

## EDITOR'S FOREWORD

*Vincent Martin Bonventre\**

Former Chief Judge Judith Kaye passed away while this issue of the *Albany Law Review* was being prepared for publication. She was a frequent visitor at Albany Law School and a strong supporter of this law review and of our annual Chief Judge Lawrence H. Cooke Symposium. Indeed, she brought all of her Court of Appeals colleagues to the law school to serve as panelists for the 2008 Cooke Symposium,<sup>1</sup> and she herself spoke warmly about the symposium's namesake as her "favorite judge in Court of Appeals history."<sup>2</sup>

It is therefore particularly appropriate that this year's joint issue of *New York Appeals* and *State Constitutional Commentary* opens with a tribute by one of New York's most prominent and respected attorneys, Henry Greenberg, to that most beloved and admired jurist.<sup>3</sup> Hank writes as one who not only served as a law clerk for then Judge Kaye, but as one who remained a close personal and professional confidant.

It would be difficult—no, impossible—to improve upon Hank's tribute, but it would be remiss of me if I did not add a few words of my own. History will remember Judith Kaye as the first woman to serve on New York's highest court and the first to serve as its Chief Judge. But those of us who worked with her and knew her and loved her will remember her warmth and kindness, her wisdom and inspiration, her dignity and class, her elegance and eloquence, and her unsurpassed decency and tireless devotion to the public good. We miss her dearly.<sup>4</sup>

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<sup>1</sup> Symposium, *Judges on Judges: The New York State Court of Appeals Judges' Own Favorites in Court History*, 71 ALB. L. REV. 1045 (2008).

<sup>2</sup> *Id.*

<sup>3</sup> Henry M. Greenberg, *Judith Smith Kaye: A Chief Judge for the Ages*, 79 ALB. L. REV. 1247 (2015/2016).

<sup>4</sup> Similarly, in my remarks to open the 2008 Cooke Symposium, I said: "There is simply no finer Judge, or public servant, or person. There is no one more decent, more devoted, more

Chief Judge Kaye would no doubt approve heartily of her current successor in the Court of Appeals center seat, Janet M. DiFiore, and she would commend her for continuing the tradition—enthusiastically welcomed by Kaye’s immediate successor, Jonathan Lippman—of bringing the entire Court of Appeals to our law school to present a Cooke Symposium.<sup>5</sup> This past year, Chief Judge DiFiore moderated “The Seven,” a discussion among her colleagues about the decision-making process at the Court of Appeals.<sup>6</sup> As has always been true when the judges of New York’s high court come to present the Cooke Symposium, the grateful audience of students, faculty, alums, and members of the local legal and judicial community was standing-room only, and the event was extraordinarily enlightening, entertaining, and exhilarating.

In this issue, a joinder of our annual *New York Appeals* and *State Constitutional Commentary*, a diverse collection of offerings provide a wide array of insights and analyses of this state’s recent case law and other legal developments, and of important concerns in public law confronting New York and other states.

*New York Appeals* begins with former Court of Appeals Judge Victoria Graffeo and Nicholas Roberts explaining the landmark *De Bour* ruling, its application in *People v. McIntosh*, and its contrast with United States Supreme Court precedent.<sup>7</sup> Next, Vincent Stark takes a comprehensive critical look at proposed reforms to this state’s criminal discovery rules,<sup>8</sup> and Michael Nolan explores the pitfalls of the Court of Appeals’ bewildering jurisdictional requirement of finality.<sup>9</sup>

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ethical, more selfless. No better a leader in this state or the nation than our own Chief Judge Judith Kaye.” *Judges on Judges: The New York State Court of Appeals Judges’ Own Favorites in Court History*, *supra* note 1, at 1048–49.

<sup>5</sup> Chief Judge Jonathan Lippman moderated a discussion among his colleagues for the 2012 Cooke Symposium. See Symposium, *The Untold Secrets of Eagle Street*, 76 ALB. L. REV. 1897 (2012/2013).

<sup>6</sup> Press Release, Albany Law Sch., *Albany Law Review’s Cooke Symposium to Feature Chief Judge DiFiore, Court of Appeals Colleagues* (Apr. 13, 2016), <http://www.albanylaw.edu/about/news/current/Pages/Albany-Law-Review-Cooke-Symposium-to-Feature-Chief-Judge-DiFiore-Court-of-Appeals-Colleagues.aspx>; see Joel Stashenko, *Court of Appeals Judges Discuss Challenges of the Job*, N.Y.L.J., Apr. 28, 2016, <http://www.newyorklawjournal.com/id=1202756155807/Court-of-Appeals-Judges-Discuss-Challenges-of-the-Job>.

<sup>7</sup> Victoria A. Graffeo & Nicholas C. Roberts, *The De Bour/McIntosh Lesson on the Importance of State Common Law*, 79 ALB. L. REV. 1257 (2015/2016).

<sup>8</sup> Vincent Stark, *New York Discovery Reform Proposals: A Critical Assessment*, 79 ALB. L. REV. 1265 (2015/2016).

<sup>9</sup> Michael Nolan, *A Case Study on Court of Appeals Finality*, 79 ALB. L. REV. 1307 (2015/2016).

James Jacobs and Zoe Fuhr explore the theoretical promise but practical limitations of background investigations under New York's SAFE Act,<sup>10</sup> and Ann Johnson argues that Michigan's broad definition of rape is far superior to New York's narrower one.<sup>11</sup> Jay Carlisle, Christine Murphy, Kiersten Schramek, and Marley Strauss argue that the Court of Appeals' recent policy focus on shielding physicians from excessive litigation is unjustified and has skewed the state's long-arm jurisdiction.<sup>12</sup>

Di Ma explains that while effective commercial gaming regulation is crucial, New York should be careful to address special concerns unique to this state.<sup>13</sup> Finally, William Davies discusses the Durable Power of Attorney ("DPOA") and measures taken to prevent abuse by agents of incompetent principals.<sup>14</sup>

In *State Constitutional Commentary*, Oregon Justice Jack Landau—a friend of the *Albany Law Review* who participated in our 2014 Cooke Symposium<sup>15</sup>—examines his state supreme court's reexamination of justiciability and, as is customary for Oregon's high court, did so independent of the federal approach.<sup>16</sup> Steven Ferrey presents a thorough exploration of federal and state preemption of local energy policies in the context of wind turbine regulation.<sup>17</sup> Cadesby Cooper analyzes the juxtaposition of challenges to teacher tenure and the state constitutional right of children to a basic education.<sup>18</sup>

Leslie Abramson surveys issues arising from the "might reasonably be questioned" standard in judicial ethics for the "appearance of

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<sup>10</sup> James B. Jacobs & Zoe A. Fuhr, *Universal Background Checking—New York's SAFE Act*, 79 ALB. L. REV. 1327 (2015/2016).

<sup>11</sup> Ann Johnson, *Gender, Victimization, and Evolving State Standards: A Study of New York and Michigan Sexual Assault Legislation*, 79 ALB. L. REV. 1355 (2015/2016).

<sup>12</sup> Jay C. Carlisle et al., *Paterno v. Laser Spine Institute: Did the New York Court of Appeals' Misapplication of Unjustified Policy Fears Lead to a Miscarriage of Justice and the Creation of Inadequate Precedent for the Proper Use of the Empire State's Long-Arm Statute?*, 79 ALB. L. REV. 1371 (2015/2016).

<sup>13</sup> Di Ma, *Employing Popular Emerging Technologies in the Regulation of Commercial Gaming is Not Always a Winning Strategy*, 79 ALB. L. REV. 1409 (2015/2016).

<sup>14</sup> William Davies, Note, *Nursing Home Abuse of Agents: Creditor Misuse of New York's Revised Durable Power of Attorney*, 79 ALB. L. REV. 1433 (2015/2016).

<sup>15</sup> Symposium, *Exceeding Federal Standards*, 77 ALB. L. REV. 1247 (2013/2014).

<sup>16</sup> Jack L. Landau, *Couey v. Atkins, A Reevaluation of State Justiciability Doctrine*, 79 ALB. L. REV. 1467 (2015/2016).

<sup>17</sup> Steven Ferrey, *Gone with the Wind: State Preemptive Power*, 79 ALB. L. REV. 1479 (2015/2016).

<sup>18</sup> Cadesby B. Cooper, *A Lesson from the New York Teacher Tenure Challenge: Distinguishing Legislative Action from Inaction within Positive Rights Analysis*, 79 ALB. L. REV. 1539 (2015/2016).

impartiality.”<sup>19</sup> Finally, Massachusetts Chief Justice Ralph D. Gants and Erik Doughty discuss developments in Massachusetts Supreme Judicial Court case law and the court’s “study group” to improve the reliability and assessment of eyewitness identification evidence.<sup>20</sup>

Thanks are due, of course, to our contributors. Beyond that, this issue was made possible by the efforts of the *Albany Law Review*’s 2015–2016 Editorial Board, particularly Editor-in-Chief Sean Mix, the Executive Editor for *New York Appeals*, Jaime Collins, and the Executive Editor for *State Constitutional Commentary*, Stacey Lococo. And special gratitude is owed to the 2016–2017 Editorial Board, particularly Editor-in-Chief Jessica Pollack and Managing Editors Eric Brenner and Tyler Robbins, who patiently and dutifully completed the work of the editorial and production process that was necessary for the publication of this issue, and did so at the same time they were preparing the volume 80 issues.

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<sup>19</sup> Leslie W. Abramson, *What Every Judge Should Know about the Appearance of Impartiality*, 79 ALB. L. REV. 1579 (2015/2016).

<sup>20</sup> Ralph D. Gants & Erik N. Doughty, *Where Science Conflicts with Common Sense: Eyewitness Identification Reform in Massachusetts*, 79 ALB. L. REV. 1617 (2015/2016).



**Chief Judge Judith Kaye, speaking about her “favorite judge,” Chief Judge Lawrence Cooke, at the 2008 Cooke Symposium on March 14, 2008, entitled “Judges on Judges: The Court of Appeals Judges’ Own Favorites in Court History.”**



**Chief Judge Janet DiFiore moderating “The Seven: About the Court, By the Court,” the 2016 Cooke Symposium, on April 26, 2016. Photo kindly provided by Tim Roske. This photo first appeared in the *New York Law Journal* on April 28, 2016.**