

A PERSPECTIVE ON STATE COURTS TODAY

*Judith S. Kaye**

I am delighted to be part of Perspectives, part of your State of State Courts issue, part of the *Albany Law Review*, and in any way part of this Law School. During my twenty-five years, three months, nineteen days, and twelve hours (but who's counting?) on the Court of Appeals—fifteen of those precious years as Chief Judge—I participated in Albany Law School activities so often that I began to think of myself as a proud alum, class of 1984. Having gone on the Court of Appeals in 1983 that would have been quite a feat!

Thank you, too, for inviting me to join the distinguished roster of authors for this issue and allowing me to choose my subject within the ambit of *The State of State Courts*.

As the economic crisis has hit hard throughout society, the state of state courts regrettably has become a more vexing subject than ever before. State courts particularly have felt the brunt of the crisis, as hard times on the one hand necessarily drive more people to court and add even further to already overburdened court dockets—the state courts have more than ninety-five percent of our nation's litigation¹—and on the other hand limit available resources.² The American Bar Association, our own New York State Bar Association, and innumerable others have convened commissions and conferences centered on how to do more with less, a consuming subject for state court leaders. With the growing literature on the subject, I will leave for others the task of writing more fully about the state of state courts today in terms of the impact of staff layoffs, suspension of jury trials, closing of parts, and

* The author currently is Of Counsel at Skadden, Arps, Slate, Meagher & Flom LLP. She was appointed to the Court of Appeals by Governor Mario M. Cuomo in September 1983 (the first woman to serve on that Court), and appointed chief judge (again by Governor Cuomo) in March 1993. At the expiration of her term, she was reappointed by Governor Spitzer in 2007, and stepped down by virtue of mandatory retirement at age seventy, on December 31, 2008.

¹ Katerina Milenkovski & Mary S. Diemer, *Is Justice Denied a Shortcut to Anarchy?*, A.B.A. (June 11, 2009), http://apps.americanbar.org/litigation/litigationnews/top_stories/state-court-budget.html.

² *Id.*

innumerable other cutting-to-the-bone cost-saving measures being implemented by the courts as they strive to protect the fundamentals of our extraordinary justice system.

The *Law Review*'s challenge to choose my own particular subject, moreover, took me on a voyage back through the many times I have published my thoughts in this journal. Often we have together offered tributes to colleagues and addressed profound issues concerning the state courts. I think, for example, of our symposium on judicial selection,³ business dispute resolution,⁴ and state constitutional law and state high courts in the twenty-first century.⁵ Those are all subjects of continuing interest to me, well within the penumbra of the state of state courts.

Perhaps most relevantly, your invitation took me back to an exciting full-day symposium at Albany Law School on reform in government generally, when my own special focus was the courts.⁶ Particularly today, in these days of fiscal crisis, naturally the courts must look both to our partners in government to assure adequate funding and to our own efficiencies to assure that we fulfill the judicial branch's independent responsibility essential to our democracy. At that symposium, I addressed a long-overdue change that would sensibly reconfigure New York's "confused and sprawling mass" of separate trial courts.⁷ Though I believe that the case was long ago made for simplification of the New York State trial court system, today more than ever we should be prioritizing the idea in the interest of economy as well as rationality.

So plainly there are many subjects deserving of Perspectives today. But what especially captured my interest about this current issue of the *Albany Law Review* is that you are addressing the fascinating issue of judicial retention and women chief justices—and that you will be doing so through the words of particularly esteemed authors. That news took me immediately to another favorite subject—diversity—and back to a fact of particular

³ See Archibald R. Murray et al., *The Road to the Judiciary: Navigating the Judicial Selection Process*, 57 ALB. L. REV. 973, 973 (1994).

⁴ Judith S. Kaye, *Business Dispute Resolution—ADR and Beyond: An Opening Statement*, 59 ALB. L. REV. 835, 835 (1996).

⁵ Judith S. Kaye, *State Constitutional Law and the State High Courts in the 21st Century*, 70 ALB. L. REV. 825, 825 (2007). Compare *People v. Weaver*, 909 N.E.2d 1195 (N.Y. 2009), with *United States v. Jones*, 565 U.S. ---, 132 S.Ct. 945 (2012).

⁶ Judith S. Kaye, *Albany Law Review Symposium: Refinement or Reinvention, the State of Reform in New York: The Courts*, 69 ALB. L. REV. 831, 831 (2006).

⁷ *Id.* at 846 (quoting Chief Justice Breitel's statements to the New York Legislature on February 27, 1974).

importance to this law school: New York State's first female lawyer (Kate Stoneman) is an Albany Law School graduate, class of 1898.⁸ By the time of her graduation Kate Stoneman had been a lawyer for twelve years, having been admitted to the bar in 1886, through affiliation with a law office.⁹

Though New York by statute did not permit women to be admitted to the bar, Kate Stoneman and several friends boldly marched onto the floor of the New York State Legislature and got the law changed.¹⁰ As she noted, back in those days, "it was the simplest thing in the world to get inside the brass rail. We had the 'run' of the two houses and were allowed to come and go as we pleased."¹¹ What a precedent for improving the state of state courts! It has definitely become much harder to "get inside the brass rail."¹²

Today, of course, women are doing far better in many ways, hovering around—sometimes even topping—half the nation's law school classes, and serving with distinction in our state and federal judiciary, and throughout the profession. As I reread my Kate Stoneman article of nearly a decade ago,¹³ however, I was struck by how much actually has *not* changed for women lawyers. How dismaying it was to see the statistics cited in an October 9, 2011 *New York Times* editorial: only fifteen percent of equity partners in law firms (six percent in our nation's largest firms) are women, women with children finding the hardest time even remaining in the profession.¹⁴ Happily, however, the Law Review's current focus on women chiefs has led me to a somewhat brighter subject—the subject of women state court chief justices¹⁵—to which I now turn.

When I became New York's chief judge back in 1993 there were perhaps one or two other women chiefs in state courts throughout the nation.¹⁶ And the fact that I was "outstanding" among the

⁸ Judith S. Kaye, *How to Accomplish Success: The Example of Kate Stoneman*, 57 ALB. L. REV. 961, 961 (1994).

⁹ *Id.* That Kate Stoneman was admitted to the New York State Bar in 1886 and was the only woman to graduate in a class of forty-four in the year 1898 is itself a sad commentary on the progress of women in the law. More than a century later, still we struggle for equal status.

¹⁰ *Id.* at 965.

¹¹ *Id.*

¹² *See id.*

¹³ *See id.* at 961.

¹⁴ Editorial, *The Glass Ceiling*, N.Y. TIMES, (Oct. 8, 2011), <http://www.nytimes.com/2011/10/09/opinion/sunday/the-glass-ceiling.html>.

¹⁵ State court chiefs throughout the nation are known as "chief justices" except in the District of Columbia, Maryland, and New York, where the head of the Third Branch is known as the "chief judge."

¹⁶ Jonathan Lippman, *Chief Judge Judith S. Kaye: A Visionary Third Branch Leader*, 84

nation's chief justices when they gathered for their twice-yearly conferences, as it turned out, was not necessarily a positive for me. Those conferences had a much more festive air back in 1993, when the male chiefs attended with their spouses. Fifteen years later, by 2008, my own last year as chief, close to one-third of the nation's state court chiefs were women.¹⁷ Over the years, the conferences had become shorter and were packed with business sessions, the women chiefs often attending without their "significant others." Last I checked, in 2011, twenty-one of the chiefs that make up the fifty-six-state Conference of Chief Justices (including the District of Columbia, as well as territories and commonwealths that make up the United States) were women, still significantly better odds than the daunting partnership statistics in law firms.¹⁸ That's one good consequence of a public process (elective or appointive) that gets women on the bench.

As a matter of interest, I have secured from the National Center for State Courts a list of current "retired" chiefs (reasons including mandatory age retirement, failed election, "spend[ing] more time with family," and "private practice").¹⁹ Of the chiefs now in their "after (chief judge)-life," fifty are men, eighteen women.²⁰ Always the optimist, I'd say the numbers reflect progress—surely since 1993. Plainly there is still work to be done to achieve our objectives of equal opportunity, gender parity, and diversity.

Enough of numbers. My contribution to your Perspectives is centered on other changes in recent decades that have been spearheaded by state courts throughout America. Most particularly, I have in mind the national movement toward "problem-solving courts" that had its origin in Dade County, Florida's drug treatment courts, and has been replicated around the world. While drug courts are one major example of the wider initiative, the root principle is that courts dealing with repeat nonviolent offenders, such as drug abusers, have an opportunity when confronting their dockets to consider more effective, comprehensive measures, such as supervised drug treatment, that will not only dispose of a case but also reroute offenders from a life

N.Y.U. L. REV. 655, 655 (2009).

¹⁷ *Id.*; see MEMBERSHIP, STATE COURTS OF LAST RESORT, NAT'L CTR. FOR STATE COURTS (2012) (on file with Albany Law Review).

¹⁸ *The Glass Ceiling*, *supra* note 14; CONFERENCE OF CHIEF JUSTICES 1–6 (Feb. 1, 2011), <http://ccj.ncsc.dni.us/Roster/012011Roster.pdf>.

¹⁹ NAT'L CTR. FOR STATE COURTS, FORMER CHIEF JUSTICES OF THE U.S. STATE COURTS (2011) (on file with the Albany Law Review).

²⁰ *Id.*

2011/2012]

Perspective: State Courts Today

1751

of crime.²¹ The approach has been extended, for example, to mental health issues, community courts, and the like. Recent decades also have seen far greater court attention to issues focused on children and families, from finding ways to expedite permanency for children in foster care limbo to dealing more constructively with juvenile offenders.²² So I ask myself, is the growth of state court initiatives like these merely coincidental with the arrival of women chief justices, or is it in some part also chromosomal?

The answer, the message I take away from all of this, my perspective, is that in every sense diversity is a positive value. People bringing their diverse life experiences to leadership positions have, without a doubt, enriched our justice system. Together, collaboratively, we will meet the current crises in the courts.

²¹ *Drug Court*, MIAMI DADE PUB. DEFENDER, http://www.pdmiami.com/drug_court.htm (last visited Apr. 14, 2012).

²² *Break the Cycle of Violence by Addressing Youth Victimization, Abuse, and Neglect*, OFF. JUV. JUST. & DELINQ. PREVENTION, <http://www.ojjdp.gov/action/sec5.htm> (last visited Apr. 14, 2012).