionably low, causing a crisis in the courts due to the small number of lawyers willing to accept appointment to criminal cases and proceedings in family court pursuant to County Law Section 18-B. In 1999, Chief Judge Kaye announced strong support for a significant increase in the 18-B fee rates. Given the scope of the problem, the court system organized a broad statewide coalition to demand increased rates. The coalition, lead by the Deputy Chief Administrative Judge for Justice Initiatives, included major bar associations, the District Attorneys Association, the State Attorney General's office, the City of New York, and the State Association of Counties, among others.

"In 2005, Chief Judge Kaye organized the Partners in Justice Colloquium, a unique event that brought together judges, lawyers and clinical law professors to collaborate on how to address the unmet legal needs of poor and low-income New Yorkers who face civil collateral consequences of criminal convictions."

In January 2000, the court system issued a report documenting the crisis and proposing a rate increase to $75 per hour for felony cases, $60 per hour for non-felony criminal cases, and $75 per hour for family court cases.[9] This report became the unifying message for coalition members, as well as the concerned broader community; the increases finally became law at the beginning of 2004. This was a major victory for access to justice in New York, and established the court system as the leader in bringing together broad coalitions of stakeholders to address such issues.

The rate increases resolved the problem of insufficient attorneys to handle the criminal and family court caseloads. However, the legislation, by imposing greater costs on the counties, created additional concerns regarding the quality of service being provided. To explore these and other significant issues, the court system hosted the New York State Indigent Defense Summit in November 2003, which brought together the major constituencies to examine the structure, finance and quality of representation provided by the current indigent defense structure. Building upon the work of the Summit, Chief Judge Kaye appointed the Commission on the Future of Indigent

Defense Services to examine all aspects of the provision of indigent defense services in New York State in 2004. The Commission's Final Report, issued in June 2006, included a broad variety of findings and recommendations, including establishing a statewide Defender Office, funded by the Legislature, to oversee and be responsible for all indigent defense in the state.[10] The Final Report has been widely noted and discussed, both in the general and legal communities, and has led to heightened awareness on the part of the executive and legislative branches that change is essential in this crucial area.

Pro Bono

Under Chief Judge Kaye's leadership, pro bono practice in New York State has evolved from seeking to increase individual attorney participation to a dynamic, multi-level, statewide effort to greatly increase the private bar's commitment to free legal services.

Initially, the court system sought to encourage voluntary service by individual attorneys. To this end, the Administrative Board of the Courts adopted, at Chief Judge Kaye's request, a resolution in May 1997 urging attorneys to provide 20 hours of pro bono service to the poor annually and to support financially the work of organizations that provide legal services to the poor. Additionally, the Continuing Legal Education (CLE) Board amended the CLE rules to allow CLE credits to be earned for the performance of pro bono work,[11] making New York only the third state to grant attorneys credit for pro bono service. Despite these efforts, the pro bono participation rate among New York lawyers remained static.[12]

In 2002, the DCAJ-JI hosted four Pro Bono Convocations throughout the state, to bring together all of the stakeholders. Stakeholders included judges, court administrators, attorneys in private practice, public interest lawyers, government attorneys, law school professors and members of the bar. The emphasis was on process: How could the courts and these other constituencies build a pro bono network that is both wide and deep and maintains the flexibility to respond to local needs? The answer: a major on-going project known as ProBonoNY. ProBonoNY is a collaboration of local action committees, organized by judicial district and composed of multiple legal constituencies that are responsible for identifying the legal needs and priorities of low-income people in the committee's district and planning activities to address those needs.

The 2002 Convocations also led to a groundbreaking recommendation for the development of pilot projects statewide to test the efficacy of discrete task representation as a way to increase pro bono service.[13] Such programs are expanding the traditional parameters of pro bono representation in significant ways.[14] In order to foster the important goals of this innovative approach to pro bono representation, the Appellate Divisions recently amended the disciplinary rules regarding the extent of mandatory conflicts checks in such programs.[15]

Assisting the Self-Represented

During the years of Chief Judge Kaye's tenure, the culture of the court system has undergone significant change in its approach to providing services and resources to self-represented litigants. The basic change is that the courts are now much more "hands-on" in helping people who come to court without a lawyer. In 1997, the New York County Supreme Court opened its first Office for the Self-Represented. The office provides a variety of kinds of help, including procedural and other court information, forms review and assistance with forms completion, and referrals. At approximately the same time, the Housing Part of the New York City Civil Court began operating Resource Centers staffed by attorneys and resource assistants to help self-represented litigants. These successful projects have been widely replicated throughout the court system, including all of the supreme courts within the New York City metropolitan area. Most importantly, it has created a paradigm that is being used in different court types, as new models are developed for ways in which the courts can ensure full access for the self-represented.[16]

Beyond court offices specifically designed to assist the self-represented, the court system has sought to ensure that both judicial and non-judicial personnel have the necessary training and resources to address the needs of the self-represented. Educational programs have been developed for judges and other quasi-judicial officers[17] on the evolving jurisprudence of self-represented litigation, including approaches to dealing with the self-represented while maintaining neutrality and impartiality. A statewide training program for non-judicial employees also has been implemented, focusing on how court staff can better address the public's informational needs.[18] The full-day training includes extensive discussion of the court system's guidelines for distinguishing legal information (which is permissible for court employees to give) from legal advice (which is not), and aims to increase court staff confidence that they are appropriately serving the public. Another key change in the court system has been the innovative and extensive use of technology to bridge the gap in unmet legal services. Technology provides a means to disseminate information and services to the self-represented. To address the limited technical knowledge and low literacy levels that are obstacles to many self-represented litigants when using the Internet, A2J (Access to Justice) technology was developed by a collaboration of institutions and providers to create "user-friendly" Web-based document assembly. By gently guiding users through interactive interviews, a simple interface determines eligibility, answers questions about unknown legal terms and the legal process, and produces customized legal forms and information sheets. The court system, in partnership with the legal services community, is work-

ing to make the A2J technology available to New York's self-represented litigants and the pro bono attorneys who assist them.[19] The future potential of A2J is enormous.

CourtHelp, a one-stop location on the Internet, available in English and Spanish, represents another major breakthrough. It offers information about courthouse locations, telephone numbers and other basic court data, free court forms, information about procedural and substantive law, and access to lawyer-referral services.[20] The information is organized into four easily understood categories and presented in a user-friendly format in plain language and with simple graphics. CourtHelp has been further strengthened by its partnership with the LawHelp Consortium, which runs a Web site providing a vast array of legal information and help to the public.[21]

The New York court system's work in creating these initiatives, which involve expanding resources for procedural and substantive information, use of technology, and comprehensive education, has changed the self-represented landscape and made New York a national leader in this area. As a result of Chief Judge Kaye's leadership on self-represented litigation, in 2006 the court system was asked to host a major regional conference on the issue. Court administrators, trial court judges, bar association leaders, legal services and pro bono providers, librarians and self-help center staffs from 22 states attended the conference.[22]

Education and Outreach to Enhance Public Trust and Confidence

In November 1998, Chief Judge Kaye appointed the Committee to Promote Public Trust and Confidence in the Legal System to study and propose strategies to address public trust concerns and the courts. The Committee's Mission stated:

> The goal of the Committee is to enhance the public's trust and confidence in our legal system. The Committee's focus is twofold - first, to assure that there is a fair and just system by which people who have contact with the legal system are treated with respect and equality, and second, to bring about a greater understanding of and respect for the legal system.[23]

After extensive fact-finding and consideration, the Committee issued its report in May 1999.[24] A major finding was that public unhappiness with the court system stems partially from a lack of understanding of its structure and procedures as well as of the substantive law. The Committee further concluded that the key to overall improvement in these perceptions was education. Specifically, this would entail teaching the public more about the courts, especially the roles of different courts, as well as the limitations and restraints placed upon them. Chief Judge Kaye charged the DCAJ–JI with responsibility for developing and coordinating community outreach initiatives aimed at educating the public and exploring ways to increase the court system's response to public needs.

The court's education and outreach efforts have included a variety of communities and approaches, and have given many New Yorkers a way to understand what the justice system is about. Two of the most interesting initiatives have involved, respectively, clergy and students. Clergy Day, begun as a small program in Queens in 2001, has grown and strengthened itself through a partnership with the Interfaith Center of New York. The initiative includes both day-long educational programs and morning roundtable discussions. Groups spanning a broad multiplicity of New York's religious spectrum participate in these sessions. In 2005, the clergy initiative was recognized for its innovative approach to court-community collaboration when U.S. Supreme Court Associate Justice Stephen Breyer attended a roundtable held at the Red Hook Community Justice Center. Justice Breyer was so impressed with the program that afterwards he requested materials to share with his colleagues.[25]

Students have been engaged in access-to-justice programs, initiated by the court system, from elementary school all the way through college and law school. Programs have ranged from court tours, training in conflict resolution, lunching with judges to discuss the court system, career days, course work and an Adopt-a-Class Program, designed to establish a working relationship with the local community by bringing court representatives into the schools. The network of relationships built from these programs is invaluable in creating the type of changes in court culture that Chief Judge Kaye has dedicated herself to bringing about.

Another significant initiative that resulted from the work of the Committee to Promote Public Trust and Confidence in the Legal System was the Year 2000 Program. This program was launched within the court system, through the DCAJ-JI, to develop and coordinate community outreach initiatives aimed at educating the public about the role and the functions of the court system. With the assistance of the court systems' Office of Public Affairs and the strong commitment of its Administrative Judges, numerous programs have been conducted. These have included town hall meetings held throughout the state to provide an opportunity for public discussions with court system administrators and staff on issues of concern to local communities; local courts' open house days to bring the public into the courthouses to better understand their operations; Senior Law Days, developed through a collaboration of many different constituencies to promote workshops on topics of interest to seniors and their caregivers; and, regional education seminars for the media. This broad-based approach to disseminating information, while at the same time hearing from the public, has been a key to increasing communication within and about the court system.

Conclusion

Since Judge Kaye's appointment as Chief Judge, her commitment to and support of eliminating barriers to justice have not wavered. She has overseen an effort, focused "like a laser beam,"[26] on meeting the needs of low and moderate-income New Yorkers in comprehensive, broad-based ways that have linked the courts, legal service providers, bar associations, private attorneys, religious organizations, community groups, government at local and state levels, and, especially, ordinary citizens. While the work of accomplishing her mission continues to evolve, Chief Judge Kaye can be proud of launching this effort and of its many accomplishments to date for the benefit of New York's courts, its legal community, and most importantly, the public.

"Since Chief Judge Kaye's appointment as Chief Judge, her commitment to and support of eliminating barriers to justice have not wavered."

Endnotes

1. *See generally* American Bar Association Resource Center for Access to Justice Initiatives, http://www.abanet.org/legalservices/sclaid/atjresourcecenter/home.html.
2. *See* Press Release, *Judge Juanita Bing Newton Appointed Deputy Chief Administrative Judge for Justice Initiatives* (New York State Unified Court System, June 29, 1999). This approach differed significantly from those undertaken in other states, which generally focused on the creation of an Access to Justice Commission or similar structures to study, and make recommendations about, barriers to access to justice.
3. *See* note 4, *infra*.
4. *Funding Civil Legal Services for the Poor: Report to the Chief Judge*, Legal Services Project (May 1998).
5. The forum is known as the 4Cs, http://www2.law.columbia.edu.fourcs/.
6. A. 6887, S. 3842, 1999-2000 Regular Sessions.
7. N.Y. State Fin. Law § 98-c.
8. *Fiscal Year 2007-2008 Budget*, at 1313 (New York State Unified Court System).
9. *Assigned Counsel Compensation in New York: A Growing Crisis*, Office of the Deputy Chief Administrative Judge for Justice Initiatives (New York State Unified Court System, 2000).
10. *Final Report to the Chief Judge of the State of New York,* Commission on the Future of Indigent Defense Services (New York State Unified Court System, June 18, 2006).
11. *See* 22 N.Y.C.R.R § 1500.22 (j).
12. The court system conducted five pro bono surveys during the period from 1991 through 2003. Each yielded similar results, with participation rates in the range of just 45%-49%. *See, e.g.*, New York State Unified Court System, *The Future of Pro Bono in New York-Volume 1: Report on the 2002 Pro Bono Activities of the New York State Bar* (Jan. 2004), *available at* http://www.nycourts.gov/reports/probono/proBono_Vol1_report.pdf.
13. "Discrete task representation," also known as "limited scope representation" or "unbundled legal services," involves the client and lawyer agreeing that the lawyer will provide some, but not all, of the work involved in traditional legal representation, with the client performing the remaining tasks. Limited-scope projects undertaken by the courts include the Housing Court of the New York City Civil Court's "Volunteer Lawyers Project" and "Volunteer Lawyer for a Day," the Kings County Family Court Pro Bono Project, the Civil Legal Advice and Resource Project (CLARO) at Brooklyn Law School and the City University of New York Law School Community Legal Resource Network's (CLRN) Office for the Self-Represented Legal Clinic.
14. *See, e.g.*, *Volunteer Lawyer for a Day Project Report: A Test of Unbundled Legal Services in the New York City Housing Court*, Civil Court of the City of York, the Deputy Chief Administrative Judge for Justice Initiatives and the New York City Bar (Feb. 2008).
15. *See Joint Order of the Appellate Divisions*, adding new section 1200.20-a (DR 5-101-a) to Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York (2007).
16. New models for serving the self-represented include an Office for the Self-Represented in Richmond County Surrogate's Court and a multi-court office in Erie County.
17. These include Family Court Support Magistrates and Court Attorney-Referees who hear and decide cases.
18. *See* Facilitating Access Training Program Reference Manuals, *available at* http://www.nycourts.gov/ip/justiceinitiatives/pdfs/FATPVol1.pdf (Volume 1) and http://www.nycourts.gov/ip/justiceinitiatives/pdfs/FATPVol2.pdf (Volume 2).
19. Examples of A2J technology that have been developed for litigants in the Housing Part of the New York City Civil Court can be found at http://www.nycourts.gov/courts/nyc/housing/interactive.shtml.
20. *See* CourtHelp at www.nycourthelp.gov.
21. LawHelp.org, www.lawhelp/ny.org. In 2003, the court system partnered with the LawHelp Consortium to add a channel of court resources to the LawHelp site.
22. For further information, *see* http://www.nycourts.gov/ip/justiceinitiatives/conference.shtml.
23. *Report to the Chief Judge and Administrative Judge*, Committee to Promote Public Trust and Confidence in the Legal System (New York State Unified Court System, 1999).
24. *Id.*
25. For a fuller discussion of the clergy initiative, *see* Hon. Juanita Bing Newton, Moise Waltner and Matthew Weiner, *A Model for How Court Systems Can Work with Religious Communities*, ABA Judges' Journal (Fall 2007), at 28.
26. *State Planning Steering Committee Luncheon Forum*, Keynote Address by Chief Judge Judith S. Kaye (New York State Bar Association, Jan. 23 2003).

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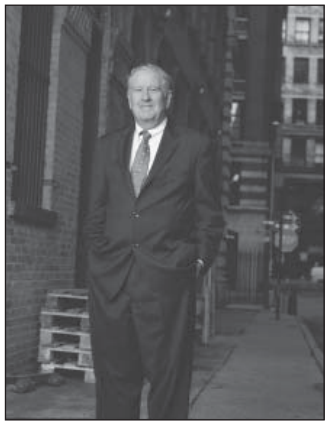
Building Public Trust Through Judicial Selection Reform

By Professor John D. Feerick and Michael J.D. Sweeney



Prof. John Feerick

As Chief Judge of the State of New York, Judith Kaye oversees one of the busiest court systems in the nation. In New York's courts of record, 1,221 judges resolve well over 3 million cases a year. In addition, 2,300 local town and village justices resolve another 1 million annually. Administering the court system is by itself a Herculean task, but it is only part of Chief Judge Kaye's legacy.

Judith S. Kaye's tenure as Chief Judge of the State of New York is striking for its extraordinary innovations. Beginning with her installation as our first female Chief Judge, Judge Kaye has graced New York with reforms that have paved the way to an independent and impartial judiciary. Among all her accomplishments, none is more important than her efforts to instill public confidence in New York's judiciary.

An independent and impartial judiciary is critical to democratic society. It is the branch of government responsible not only for resolving disputes between private parties fairly, but also for resolving disputes between the government and private parties. As such, it is charged with protecting the individual from government overreaching, and holds an important place in New York's constitutional balance of powers. It is the branch that holds the representative branches to their responsibilities.

Impartiality and independence are so critical to the judicial role that even the appearance of partiality or improper influence degrades a judicial system. The justice system is founded on public confidence and if people do not believe in the impartiality and independence of the judiciary, they will resort to other means to resolve those matters that are properly in the judiciary's realm. A former administrative judge expressed the idea when he was quoted as saying that if the public does not have faith in the judiciary, "people won't go to court, but to the streets or to a gun dealer."[1]

Any judicial system runs a substantial risk of low public confidence. Courts are where people come to resolve conflict. As is typical in any conflict, one party loses and often neither party wins outright. The risk that participants will blame their lack of success on some part of the judicial system runs high. The risk is especially high in an adversarial justice system like ours that pits parties against one another. Only confidence that the system is independent and impartial can generate public confidence. To maintain public confidence, a judiciary must strive to protect its independence and impartiality in everything it does.

Michael J.D. Sweeney

Seventy-three percent of New York's 1,221 full-time judges are elected, as are most of its 2,300 town and village justices. An elected judiciary presents a unique set of challenges to public confidence. A judge's role in our society makes judicial elections different from elections for other branches of government. We expect judges to apply the law as it is written, impartially and independent of outside influences. We do not require the same impartiality or independence of legislators or executives. The demands of impartiality and independence mean that although judicial candidates rely on the support of others for election, they cannot acknowledge that support as judges. Although candidates compete for office, they must be careful not to campaign in a way that erodes confidence in their impartiality.

No one takes more seriously the notion that "without public confidence, the judicial branch could not function" than Chief Judge Kaye. Nor is anyone more aware that "the public's trust has always been the source of strength for The Least Dangerous Branch—and in the final analysis, a strong, independent judiciary is what will preserve American freedoms."[2]

While public confidence is crucial, it is multifaceted and influenced by many factors. Chief Judge Kaye recognizes this complex dynamic and has worked relentlessly to promote public confidence in the judiciary. She, more than anyone, recognizes the tremendous dedication and integrity of the thousands of people who make up New York's judicial branch—the judges, court employees and administrators. Appropriately, much of Judge Kaye's work as Chief Judge of the State of New York has focused on inspiring public confidence in the judiciary.

For example, no Chief Judge has been more aware of the relationship between judicial diversity and public confidence than Judith Kaye. She expressed her approach to diversity in quintessential Kaye fashion shortly after assuming the office of Chief Judge.

> I was sworn in as the Chief Judge of the New York State Court of Appeals on the 23rd day of March 1993, a day I will never forget. I wore red shoes on that day, as I have often worn red shoes on the bench. Insofar as we are able to determine, no other judge of the Court of Appeals in recorded history has worn red shoes on the bench. It is my perception, it is my hope, it is my fervent desire, that we should have more people wearing red shoes on the bench of the Court of Appeals, women and nonwomen, and indeed more people in red shoes on all the benches throughout the State of New York, and on the road to the judiciary.[3]

She has been true to those words throughout her tenure on the Court of Appeals, working as a tireless advocate for diversity in the legal profession and on the bench.

"[S]he has worked hard to reform the jury-selection process to ensure that serving as a juror is a positive experience."

Chief Judge Kaye also recognizes that confidence in the judiciary requires recognition that it is a human institution directly affecting the lives of people. For example, under her leadership, New York developed a series of problem-solving courts that challenge judges to address underlying societal problems in individual cases and to involve others to address those problems. In New York's community courts "wherever appropriate, the judge in imposing a sentence seeks to combine punishment and help, sentencing offenders to perform community service and receive social services like drug treatment and job training;" in drug courts judges focus on helping defendants break the cycle of addiction through closely monitored treatment and cooperation between judge, prosecution and defense; and in domestic violence courts a single judge can deal with all aspects of a family situation to ensure victim safety and defendant accountability.[4] Chief Judge Kaye's extraordinary efforts to respect the humanity of litigants instill public confidence.

So, too, do Judge Kaye's jury reforms promote public confidence. By eliminating virtually all the automatic exemptions from jury duty, Judge Kaye ensured that virtually everyone in New York State will participate in the jury process. At the same time, she has worked hard to reform the jury-selection process to ensure that serving as a juror is a positive experience. Each time someone serves, that person receives a civics lesson in the operation and importance of the judiciary. That knowledge is the foundation of public confidence.

By championing the judiciary, Chief Judge Kaye has helped build public confidence in it. She is the public face of New York's judiciary, publishing articles, giving speeches and making appearances at an astonishing rate, striving to make the public understand the commitment and integrity of the people who make up New York's judiciary. She also is relentless in her campaign to improve New York's judiciary, from providing institutional support, such as establishing the Center for Court Innovation and the Judicial Institute, to her unprecedented efforts to bring judicial compensation in line with the responsibilities of the office.

Chief Judge Kaye also appreciates that the media have a direct effect on public confidence and she jealously protects the integrity of the judiciary and its members. Whenever the judiciary or its members are unjustly criticized, the Chief Judge responds. And where criticism is warranted, she quickly moves to address the issue, large or small. In response to legitimate criticism, she has sought major reform in areas such as fiduciary appointments, indigent representation, the jury system, ethical rules governing attorney conduct, town and village courts, and judicial elections.

It is this last area about which we would like to speak having served as Chair and Legal Counsel for the Chief Judge's Commission to Promote Public Confidence in Judicial Elections. We believe that the Commission's experience gives some insight into the courage and commitment of Chief Judge Kaye.

The Commission to Promote Public Confidence in Judicial Elections

Midway through the Chief Judge's term, public confidence in New York's elected judiciary faced an extraordinary challenge. New York's judicial-election system has been criticized at various times in its history, but at the turn of the 21st-century events heavily taxed public confidence in judicial elections. Public accounts of undignified campaign activity in local judicial elections around the state, connections drawn between campaign contributions and judicial decision-making, and attacks on political party control of judicial elections combined to cast judicial elections in a bad light. Scandals had developed in several parts of the state and included judges and political leaders being prosecuted for corruption. Criticism of the judicial-election system and the elected judiciary was rife, and calls for reform of the system came from the government, citizens groups, non-profit organizations, academics, commentators, and the media.

The scandals reinvigorated the call by many bar associations and non-profit organizations to abolish judicial elections as fraught with challenges to judicial independence. The media created frenzy around the scandals, using them to question the integrity of the elected judi-

ciary in general. In 2003, a group of plaintiffs brought suit in federal court challenging the constitutionality of New York's system of electing justices of the supreme court. In 2006, the federal court found that the system violated the federal Constitution, and the U.S. Court of Appeals for the Second Circuit unanimously affirmed the decision.[5]

Chief Judge Kaye was deeply concerned with the criticism and scandal. She recognized that the publicity heaped on the scandals involving a few judges and politicians could poison public confidence in the judiciary as a whole. Despite all her previous efforts, public confidence in New York's elected judiciary was losing ground. She knew that New York was not unique in facing this challenge. In her capacity as the President of the Conference of Chief Justices, Judge Kaye saw disturbing trends in judicial elections developing across the country. Although New York had not yet experienced many of these trends, it would not avoid them without active efforts. New York shared many of the harbingers of danger, such as a citizenry poorly educated about the judiciary in general and judicial elections in particular.

Judge Kaye's reaction was measured and wise. As she always has, she first came to the support of the thousands of judges and judicial employees who work so hard at their jobs. She resisted the pressure from the media, citizen groups, and the bar to turn on judicial elections as the culprit for the scandals. Instead, Judge Kaye looked for solutions that would restore public confidence in judicial elections and would increase public participation and understanding about the elected judiciary.

In her 2003 State of the Judiciary message, Judge Kaye announced that she had appointed a commission to provide a blueprint for fostering dignified judicial campaigns and improving voter participation.[6] She appointed commissioners for their professional, political, geographic and social diversity, ensuring that the Commission's members represented the great diversity of interests in New York's judiciary.[7]

Judge Kaye specifically asked the Commission to develop solutions for restoring confidence in the elective system, avoiding the intractable debate over election versus appointment of judges. She recognized that reform was needed in the short term and that New York's judicial selection system was unlikely to change to an appointment system any time soon.

Once she appointed the Commission, Judge Kaye provided it with the resources and independence necessary to do its work. She supported the Commission's work to the fullest extent that she could, with resources, information, and cooperation. While she was always available to help, she never asked more of the Commission or commissioners than to help inspire public confidence in judicial elections and voter participation.

With the Chief Judge's support, the Commission was able to conduct a substantial amount of work in support of its mandate. Important primary research included:

- Public hearings;
- A major public opinion poll;
- Focus groups;
- A survey of sitting New York State judges; and,
- Countless interviews with concerned citizens and political and civic leaders.

The research was discussed and analyzed at more than 100 meetings of the full Commission, its subcommittees and various working groups. In addition to its own research and review of existing information, the Commission profited from the help of several organizations willing to support an effort led by Chief Judge Kaye.

The Commission recognized five aspects of New York's system of judicial elections that threaten public confidence: campaign activity, campaign finance, candidate selection, voter participation and candidate diversity. With respect to diversity, our research showed that the link between diversity on the bench and public confidence is strong. As one witness at our public hearings testified, "I think that when you come before the bar of justice, and you see from time to time people reflective of your background and experience . . . it engenders confidence that one can get a fair shake." Our work clearly indicated that diversity promotes participation and confidence in the justice system by involving communities and taking into account different perspectives.

We also found that effective public education regarding the judiciary was sorely lacking in New York State. While an educated, voting public promotes public confidence in many ways, participation in judicial elections in New York is dismal. Public polling showed that most New Yorkers do not know how Justices of the Supreme Court or judges of the Court of Appeals are selected, or even who the candidates are that appeared on ballots. Understandably, voters opt not to vote in judicial elections. The lack of education and participation in elections drives a lack of confidence in the elected judiciary.

A third factor draining public confidence is political leaders' control over the selection of candidates. The public overwhelmingly believed that political leaders, not the voters, determine who can run for judicial office, and that political parties influence judicial decisions. As a result, voters have little confidence that their votes make a difference, and they do not vote in judicial elections.

Campaign finance also places a great burden on public confidence. Public polling showed that more than 80% of voters believe that campaign contributions influence

judicial decisions. Even more ominous were the results from the judicial survey showing that more than 40% of judges believe that contributions affect decisions, and 80% believe that it is reasonable to question a judge's impartiality based on campaign contributions.

Finally, our research showed that campaign activity can have a negative impact on the elected judiciary. Conduct such as campaign speech and related political activity during the campaign season can lead voters to lose confidence in judicial independence and impartiality.

"As a result of the Chief Judge's commitment, New York is the only state in the country with statewide screening commissions for candidates for elective judicial office."

The Commission presented three reports to the Chief Judge. In our first two reports, we offered recommendations addressing these areas, reserving recommendations on New York's judicial convention system for our final report. The recommendations varied in character. Some are non-controversial, others call for bold action. Some could be implemented with the judiciary's regulatory power; others require legislative action.

No matter the character of a recommendation, Judge Kaye championed them all. Where she could use her authority to implement recommendations, she did. Where regulatory powers lay with the Administrative Board of the Courts and the Court of Appeals, she created the opportunity for a full hearing and consideration of the recommendations. As a result, many went into effect. Where legislative action was required, Judge Kaye worked hard for the reforms. While not always successful in her efforts, she courageously worked in support of the recommendations.

A primary example of the Chief Judge's efforts is the establishment of Independent Judicial Election Qualification Commissions ("IJQEC") throughout the state. The Commission urged the establishment of IJQECs in each of the state's 13 judicial districts to ensure that every candidate for elected judicial office is qualified to serve, and to encourage candidacies from under-represented communities.[8] Although the Commission recommended that the Legislature establish the IJQECs, we urged the judiciary to use its regulatory powers should the Legislature not act. It was the Commission's collective view that establishing such commissions were within the judiciary's constitutional authority to protect its integrity. When the two houses could not pass the required legislation, Chief Judge Kaye provided the leadership for the Court of Appeals and the Administrative Board to pass rules establishing the IJQECs.[9] The judiciary's regulatory action showed substantial respect for the separation of powers. In fact, the Commission urged her to go further. As a result of the Chief Judge's commitment, New York is the only state in the country with statewide screening commissions for candidates for elective judicial office. It is a model studied around the country.

The Commission offered two recommendations with respect to campaign activity. The first was an extensive revision to the Chief Administrative Judge's Rules governing campaign activity. Chief Judge Kaye quickly presented the recommended changes to the Court of Appeals and Administrative Board, and many of the revisions were adopted. The Commission also recommended the establishment of a Judicial Campaign Ethics Center to help everyone—judicial candidates, the media, the public and others—understand candidates' ethical obligations, especially while on the campaign trail. The Chief Judge established the Center immediately. New York's changes to the ethical rules were ahead of the curve, and many states and the American Bar Association followed New York's lead.[10] The Judicial Campaign Ethics Center allows New York to implement the changes and to stay on the leading edge of ethics reform.

Under Chief Judge Kaye's leadership, several of the Commission's recommendations on campaign financing were adopted. Working with the support of the judiciary, the Legislature passed one of the most open campaign finance reporting laws in the country. It requires candidates to make timely, electronic disclosures, and the disclosures are made publicly available on the Internet shortly thereafter.[11] The Chief Administrative Judge also made recommended rule changes aimed at preventing political parties from bringing pressure on judicial candidates to make contributions to the party.[12]

The Chief Judge implemented many of the Commission's recommendations with respect to public education. Commission recommendations for a judicial directory listing relevant information about sitting judges and a voter guide were incorporated into the Judicial Campaign Ethics Center, and both are currently publicly available online. Judge Kaye also convened a statewide symposium on voter education that brought together judges, educators and concerned citizens, as well as experts from around the country.

Finally, in February 2006, the Commission issued its final report containing recommendations for reforming the convention system by which New York selects its Justices of the Supreme Court. We found reform of the system preferable to the alternative—open primaries—because the convention avoided much of the campaign finance and campaign activity that threatened public confidence. A few days before our report, the U.S. District Court declared the convention system unconstitutional, excoriating it for backroom dealmaking. Although the United States Supreme Court eventually overturned the District Court decision, it did so without endorsing the

current system. Justice Stevens remarked in his concurrence, "The Constitution does not prohibit legislatures from enacting stupid laws."[13] Judge Kaye treated the system with more respect, endorsing the Commission's recommendations and saying, "I am confident that the reforms we are now implementing will significantly improve judicial elections."[14]

That some of the Commission's recommendations have not yet been adopted is not a reflection on Chief Judge Kaye's efforts. She encouraged us to think broadly and be ambitious in our recommendations, and we did. We recommended public financing, retention elections, recusal based on campaign contributions, and an overhaul of the convention system of selecting candidates for Justice of the Supreme Court. Chief Judge Kaye advocated all these positions. In many cases, the judiciary offered draft legislation and lobbied the legislative and executive branches. Many of the recommendations were part of bills passed in the Assembly. These recommendations, however, required action beyond the judiciary. While it is unfortunate that public leaders did not rise to the challenge of protecting public confidence in the elected judiciary, blame cannot be laid at the feet of Judith S. Kaye.

Judge Kaye's success is not diminished by the fact that some of our recommendations have not yet been adopted. Elihu Root could have been instructing those involved in judicial selection reform:

> There are no worse enemies of all attempts at improving the machinery of government than the people who are always in a hurry, who are dissatisfied if results are not reached today or tomorrow, who think that if they cannot, on the instant, see a result accomplished, nothing has been done. The process of civilization is always a process of building up, brick by brick, stone by stone, a structure which is unnoted for years, but finally, in the fruition of time, is the basis for greater progress.[15]

Through her courage and perseverance, Chief Judge Kaye has paved the way for a future of public confidence in an independent and impartial elected judiciary. Under her leadership, New York State has become a national leader in addressing the challenges of electing judges. Moreover, the work and debate sparked by her have created a body of knowledge and ideas that will contribute to public confidence in judiciaries around the country and around the world for years to come. That will be an important part of her legacy.

Endnotes

1. Bob McCarthy, *Doyle Helped Spark Judicial Reform,* Buffalo News, October 8, 2006, 13.
2. Judith S. Kaye, Strong, *Independent Judiciary Is What Will Preserve Freedoms*, N.Y.L.J., May 3, 1999, at S1, col. 1.
3. Archibald R. Murray et al., *The Road to the Judiciary: Navigating the Judicial Selection Process*, 57 Alb. L. Rev. 973, 975 (1994).
4. Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 Yale L. & Pol'y Rev. 125, 133 (2004).
5. *Lopez Torres v. New York State Bd. of Elections*, 411 F.Supp.2d 212 (E.D.N.Y. 2006*), aff'd*, 462 F.3d 161 (2nd Cir. 2006), *cert. granted*, 127 S. Ct. 1325 (2007), *rev'd*, 128 S. Ct. 791 (2008).
6. Judith S. Kaye, Chief Judge of the State of New York, Administrative Board of the Courts, The State of the Judiciary 2003: Confronting Today's Challenges 18 (Jan. 13, 2003), *available at* http://www.nycourts.gov/admin/stateofjudiciary/soj2003.pdf.
7. Commissioners included Hon. Rolando T. Acosta; Lenore Banks; Helaine M. Barnett, Esq.; Richard J. Bartlett, Esq.; Eve Burton, Esq.; Kathy Hirata Chin, Esq.; Barry A. Cozier, Esq.; Evan Davis, Esq.; John Dunne, Esq.; Professor John Feerick; Dolores Fredrich, Esq.; George Friedman, Esq.; Nicole A. Gordon, Esq.; Stewart F. Hancock, Jr., Esq.; Hon. Allen Hurkin-Torres; Michael Klein, Esq.; Hon. James J. Lack; Craig Landy, Esq.; Hon. George D. Marlow; Hon. James M. McGuire; Francis T. Murphy, Esq.; Hon. Judith F. O'Shea; Basil A. Paterson, Esq.; Hon. Renee R. Roth; Assoc. Dean Patricia Salkin; Thomas Schwarz, Esq.; Hon. Toko Serita; Hon. Robert A. Spolzino; Judith Toyer, Esq.

   For a roster of Commission members see Report of the Commission to Promote Public Confidence in Judicial Elections, June 29, 2004.
8. At the time of the Commission's work, New York State had 12 Judicial Districts. A 13th was established in December 2007.
9. N.Y. R. Chief Admin. § 150.0-.9 (2008).
10. *See* Model Code of Judicial Conduct Canon 4 (2007).
11. N.Y. Election Law § 3-102(9-A)(a)-(f) (McKinney 2006).
12. N.Y. Comp. Codes R. & Regs. tit. 22, § 100.5(A)(2)(v), (6) (2008).
13. *New York State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 801 (2008).
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Shaping the New York ADR Landscape

By Fern Schair and Daniel Weitz

A. Introduction—At the Beginning

Daniel Weitz

The transformation of New York's court system under the leadership of Chief Judge Kaye, including the ADR landscape, has been nothing less than remarkable. The number, scope and innovation involved in both pilot projects and mature programs, in every geographic area and every court, are beyond what could have even been imagined at the time she was first appointed Chief Judge.

As far back as 1994 there was "a relative paucity of court annexed ADR programs, especially in courts of civil jurisdiction" in New York State.[1] It was fair to say that New York, a pioneer in so many areas, was not in the forefront of the use of ADR in the courts, with the possible exception of the Community Dispute Resolution Centers Program (described more fully below).

"The transformation of New York's court system under the leadership of Chief Judge Kaye, including the ADR landscape, has been nothing less than remarkable."

In that year, the recently appointed Chief Judge of New York, Judith S. Kaye, commissioned an Alternative Dispute Resolution Project Task Force. Her mandate was to seek to promote expedited and streamlined dispute resolution through a range or menu of options for litigants, while providing processes that were "user-friendly" to litigants.

At that time, the ADR Project was one of many efforts under way to respond to the needs of court users. Some initiatives dealt with improving the efficiency of the litigation process (e.g., committees on case management and review of assignment systems), and many had the specific objective of improving the experience of those coming into contact with the system (e.g., enhanced court facilities, improvements in the jury system, increased information services, "civility" training for court personnel and establishing children's centers in many courthouses).

Prior to Judge Kaye's appointment, there had been a decade of "remarkable growth on the use of ADR by courts at both the federal and state levels" outside of New York.[2] However, the use of mediation and other forms of ADR in New York were extremely limited, with one extraordinary exception—the Community Dispute Resolution Centers Program (CDRCP).

The creation of CDRCP in 1981 could accurately be described as a pioneering effort in New York. Several factors came together to create what has become an enduring concept well before formal ADR court-annexed programs began to be part of the justice landscape: that people should have an informal, quick and inexpensive option for dealing with conflict before judicial intervention became necessary. The Centers, though generally not court-annexed, are supported by New York's Unified Court System (UCS). By funding the creation of such Centers, which primarily utilize community-based voluntary mediators, the court system saw an opportunity to better focus its resources on situations where judicial intervention was necessary for resolution. The entire Community Dispute Resolution Centers Program, modeled on the success of several early not-for-profit community mediation centers, involves funding by OCA for a non-profit CDRCP in each county.[3] The Unified Court System maintains offices in Manhattan and in Cohoes to administer and oversee the varied not-for-profit organizations that carry on this work. In the majority of the cases statewide (nearly 40,000 total each year), the parties are referred to the Center by the courts, law enforcement and public and private agencies.

While CDRCP was well under way in 1994, very little else was occurring on the ADR front in New York State.

B. The New York State Court ADR Project

From 1994 to 1996, the Task Force appointed by Chief Judge Kaye surveyed the rather bleak ADR landscape in New York, and held a series of public hearings around the State. Speakers in Albany, Nassau, New York and Monroe Counties in 1994 were numerous and diverse. The only common thread was a concern that often reached the level of resistance to ADR in any form. More than 100 people, representing hundreds of thousands of lawyers and laypersons, either testified in person or submitted comments in that first round of hearings. Many represented bar associations, business groups, ADR providers, and organizations focusing on women and/or children.[4] Most expressed concerns, some issued alarms; very few voiced support for any effort by the New York court system to expand ADR programs.

Two years later, after a Proposed Final Report was issued, another round of hearings was held. Fewer persons (about 50) and organizations participated, and the level of concern was lowered and focused on specific areas, rather than any movement towards ADR in general. By providing the process and outlet to listen to and address con-

cerns, Chief Judge Kaye's Task Force had been able to see the evolution from the usual blanket resistance to change to the focus on specific areas in which special attention must be paid.

The recommendations in the Final Report, issued in May of 1996, included the following broad areas of action:

- The court system should encourage expanded use of ADR and development of pilot projects around the state;
- All programs should be implemented in accordance with basic statewide standards and should be initially offered at no cost to users;
- Users should be able to choose their own neutral(s) from lists of neutrals compiled by district administrative judges, in accordance with statewide qualifications criteria that emphasize experience, training, and the subscribing to a specific code of ethics;
- A state court ADR program should be created, and should be charged with helping administrative judges to implement and monitor programs, approve training programs and lists of neutrals, and coordinate and disseminate information about all programs around the state.

C. Progress to Date

Building on the momentum of the Task Force and with Judge Kaye's continued leadership, New York's court system embarked on an era of tremendous expansion of ADR. One major reason for this success is the implementation of the last recommendation cited above. The court system has created an Office of Alternative Dispute Resolution and the position of Statewide ADR Coordinator. There are now 10 full-time staff members to assist judges, court administrators and others in the design implementation of ADR programs, thereby applying a cohesive statewide level of technical assistance that can be tailored to that community and its courts. In addition, they are charged with the coordination and dissemination of information about ADR programs statewide, and provide educational programs for members of the judiciary, the Bar and litigants. Another vital part of the mission of that office is to continue to work with and strengthen the Community Dispute Resolution Centers Program, in order to resolve many disputes that might otherwise become civil, family and criminal courts cases.

Consistent with her directive to never rest on accomplishments, Judge Kaye quickly embraced the CDRCP. Under Judge Kaye's leadership and through her unrelenting support of innovative problem-solving approaches, the CDRCP evolved into what is now an international model of a public and private partnership for the provision of mediation for thousands of cases that would otherwise end up in court. ADR staff have been invited to speak all over the United States and beyond to help others develop a system as comprehensive and dynamic as New York's CDRCP.

As noted above, each year nearly 40,000 cases are handled by the CDRCPs serving more than 96,000 individuals. These cases average roughly six weeks from time of filing to disposition when handled through the CDRCP—a minimal cost to the state, when compared with the more traditional court process. Annual exit surveys of parties who went through CDRCP mediation show satisfaction rates as high as 96%, including parties whose cases did not result in an agreement. Overall, resolution rates for CDRCP matters typically reach 80% each year. In 2005, the CDRCP promulgated statewide ethical guidelines for its more than 1,500 volunteer mediators. In 2006, it launched a Mediator Ethics Advisory Committee to provide guidance to CDRCP mediators dealing with ethical questions that might arise in their cases. Opinions are available on the UCS Web site, and the committee annotates the standards of conduct in light of new committee opinions.

"Under Judge Kaye's leadership and through her unrelenting support of innovative problem-solving approaches, the CDRCP evolved into what is now an international model of a public and private partnership for the provision of mediation for thousands of cases that would otherwise end up in court."

Another area of great expansion has been the use of mediation in the Commercial Division. Given her prior experience as a commercial litigator, it is not surprising that Judge Kaye would recognize the usefulness of mediation in complex commercial matters. In 1995, only a year after she became Chief Judge, the first mediation program for commercial cases was launched in New York County in conjunction with the launch of the innovative Commercial Division. Today, either mediation is available or new programs are in the final stages of implementation in New York, Nassau, Suffolk, Westchester, Kings, Queens and Erie Counties. These Commercial Division courts have their own rosters of highly trained and experienced mediators, many of whom are specialists in particular areas of commercial litigation. The mediators' qualifications are available to the public and the courts in easy-to-read charts on the Commercial Division's Web site that identify these specialties, in addition to other basic biographical information. The Uniform Commercial Division Rules permit a Justice of the Division to send the parties to mediation at any time, whenever he or she feels that an opportunity for settlement negotiations outside the presence of the court may be warranted. The success rate of these mediations has been high; for example, in New York County in 2007, 318 cases were referred to mediation,

and of those, 56% settled. Even these numbers understate mediation's role in effectively settling cases. Lawyers and litigants alike have noted that mediation can often lay the seeds for a later settlement before trial, often well after the mediation session has concluded.

"New York has emerged as a leader in providing mediation for families and children who are otherwise unable to access quality mediation on their own."

Although these programs initially relied solely on volunteer mediators, acceptance of commercial mediation has reached the point where mediators are now permitted to receive compensation, paid jointly by the parties, after satisfying a minimum amount of pro bono mediation and giving the parties an opportunity to decide whether they wish to continue the process. This recent policy shift is further evidence of the growth and acceptance of mediation in commercial matters. The New York County Commercial Division also developed Standards of Conduct for ADR Neutrals, providing an added measure of quality assurance and guidance for neutrals serving on rosters. These standards also provide a model for other Commercial Division courts throughout the state.

Another previously unimaginable example of ADR in New York is the Eighth Judicial District's Civil ADR protocols. These protocols were the first, and to date only, comprehensive combined rules for a multi-option ADR program in New York State covering general civil, commercial, matrimonial and family matters. The court's menu of ADR options include mediation, neutral evaluation, arbitration and parent coordination. The program was named in memory of Martin Violante, who successfully resolved thousands of cases as a staff ADR neutral in Erie County.

Yet another example of the increase in scope of ADR services in New York is the Attorney-Client Fee Dispute Resolution Program, which provides arbitration and in some cases mediation for fee disputes between attorneys and their clients. This program is a collaboration between the court system and the organized Bar in that dispute-resolution services in many counties are provided by the local bar association. For those smaller bar associations that are unable maintain the program themselves, the local judicial district provides the service.

Notwithstanding the success in developing ADR programs, such as the Civil ADR initiatives described above, nowhere has there been greater proliferation of ADR in New York than in the area of matrimonial and family-related matters. In particular, New York has emerged as a leader in providing mediation for families and children who are otherwise unable to access quality mediation on their own. This is no doubt in large part the result of Judge Kaye's tireless efforts to implement reforms in the way in which the courts respond to the needs of families and children.

Each year, thousands of family-related disputes are successfully resolved through mediation while avoiding the need for protracted litigation. Custody and visitation mediation is available statewide at little or no cost to litigants in family court. Mediation is also available for parent-teen/PINS cases, child permanency cases, and soon we will extend mediation services to juvenile delinquency cases as well.

Several Supreme Court divorce mediation programs have been launched, or are soon to be launched, including those in New York, Nassau, Erie, Suffolk, Orange and Queens counties; and innovative ADR programs such as Parenting Coordination for high-conflict custody disputes have been developed in Nassau and Erie counties. In her 2006 State of the Judiciary, Judge Kaye announced her intention to create the nation's first-ever Court-Based Collaborative Family Law Center, which will open this fall in New York County. The Center will provide collaborative attorneys, divorce coaches and financial-planning guidance to couples seeking to limit the trauma, delay and costs associated with the process of divorce in New York State.

Much of the success in the area of family ADR has been achieved after overcoming significant early resistance to ADR. Valid concerns were raised by domestic violence advocates, among others, regarding the dangers posed to victims of domestic violence in mediation or the need to safeguard the interests of the non-moneyed spouse in mediation. Through a collaborative program design between the bench and bar, and the use of effective screening mechanisms to prevent inappropriate referrals to mediation, the court's family-related ADR programs have successfully balanced the need for safety and informed decision making while offering a viable alternative to litigation.

A fabulous example of what can be done through collaboration between the bench and bar is the domestic violence screening tool developed in New York City Family Court. The UCS ADR Office, in partnership with the ADR and Domestic Violence Subcommittees of the NYC Family Court Advisory Council, developed a uniform screening tool to assess the appropriateness of cases referred for mediation at CDRCPs located in New York City. This two-year collaboration resulted in the promulgation of the screening tool in late 2003 along with a full day of training for screeners in adapting to the new tool. A training curriculum was developed which continues to serve as a resource to screeners as they utilize the screening tool. A follow-up training was held in 2005 along with the implementation of a few revisions to the tool. This effort addressed concerns about inappropriate referrals to mediation and also resulted in early identification of po-

tential domestic violence victims who could be connected with appropriate resources.

"On June 18, 2008, the Administrative Board of the Courts promulgated Part 146 of the Rules of the Chief Administrative Judge, establishing statewide guidelines for the qualifications and training of mediators and neutral evaluators serving on court rosters."

Finally, one of our most recent developments is a sure sign of how far New York has come since those days of great resistance to ADR more than 10 years ago. On June 18, 2008, the Administrative Board of the Courts promulgated Part 146 of the Rules of the Chief Administrative Judge, establishing statewide guidelines for the qualifications and training of mediators and neutral evaluators serving on court rosters. This new rule reflects the evolution of ADR in New York, from our early pilot programs where the approach was that of "let a thousand flowers bloom" to today, where programs have reached the point of maturity and where consistent standards can be achieved.

ADR in New York has come a long way under Judge Kaye's leadership. From the roots of the CDRCP in 1981 and the New York County commercial mediation program in 1995 to the Comprehensive ADR Program for civil cases in the Eighth Judicial District, the first court-based Collaborative Family Law Center, or the promulgation of Part 146, New York has emerged as a leader in ADR with still more room to grow. For this, we can thank Judge Kaye and her vision of promoting ADR through collaboration among the bench, Bar and public, which enabled tremendous achievements in the New York State courts.

Endnotes

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3. *See*, N.Y. Judiciary Law Art. 21-A (§ 849-b or 849-e) (McKinney 2003).
4. Judge Judith Kaye, *supra* note 1, at 97–105.

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Chief Judge Kaye and the Commercial Division

By Robert L. Haig

I have been asked to write this article about Chief Judge Kaye's contributions to the Commercial Division of the Supreme Court of the State of New York. As most readers already know, an enormous amount has been written and said about the Commercial Division during the past 13 years. Frankly, it's a real challenge to tell you something about the Commercial Division that you haven't already heard at least several times before. Legal newspapers and bar journals throughout the United States have showered superlatives on the Commercial Division in numerous articles. I'm not going to repeat the thoughtful analyses in those articles because many readers have probably already read them.

In thinking about this article, I considered comparing the Commercial Division to the United States District Court for the Southern District of New York or the Delaware Chancery Court. The mere fact that the Commercial Division now plays in those major leagues is a great compliment to it. However, I concluded that such a comparison might not only be impolitic and get me in trouble, but it would also be comparing apples and oranges. The more I thought about it, it seemed the most meaningful and fair way to evaluate what the Commercial Division has accomplished over the last 13 years and what it means to us now is to compare it to commercial litigation in New York State prior to the creation of the Commercial Division in 1995.

There is another reason why focusing this article on a comparison of the Commercial Division to the Southern District of New York or the Delaware Chancery Court is not as helpful as it could be. That is because both the Southern District of New York and the Delaware Chancery Court evolved and developed over more than 200 years. Literally hundreds of judges contributed to the success of those two great courts. In contrast, the Commercial Division has evolved over 13 short years and there was only one person who was truly indispensable to its extraordinary success. That person was Chief Judge Judith S. Kaye.

Commercial Litigation in New York Before 1995

Prior to 1995, almost everyone in the New York State court system wanted to handle commercial cases expertly and efficiently. They meant well and wanted to do the right thing. But there were too many cases and not enough money and other resources. As a result, the court system's ability to handle commercial cases appropriately had become significantly impaired.

Lawyers who had commercial cases in the New York courts prior to 1995 usually did not want to be there. They often looked longingly to the federal courthouses or private ADR for salvation. At a preliminary conference or an oral argument of a motion or a trial, the judge sometimes didn't seem to have the time to try to understand the complexities and nuances of a commercial case. When lawyers made a motion for summary judgment or to dismiss the complaint in a commercial case, they worried that the motion might be denied just because the papers were voluminous and the court lacked the time to separate the wheat from the chaff. When lawyers needed more discovery, they often had to devote much time to non-productive litigation about the form of demands for bills of particulars and about the timing and specificity of notices for discovery and inspection of documents. No matter how badly an adversary misbehaved, delayed or obfuscated, nobody ever seemed to care or to do anything about it.

In 1995, the numerous other demands on the court system often prevented business cases from being handled efficiently, cost-effectively and in a businesslike way. And speaking of business, many corporate clients hated having to litigate in the New York State courts. Clients often wanted to discuss with their lawyers the other places that they could bring commercial cases and sometimes directed their lawyers to avoid the New York State courts at all costs. If a commercial case ended up in the New York courts, it was often hard for a lawyer to explain to his client why it cost so much and why so frequently the case didn't seem to advance to a logical conclusion in a reasonable amount of time. Indeed, lawyers worried that the inexplicable events that sometimes happened in commercial cases prior to 1995 might be perceived by their client as evidence of their own professional shortcomings. Everything seemed to be so process oriented and no one except the lawyer and his client seemed to care about finding the solution to the problem.

When clients finished a commercial case in the state courts prior to the establishment of the Commercial Division, they often did not feel good about the experience. Indeed, clients often did not feel good about their lawyer. As a result, commercial litigators sometimes did not feel good about their profession and about the process to which they were devoting their professional lives. Lawyers were not always happy and proud to be commercial litigators.

The Birth of the Commercial Division

The gloomy outlook for commercial litigators in New York State courts started to change in the early 1990s. In 1993 and 1994, four new Commercial Parts had been es-

tablished in Manhattan. A separate judge was assigned to each Part to preside over commercial cases exclusively. After the initial success of the Commercial Parts, Chief Judge Kaye began to envision a more permanent structure. At the same time, the Commercial and Federal Litigation Section of the New York State Bar Association presented its report on establishing permanent commercial courts in New York. Responding to the Section's recommendation, Chief Judge Kaye appointed a Commercial Courts Task Force to create a Commercial Division.

Each of the meetings of the Task Force took place in the conference room in Chief Judge Kaye's New York City chambers. Judge Kaye attended every minute of every meeting. She also made key decisions during the meetings. For example, an issue was raised during the meetings as to whether the new Division should be a "pure" business court or a complex litigation court which would handle both commercial and tort cases. Another key issue was whether the new court would be established by constitutional amendment, statute, or court rules or directives. Other significant issues were how a "commercial case" would be defined and what procedures would be used for assigning cases to the Commercial Division.

Judge Kaye's decisions on these fundamental issues established the foundation from which the Commercial Division evolved. In addition, as discussed later in this article, the Commercial Division has become the model for most of the business courts that have been created throughout the United States over the last 13 years. Accordingly, as a practical matter, Judge Kaye's decisions during the meetings of the Commercial Courts Task Force in 1995 established the framework for the modern business court in the United States.

In November 1995, the Commercial Division was launched. As *The Wall Street Journal* reported on October 11, 1995, "While several other states have been pushing for trial courts devoted exclusively to business litigation, New York is the first in which a general trial court has implemented such a program."

The Commercial Division's Growth

In 1995, the Commercial Division had courts only in New York and Monroe counties. However, from this modest beginning, the Commercial Division soon became a striking success, and as early as its first anniversary, the Commercial Division was receiving accolades from Bar associations and business organizations. Its immediate success must be seen in large part as a fulfillment of the original goals set for the Commercial Division by Chief Judge Kaye: the creation of a court as sophisticated as the business environment in which it was located, and a court flexible enough to allow for constant improvement and innovation, particularly in the areas of technology and court administration.

From this auspicious beginning, the Commercial Division continued to improve, particularly in the field of court technology. Over the years, the Commercial Division has introduced New York State courts to the capability to present evidence electronically, computer monitors in the jury box, real-time court reporting, and electronic transcripts. The Commercial Division's case management software and its database for the administration of ADR have enabled its judges to oversee cases with greater efficiency. More recently, the Commercial Division has begun to experiment with e-filing by launching pilot programs across the state. The Commercial Division in New York County has gone even further by instituting a policy that all cases filed in the county will presumptively be e-filed matters. Adapting the courtroom to advances in technology has enabled the Commercial Division to streamline cases and speed up trials, which is of obvious benefit to both litigants and the court itself.

Perhaps less visible than the advancements in technology—but no less significant—is the Commercial Division's sophisticated and evolving body of case law. This highly respected jurisprudence has been authored by judges who were selected for the Commercial Division based on their experience and aptitude in managing complex commercial cases, and their work in the Commercial Division has allowed them to hone their expertise in commercial law. The fruits of their labors—their published decisions—are available on the Commercial Division's Web site and are also published four times each year in *The Commercial Division Law Report*—required reading for any serious litigator practicing commercial law in the courts of New York.

Under Chief Judge Kaye's leadership, we have also witnessed advancements in the Commercial Division's administration of cases. Perhaps the most obvious improvement in administration was the Commercial Division's adoption of its Uniform Commercial Division Rules in 2006, which relieved lawyers of the burden of being familiar with the specific and idiosyncratic rules of multiple courts. But the strength of the Uniform Rules lies in more than just their uniformity: they also demonstrate how nimbly the Commercial Division has adapted to an ever-changing legal landscape, especially with regard to the daunting perils of e-discovery. Here, the Rules address the pitfalls of conducting discovery in an electronic age, where evidence can be hiding in literally dozens of far-flung locations.

Perhaps most important, the organization of the Commercial Division allows judges to manage cases with the attention and care unheard of in other forums. The result is that judges can move cases along at an efficient pace while still allowing enough time on the docket for litigants to thoughtfully reflect on developments in their cases.

During many of the last 13 years, Chief Judge Kaye convened annual "celebrations" of the anniversary of the Commercial Division at the New York County Supreme Courthouse at 60 Centre Street in Manhattan. The speak-

ers at those celebrations included Mayor Bloomberg, chief executive officers of major corporations, presidents of business organizations, and leaders of Bar associations. The celebrations provided useful information about the Commercial Division to delegations from other states that were considering the creation of business courts. They also provided additional opportunities for Chief Judge Kaye to articulate her vision for the Commercial Division and to remind all involved of the high standards to which she holds it. For example, as Judge Kaye stated at the celebration of the 10th anniversary of the Commercial Division in November 2005, "[f]rom day one, our mutual objective was a justice system equal to New York's status as a commercial and financial center, and a leader in the development of commercial law."

For those who have litigated in the Commercial Division, its improvements are palpable and obvious. For those who have not, the success of the Commercial Division speaks for itself: since its inception in 1995, the Division has expanded to 22 Parts serving Albany, Kings, Nassau, New York, Onondaga, Queens, Suffolk, and Westchester counties, and throughout the Seventh and Eighth Judicial Districts. Lawyers know that the Commercial Division is the premier forum for litigating complex commercial disputes, and so does the business community: it is no accident that so many contracts drafted over the past decade have specified the Commercial Division as the forum of choice in the event of litigation.

Chief Judge Kaye has never been content to rest on her many laurels—and neither has the Commercial Division under her leadership. In 2005, Judge Kaye conceived of using a series of focus groups throughout New York State to elicit suggestions for improvements in the Commercial Division. Focus groups were thereafter conducted in late 2005 and early 2006 in five locations around the state. The participants included in-house counsel of corporations, commercial litigators and judges. Although the focus groups produced a number of ideas for improving the Commercial Division, it soon became apparent that the Commercial Division's constituents were, for the most part, satisfied with its operations. Accordingly, the focus groups devoted the majority of their attention to identifying Commercial Division innovations that had proved successful and should therefore be considered for exportation to other parts of the New York State court system. These efforts of the focus groups resulted in a report in August 2006 to Judge Kaye outlining 12 major Commercial Division innovations that might be used elsewhere. Consideration of those proposals is under way in New York. In addition, the Commercial Division Focus Groups Report has been distributed throughout the United States to judges and lawyers who are interested in creating and improving business courts.

The Success of the Commercial Division

In 13 short years, Chief Judge Kaye has presided over a Commercial Division that has transformed itself from a concept, to an experiment and, ultimately, to the model for how cases get managed in New York State. It is a testament to Chief Judge Kaye's vision and leadership that the Commercial Division has become a template for other courts in the state and the envy of courts across the country.

Are we better off now in the Commercial Division than we were in the years before 1995? That's an easy question to answer. I have never met a commercial litigator or a corporate client who doesn't think that the Commercial Division is an enormous improvement over what took place before 1995.

Since 1995, the Commercial Division has led an emerging national and international trend toward creation of business courts. Depending on exactly how you define a business court, there are about 17 other states that now have business courts. There are more than 10 additional states in various stages of considering creation of commercial courts. Many of these other states are considering the model of the Commercial Division. Everyone knows who the leader is.

One major reason for the Commercial Division's leadership role is the ability and expertise of the Judges assigned to the Commercial Division—an assignment process that has engaged Judge Kaye's interest since its inception. While other jurisdictions with business courts have studied rules and procedures, agonized over the definition of a commercial case, worked on various commercial ADR programs, and considered technology to facilitate the efficient disposition of commercial cases, I think that everyone in these other jurisdictions would agree that the single most important factor in determining the success of a commercial court is the ability, expertise and productivity of the judge who sits there.

You can have the best rules, procedures, operating statements, ADR programs and technology in the world but if you don't have the right judge, your commercial court simply will not succeed. And, the special circumstances and problems of the New York courts confirm and amplify the need for expert commercial judges. It is hardly luck that the Commercial Division judges have been so good: their appointments have been the product of a selection process overseen by Chief Judge Kaye.

So why and how is the Commercial Division so good? Is there some secret which explains its success?

One important reason is the Commercial Division's efficiency and productivity under difficult circumstances. The Commercial Division not only issues good decisions, it issues lots and lots of them—and it has to, because new cases are constantly being filed. The success of the Commercial Division is particularly remarkable in light of its extraordinary case loads and the complexity and variety of the cases that come before it. The one statistic that startles judges and lawyers in other states is the fact that 5,000 or 6,000 new cases are filed each year in the Com-

mercial Division in New York County alone. I don't have space to discuss the Commercial Division's other statistics but the numbers are extremely impressive—particularly the reductions in the average number of days required to dispose of cases and the increase in the percentage of settlements, especially at the beginning of cases.

The Commercial Division has made contributions that others have characterized as follows: "a rising tide raises all boats." The work done by the Commercial Division has benefited the entire New York court system. Complex business cases have been removed from other parts of the court system, allowing those parts and the entire system to function more efficiently. The Commercial Division has also served as a laboratory for the rest of the court system. In addition, the Commercial Division has contributed to the growth of the law in a way that provides guidance for other judges and for lawyers and businesses seeking to predict the legal consequences of their business decisions. A substantial body of commercial law once again is being generated by the New York State courts—and many of these cases come from the Commercial Division.

Reactions to the progress made by the Commercial Division have been almost uniformly positive. At the Commercial Division's first anniversary, the Chair of the American Bar Association's Section of Business Law described the Commercial Division as a "magnificent accomplishment."[1] The *National Law Journal* reported that "the Commercial Division has received rave reviews from practitioners and business leaders alike. . . . Cases are rigorously managed, with rapid disposition of motion practice, realistic and practical scheduling, and trial dates set early in the case to promote efficiency."[2]

Other reactions have been even more effusive. At the eighth anniversary celebration of the Commercial Division in 2003, Kathryn S. Wylde, President and CEO of the Partnership for New York City, showered this praise on the Commercial Division:

> Just ten short years ago it was hard to imagine that the New York state courts would be viewed as *the* place for business to go for fair, efficient and effective dispute resolution. Today, the Commercial Division handles complex, sophisticated, and cutting-edge cases from an array of New York–based industries including Wall Street, media, the arts, international finance, and the Internet. Through sound administration, the use of expert judges and a capable court staff, the Commercial Division helps businesses resolve disputes expeditiously and has established a reputation for fairness, expertise, and predictability so critical to promoting confidence in the adjudicative process. Indeed, we all agree with Chief Judge Kaye's assessment that the Commercial Division is a "world class forum for the resolution of business disputes."[3]

Finally, perhaps most important is the fact that the Commercial Division has given the rest of the New York Court system a glimpse of what is possible when it tries really hard to make things better. Thirteen years ago, the prevailing attitude in the New York courts was that there were too many cases and not enough money and that no improvement was possible. Thirteen years later, there are still too many cases and not enough money; however, people no longer think that improvement is impossible. Instead, the Commercial Division is a literally world famous facility for the resolution of business disputes that is studied and imitated by judges and lawyers throughout the United States and many other countries as well.

The Commercial Division is renowned for its thoughtful decisions, its prodigious productivity, its willingness to work with lawyers to get the job done together and to allow all of us to get on to the next case, and its contributions to the rest of our court system.

Conclusion

Before 1995 commercial litigators and their clients occasionally felt anger about the New York court system, they sometimes felt despair, and they frequently felt frustration. Compare and contrast those feelings with the way commercial litigators and their clients feel now. Today we all feel respect for the Commercial Division and gratitude and appreciation for what it has done for us and for the State of New York. We are proud of it and we're glad it is in our state and not someplace else. Just think about it! In 13 years we have gone from anger, despair and frustration to gratitude, pride and respect. In fact, the Commercial Division has taken commercial litigators from professional despondence to professional happiness in 13 short years. That's simply astounding and marvelous. And there is only one person who has been indispensable in getting the Commercial Division to where it is today. That person is Chief Judge Judith S. Kaye.

Endnotes

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Reforming New York's Courts: Chief Judge Kaye and the Special Commission on the Future of the New York State Courts

By Carey R. Dunne

It is an old adage that "court reform is not for the short-winded." More importantly, it is not for the short-sighted, especially in New York, which has for generations defied numerous attempts to achieve structural and substantive reform. However, thanks to the far-sightedness and tireless efforts of Chief Judge Judith S. Kaye, the groundwork has finally been laid for long-term structural and substantive changes to our state and local court systems.

The New York State Court System: Chief Judge Kaye's Efforts at Reform

New York State has the most archaic and bizarrely convoluted court structure in the country. Antiquated provisions in our state Constitution create a confusing amalgam of trial courts—an inefficient and wasteful system that causes harm and heartache to all manner of litigants, and costs businesses, municipalities and taxpayers in excess of half a billion dollars per year. Other states have long ago streamlined their court systems to make them efficient, attractive to business and sensitive to the needs of litigants. New York, on the other hand, continues to operate a blizzard of overlapping courts: supreme courts, county courts, family courts, surrogate's courts, a Court of Claims, New York City criminal and civil courts, district courts, city courts, and town and village justice courts.

For decades, commissions, scholars, legislative panels and others have decried the inefficient and wasteful structure of the New York courts, and have advanced myriad proposals for reform. Time after time, these efforts have stalled, not for lack of popular support, but for lack of political will.

Despite this history of political intransigence, Chief Judge Kaye has long regarded it a personal mission to restructure and modernize the New York State courts. In March 1997, Chief Judge Kaye and then Chief Administrative Judge Jonathan Lippman proposed a concurrent resolution to amend Article VI of the New York State Constitution (the "1997 Proposals") for the purpose of restructuring and simplifying the New York trial courts.[1] The 1997 Proposals sought to reconfigure the state's 11 trial courts into a two-tiered structure, consisting of a Supreme Court with at least five divisions—family, commercial, probate, state claims and criminal—and a statewide system of District Courts with jurisdiction over misdemeanor criminal cases, housing cases, and civil cases involving claims of $50,000 or less. The amendment also proposed the creation of a Fifth Judicial Department to relieve the caseload burden on the state's appellate court system, and the elimination of the limitation on legislative authority to increase the number of Supreme Court Justices.

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In April 1997, the 1997 Proposals were introduced in a concurrent resolution in the New York State Senate, and in September 1997, the state Assembly Judiciary Committee announced an alternative set of proposals that included elements of the Chief Judge's plan.[2] Despite a series of public hearings and much support for the proposals from good government groups and editorial writers across the state, the 1998 legislative session closed without a vote in either chamber on the 1997 Proposals.

Nonetheless, in 2002, Chief Judge Kaye again attempted to generate support for her restructuring plan by announcing a modified version of the 1997 Proposals. The 2002 plan incorporated all of the provisions of the 1997 Proposals but did not provide for the merger of the Surrogate's Court into the Supreme Court, which had proved to be particularly controversial. Still, no legislative action was taken on the 2002 version of the Chief Judge's plan either.

The Special Commission on the Future of the New York State Courts

In July 2006, Chief Judge Kaye took a different approach and established the Special Commission on the Future of the New York State Courts, giving it a mandate to study and make recommendations in the area of court restructuring.[3] In her 2006 State of the Judiciary address, the Chief Judge said:

> The Commission will be asked to look at systems across the nation for ideas, and to prepare a court structure that is free of barriers that force the unnecessary fragmentation of courts and cases, that is user-friendly, has the benefits of both specialization and simplicity and that is accessible to all New Yorkers.

The Commission was initially comprised of 30 members, including 14 judges and former judges from the New York State Court of Appeals, the Appellate Division, the Supreme Court (both elected and Acting Supreme Court Justices), the Court of Claims, the Surrogate's Court, the Family Court, the Civil and Criminal Courts of New York City, the upstate City Courts, and the New York City Housing Court. It also included, from across the state, former legislators, academics, practicing lawyers, and representatives of the business community.

The Commission's First Report: Court Restructuring

The Commission undertook a comprehensive review of the state court system. For seven months, the Commission studied the voluminous record of prior court restructuring efforts, gathered and analyzed data on court filings and productivity, conducted a financial analysis of the impact of potential reform, met with judges, legislators, politicians, business leaders, Bar associations, good-government organizations and others from around the state, and deliberated extensively as a group.

In February 2007, the Commission issued its first report, entitled "A Court System for the Future: The Promise of Court Restructuring in New York State."[4] In connection with that first phase of its work, the Commission found that the structure of New York's state-funded court system—which currently consists of a maze of 11 separate trial courts—imposes significant harm and costs on its citizens. First, the complex and overlapping structure of the trial court system forces litigants to litigate cases simultaneously in separate courts. For example, individuals and both large and small businesses must litigate in both Supreme Court and the Court of Claims whenever the state and a non-state party are named as parties in a personal injury, medical malpractice, or commercial dispute. Moreover, families in crisis have cases that are regularly fragmented among Supreme Court, Family Court, and a criminal court for separate adjudication of matrimonial, custody and domestic violence matters.

Second, the Commission found that the fragmented nature of the trial courts prohibits the state-funded court system from efficiently managing cases. For example, for jurisdictional reasons, a backlog that develops in one court cannot now readily be ameliorated by transferring cases from that court to an underused but perfectly capable court across the street. Because of this fragmentation, in millions of cases each year people waste countless hours making redundant court appearances, filing duplicative papers and briefs, and suffering through delays caused by courthouse backlogs and inefficiencies.

Third, the report concluded that these inefficiencies have significant fiscal implications to individuals, businesses and taxpayers. The Commission conducted an economic analysis of the costs of the current structure and the substantial savings that would result if the court system were simplified. The report included a detailed study estimating that approximately $502 million in annual savings would be realized if court reform is achieved. Of this total, $443 million in annual savings would be realized by individual litigants, business litigants, employers, municipalities and others. In addition, the Commission estimated that a further $59 million would be saved in the court system's annual budget. The Commission's methodology in conducting this financial analysis, and its conclusion, were independently verified by the National Center for State Courts.

In an attempt to reform this inefficient and wasteful structure, the Commission proposed a sweeping consolidation of the state-run courts. Specifically, it recommended the consolidation of the state's major trial courts into a simple two-tiered structure consisting of a single Supreme Court and a statewide network of District Courts. This would be accomplished through a merger of the current Court of Claims, the County Courts, the Family Courts and the Surrogate's Courts into the Supreme Court and the merger of the current Civil and Criminal Courts in New York City, the Nassau and Suffolk District Courts, and the 61 City Courts outside of New York City into a statewide network of District Courts. Although different in certain respects, the core elements of the plan very much resembled the 1997 and 2002 proposals that had been advanced by the Chief Judge.

In her 2007 State of the Judiciary address, Chief Judge Kaye endorsed the Commission's report, and urged the adoption of the constitutional amendment that had been proposed and drafted by the Commission. The Commission's proposals were also supported by numerous good-government groups and bar associations from across New York State. Former Governor Eliot Spitzer later endorsed the plan, and on April 27, 2007, he proposed to the Legislature a comprehensive constitutional amendment to restructure New York State's courts along the lines that the Commission had recommended. While the proposal did not advance in that legislative session, the work that has been commissioned by Chief Judge Kaye on this subject has now created a case for structural reform that is the most comprehensive and compelling in the state's history.

The Commission's Second Report: Town and Village Justice Courts

The Commission's first report made clear that it had not had sufficient time to study and make recommendations about the *other* court system in the state: the town and village courts, also referred to as the Justice Courts, which actually outnumber those in the state-run system, with more than 1,250 in 57 counties. These are purely local courts, each funded and operated by its own municipality, and the judges who sit in them (most of whom work part-time) are typically elected by the individual towns or villages in which they sit. In a tradition dating back to colonial times, these town and village justices (formerly known as justices of the peace, police justices or magistrates) need not be attorneys, and today more than 70% of them are non-lawyer representatives from their local communities. Statewide, there are over 50% more of these justices (more than 1,800) than the number of judges in the state-run system. As the Commission noted in its first report:

> While they are controversial, it is clear that these courts play an enormously important role in the state, particularly in suburban and rural regions, and, given this importance, it is our view that additional time and study is needed before structural or other reforms can be evaluated. To this end, we have proposed, and the Chief Judge has agreed, that the term of our Commission be extended, so that we may conduct an appropriate review of this important issue.[5]

Accordingly, from April through October 2007, the Commission conducted the most extensive review of the Justice Courts in New York State history. To provide further expertise for this new phase of work, four town justices (three current and one former) were added to the Commission, including the current and immediate past presidents of the State Magistrates Association (the statewide association of town and village justices), and a non-attorney justice. As part of its fact-finding exercise, groups of Commission members and staff visited nearly 100 Justice Courts in every judicial district, literally criss-crossing the state, from suburban areas to the most rural regions, and dozens of communities in between.

In these visits, Commission members observed proceedings, inspected facilities and learned about court operations. In town-hall style meetings across the state, they met with hundreds of town and village justices, and dozens of their clerks, to gauge their experience, understand their issues and needs, and listen to their suggestions and critiques of the system. They also met with district attorneys, public defenders, law enforcement representatives, probation officers, town supervisors, village mayors, and private practitioners in virtually all of the counties the Commission visited. In addition, the Commission held four public hearings (in Albany, Ithaca, Rochester and White Plains), where it heard testimony and received submissions from 85 witnesses representing a wide range of interests.

In September 2008, the Commission delivered to Chief Judge Kaye a nearly 300-page report detailing its findings and proposed reforms for the Justice Courts. In this second report, the Commission identified four broad categories of findings: those concerning the organization of the Justice Courts; the qualifications of the Justices; the courts' facilities and resources; and the role of fines and funding in the courts. In addition, it advanced specific proposals for reform, accompanied by model legislation that could be used to implement these proposals. A summary of these findings and the Commission's proposals follows.

Findings of the Commission

Findings Regarding the Organization of the Justice Courts

For hundreds of years, Justice Courts have grown organically, on an *ad hoc* basis, without any plan to distribute courts in a manner that is efficient or designed to fit the needs of New Yorkers. As a result, Justice Courts are sprawled around the state, with many counties supporting a glut of courts, many of which sit in overlapping jurisdictions, and some of which coexist in a single building or in redundant facilities across the street.

There are serious economic and quality-of-justice consequences to this vast array of courts, and the overabundance of Justice Courts creates enormous burdens on taxpayer-funded resources at the local, county and state levels. Localities are forced to bear the costs of maintaining duplicative court facilities, judicial and non-judicial salaries, and security arrangements, while county governments must ensure that there are enough district attorneys, public defenders and probation representatives available to appear in every Justice Court within the county's jurisdiction. If there were fewer Justice Courts, these burdens could be substantially reduced, and the state could provide more targeted and meaningful support to upgrade the facilities and security of the courts that remain. In short, state assistance to, and oversight of, the Justice Court system could be achieved more practicably and effectively in a system less fragmented than the current jumble of more than 1,250 courts.

In addition, given the realities of modern travel, this extensive web of local courts is no longer necessary. The Commission found that the vast majority of litigants who are hauled into a Justice Court today do not even reside in the locality in which the particular court sits; in fact, in 40% of the cases that the Commission examined, one or more of the litigants resided outside the *county* in which

the Justice Court sat. This is because the dockets of most Justice Courts are filled with Vehicle and Traffic Law violations and criminal charges that often relate to offenses involving a vehicle. As a result, almost by definition, most of the cases heard before the Justice Courts involve individuals who, in some fashion, have access to a vehicle, and for whom there is little practical difference whether a court is located in his or her town, or a few miles away.

At the same time, the Commission concluded that a wholly state-run "District Court" concept—while perhaps ideal in principle—is not politically or financially realistic as a statewide replacement for the Justice Courts. This is because of the significant support that exists among stakeholders across the state for maintaining a system in which local justice is locally administered. In addition, the Justice Courts vary so vastly in their size, their dockets and the populations they serve that it would be impossible to impose a statewide "one size fits all" approach that would satisfy this demand for local control. Finally, creating an array of District Courts that would provide the necessary local coverage would constitute a huge cost to the state. For these reasons, it became clear to the Commission that the demands for local justice are not politically or practically amenable to a wholly state-run system.

Findings Regarding the Qualifications of Justices

Many New Yorkers are surprised to learn that the large majority of the state's local justices have never been to law school. Recent articles on the topic point out that other professions—from hairstylists to massage therapists—arguably require more training and certification than that which is required to sit as a justice in a town or village court. Many of the Commission members shared this concern, and believe that—in a perfect world—all judges would be attorneys, particularly in the most serious and sensitive categories of cases.

At the same time, as with the topic of District Courts, the Commission's extensive review led it to the conclusion that effective reform could be achieved without resorting to the politically and pragmatically unrealistic step of requiring all judges to be attorneys. First, the majority of town and village justices are hardworking and experienced, are adequately dispensing justice, and are otherwise performing at an acceptable level. In addition, virtually all of the many non-attorney justices with whom the Commission met praised OCA's recent initiatives to improve judicial education and training, and are eager for more training and enhanced resources.

Second, it is clear that, in many counties, there is no realistic alternative to the non-attorney justice. Many critics of the current Justice Court system have made the assertion that, if properly motivated, sufficient numbers of attorneys could be persuaded to serve in Justice Court positions in all areas of the state. The Commission, however, concluded that this simply is not feasible as there are hundreds of towns and villages that have few attorneys in residence, and as no reasonable system of inducements would prompt sufficient attorneys to relocate or otherwise assume all of these town and village positions. As a consequence, in many areas of the state, the current Justice Court system, without non-attorney justices, would provide no local justice at all.

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Findings Regarding Justice Court Facilities and Resources

In its travels around the state, the Commission visited many courthouses that were completely dilapidated and not fit for the conduct of judicial proceedings. It also visited sleek and modern courthouses that were virtually indistinguishable from those in the state-paid system. But the majority of the Justice Courts fell somewhere in between these two ends of the spectrum, and were simply trying to make the best of their imperfect conditions. Some of these courts operate in large facilities but are overwhelmed by huge dockets and lack the funding to handle cases appropriately. More often, they are smaller courts that share space in offices with other town or village agencies, making arrangements as necessary during court hours to provide a modicum of security and order. Most have computers, at least part-time clerks, and access to interpreters and recording capabilities when necessary. In short, the majority of the Justice Courts are operating in facilities that make it difficult to dispense appropriate justice, but which, in many cases, are capable of being improved. The question is how to bring such courts into the modern age.

In addition to visiting many courts that did not have adequate facilities, the Commission encountered a number of courts that were unsafe for a variety of reasons. For example, the Commission visited courts that were virtual firetraps, with no emergency exits and which, on court nights, were routinely filled with litigants, court personnel and spectators well beyond the legal capacity. The Commission also visited a great many courts that were completely inaccessible to the disabled; in some courthouses, cases involving the disabled are heard in hallways or other inappropriate settings. Likewise, with respect to the provision of security officers or detection of weapons, nearly all of the Justice Courts require improvement. Even in the courts with better facilities, security arrangements are often lax or non-existent, and justices, staff, litigants and the public are exposed to dangers on a daily basis.

Findings Regarding the Role of Fines and Funding

Not surprisingly, the problems that exist with the Justice Courts almost all come down to money. The largest and most effective courts are those that are well-funded, and supported by a revenue stream generated by a robust docket and the associated fines and fees that come with it. At the other extreme are those courts that are woefully underfunded, and that may be subject to inappropriate pressure to produce results that enhance municipal coffers. The financial backdrop is a statewide regime that apportions fines and fees in complex ways among state, county and local governments, a regime that can be subject to manipulation, since the outcome reached in a particular case can directly determine whether the resulting fine goes to the state or the municipality.

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Being creatures of their municipal governments, the Justice Courts get little by way of outside financial support, the main exception being a system of relatively modest legislative grants that are available through OCA. Any consideration of reform must thus address the question of whether the state should provide more financial support to these courts, especially if the goal is to encourage the Justice Courts on a statewide basis to be more streamlined and efficient.

Proposals of the Commission

Minimum Standards

The Commission concluded that the first step in improving the quality of justice that is delivered in the Justice Courts is to establish a set of standards—for court facilities, resources, security and other requirements—that would be enforced statewide, as a means to ensure that all courts are safe and fit for judicial proceedings. In establishing such standards, the goal would not be to "gold plate" all courts, and the standards would have to be flexible and realistic enough to reflect local differences and needs, and to avoid an unintended diminution in the access to justice, particularly in rural areas. But the Commission concluded that a statewide effort can and should be undertaken, as the current approach of allowing courts to operate on an *ad hoc* basis, without adequate resources or due regard for broader issues of efficiencies, economies and the quality of justice, is unacceptable.

County-Based Panels to Bring About Combinations and Reform

To address the overlap and inefficiencies that currently exist among the Justice Courts, to achieve the minimum standards discussed above, and to improve the quality of the courts and the justice they dispense, the Commission concluded that the number of Justice Courts must be reduced through a process of combination and reform. There is simply no way, logistically or financially, that needed improvements—in areas such as facilities, accessibility, security, technology, training of justices and support staff, money-handling and implementation of specialized court programs—can be effectively accomplished for all of the 1,250-plus existing courts around the state. Moreover, given the proximity of many of the courts to one another, there is no need for all of these courts to remain in existence in order for justice to be provided on a local basis.

The process of deciding which courts to combine would require a significant degree of collaboration among the Justice Courts and their constituencies, and this process cannot take place solely at the municipal level. Still, a wholly top-down, state-run approach is not feasible either. Determinations of where combinations are necessary cannot be made in the abstract, and a close review and understanding of each individual county and community would be necessary before effective recommendations can be made.

To this end, the Commission proposed the creation of review panels in each county, panels that would be directed by the state legislature to assess which courts meet (or can be improved sufficiently to meet) the new minimum standards, and that would develop plans for combining courts on a county-by-county basis. In developing these plans, the panels would be required to follow statutory guidelines that would incorporate not only the concept of minimum standards described above, but also geographic, demographic and docket-related considerations of where courts are most needed; the condition of court facilities and security arrangements; the distance that litigants and others must travel to gain access to a court facility; the proximity of courts to detention facilities; the availability of justices to conduct arraignments; and other similar issues. These panels would be comprised of representatives from relevant constituencies, including town, village and county governments, Justice Courts, and the local Bar. The work of the panels would be facilitated by OCA, which would help guide and coordinate the panel reviews within each judicial district, to promote consistency around the state.

The Commission also suggested that such panels be provided with a presumed range of the court combinations that are to be achieved on a county-by-county basis.

The purpose of these recommended ranges would be to ensure the fairness, uniformity and effectiveness of the consolidation program across the state. Each of the panels would be given a set period of time to perform its work, after which the recommendations would have the force of law (unless a county legislature enacts a substitute plan, as discussed herein). The panels would address only the combination of courts and would not be permitted to make changes to the number of judgeships, which is a decision best left to the localities after the consolidation analysis is complete. Nor would this process involve any changes to the manner in which justices are selected. The panels would thereafter be disbanded, and the further monitoring and enforcement of standards in the Justice Courts would, as noted above, become the responsibility of OCA.

Safeguarding Due-Process Rights and Improving the Quality of the Justice Court Bench

The Commission's report also set forth specific recommendations to improve further the education, training and certification of justices. With respect to the role of non-attorney justices—and after extensive debate about the possible proposals that might address these recurring concerns—the Commission concluded that the simplest and most effective solution is to provide all defendants who appear before a non-attorney justice in a misdemeanor criminal case with an "opt-out" right to have his or her case heard by an attorney judge, at a point after arraignment but before a trial is scheduled or before substantive motions are made. The Commission believed that such an "opt-out" right should address any substantive or due process concerns, without entirely dismantling a system that has been in place for hundreds of years.

Reforming the Funding Process to Upgrade and Achieve Efficiencies in the Justice Courts

Finally, achieving the necessary Justice Court reforms would require the adoption of new funding strategies, even in areas where combinations result in a reduced number of courts. To this end, the Commission's report identified a number of funding steps to be considered that would enhance and rationalize the existing mechanisms by which the courts are funded at the state and local levels. These include the creation of a state-funded Aid to Localities program so that the state can provide direct financial support to the Justice Courts, as well as an expansion of the Justice Court Assistance Program, an application-based grant program administered by OCA that has had a significant impact already in improving the condition of many Justice Courts.

In addition, the report included ideas for reforming Justice Court fine and fee-collection procedures and expanding the City, Town and Village Resource Center, which provides confidential guidance to justices on a broad array of substantive, procedural, case management and administrative issues.

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Conclusion

As in the case of the state-paid courts, proposals to reform the Justice Courts have been made repeatedly over the years, proposals that have fallen prey to political intransigence and bureaucratic inertia. Thanks to the vision of Chief Judge Kaye—and her willingness to challenge history and the status quo—the best case for reform has finally been made, and New York State is now positioned to deliver its citizens a court system for the 21st century.

Endnotes

1. *See* S. Con. Res. 4226 (as introduced on Apr. 7, 1997).
2. *See* N.Y. Assembly Judiciary Comm., Judicial Reform, Integrity and Access to Justice Act 5-7 (1997).
3. *See generally* http://www.nycourtreform.org/.
4. *See* Special Comm'n on the Future of the N.Y. State Courts, A Court System For the Future: The Promise of Court Restructuring in New York State (2007), *available at* http://www.nycourtreform.org/reports.shtml (hereinafter "A Court System for the Future").
5. A Court System for the Future, *supra* note 4, at 82.

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