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Reflections on Opportunity in Life and Law

Judith S. Kaye

Opportunity: a chance or prospect for advancement or success. That is the theme, the core of this essay—opportunity in life, opportunity in law, opportunity to rewrite the law. Sometimes seizing an opportunity requires nothing more than finding yourself in the right place at the right time and maintaining a positive attitude. You could call this simply living life—I surely have no better illustration than my own life. Other times, opportunity requires a firmer stance—a refusal to back down when things are unfair, or discriminatory, or just plain tough, because then, what appears to be an insurmountable personal challenge can turn into opportunity for widespread change. We have arrived at such a moment of opportunity in New York. In 2017, New Yorkers can vote whether to hold a constitutional convention to amend our State Constitution. Didn't know that we have a New York State Constitution? Read on.

For the opportunity to write and publish this piece I credit Lillian V. Smith, Editor-in-Chief of the *Brooklyn Law Review*. Lily's invitation arrived after she summered at the law firm of Skadden Arps, where I am Of Counsel, and we enjoyed several interactions, including her outstanding participation in a mock trial before me.

OPPORTUNITY IN LIFE

Opportunity in Life—meaning my personal life—takes me directly back to my youth, tangibly underscored twice in recent months. In November, I was inducted into the Hall of Distinction of the Monticello Central School, Monticello, New York, and received a plaque now adorning my office wall in Times Square. “Distinguished Alumna. 1954.” A treasured memento. About the same time, I brought into the office my most treasured memento of all: the school bell from the one-room schoolhouse I attended in nearby rural Maplewood, New York, for the year before my parents, my brother, and I moved into “the big apple,” which for us was the village of Monticello in Sullivan County.

Until I was six years old, my parents, both immigrants from Eastern Europe—my father an illegal immigrant, ultimately naturalized—were farmers, with cows, chickens, and vegetables to sustain us. In Monticello, they became shopkeepers, first Smith's General Dry Goods Store, then Smith's Apparel, a women's clothing store. From the time I was tall enough to reach the countertop, I worked in the store. We never actually knew a lady lawyer.

It would hardly serve as sufficient thanks to Lily Smith were I to encumber this issue with a detailed recounting of my journey from Maplewood to Times Square. Instead, I will center my story on the observation of an Albany interviewer some decades ago that I must have been among the very first female lawyers in the nation. That's way off base in one sense—even in New York, Kate Stoneman was admitted to the Bar a century before me. Not so off base in the sense that to this day, gender lines are not yet obliterated, even within the legal profession. While I was not one of the first women lawyers in history, my half century at the Bar has seen significant gender change, which hopefully will interest *Brooklyn Law Review* readers, women and nonwomen.

Actually, it was my lifelong desire to be a world-class journalist that brought me to New York City—Barnard College, just across the street from the Columbia School of Journalism, to be precise. Or perhaps, to be more candid, the attraction was that it was pure perverseness in the eyes of my parents for me to attend college in the wilds of New York City and to aspire to be a reporter instead of a teacher/wife/mother. Failing upon graduation to secure any more than a job as a Social Reporter, I decided to follow in the footsteps of Tony Lewis—he had a year or so at Yale Law School and was reporting on the Supreme Court—and I enrolled in night law school (NYU had one at the time). No newspaper would consign a law-trained person to the Social Desk!

I never had the chance to test out that proposition. Law school captivated me, and I graduated in August 1962, having transferred into the day division and accepted an offer of employment in the Litigation Department of none other than Sullivan & Cromwell as the only woman in Litigation in 1962. Again, I am skipping over the law school years, when women in my class were about 10 of 300, there were no female faculty, and the job search was, in a word, incredible. "Our quota of

women is filled,” was the response I received (if any) to virtually every big law firm employment application.¹

“Hang in” was the lesson I most perfected, surely a required course for a woman litigator back in 1962. While I was not one of the first women lawyers in history, my half century at the Bar has truly been a time of radical gender transformation. By the mid-1970s, women were approaching half the law school enrollments. Even more important, I—women—had awakened to the fact that “our quota of women is filled” was not only an inappropriate response. It was also illegal, wrong. Ironically, Sullivan & Cromwell was itself the subject of a discrimination suit by women following me.² With our raised consciousness has come increased opportunity, though, as noted earlier, the rise to the top is to this day hardly equal.

“Hang in” I will first define physically in the sense that I doubt I was ever unemployed, from law school graduation, through marriage and three children, through taking the oath of office as Associate Judge of the Court of Appeals. And it wasn’t the money that mattered. At some points during those decades my paycheck was pretty close to zero, as I accepted part-time employment that allowed for more time at home, at first working with NYU Law School Dean—then City Bar President Russell Niles—then starting a flexible three-day work week (denoted the “Mommy Track”) as a litigator with a small firm. Having struggled mightily to get a job, my concern was that, if I left the workforce, I would never be able to return. Today, particularly given our raised collective awareness, the presence of more women throughout the profession and recognition of the value of diversity, both flexible work options and re-entry are far more common.

The balance of my “hang in” message is mental. Whether the choice is to stay at home or to work around the world around the clock, staying positive is essential. Yes, it’s a daunting world out there, today even more than ever. But open, outspoken perseverance, positivism, plowing ahead, remain the key to opportunity. No one more than you yourself can derail your life dream.

¹ See Judith S. Kaye, *The Progress of Women Lawyers at Big Firms: Steadied or Simply Studied?*, 76 FORDHAM L. REV. 1941 (2008); Judith S. Kaye, *How to Accomplish Success: The Example of Kate Stoneman*, 57 ALB. L. REV. 961 (1994).

² See, e.g., *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975) (District Judge Constance Baker Motley’s refusal to disqualify herself on the ground that she is of same sex as plaintiff).

OPPORTUNITY IN LAW

For Opportunity in Law I have no better example of the chance or prospect for advancement than my 25 years, 3 months, 19 days, and 12 hours as a Judge of the State's high court, the Court of Appeals (September 12, 1983, to December 31, 2008), 15 of those years as Chief Judge of the Court as well as Chief Judge of the State of New York (starting March 23, 1993). Truly Lawyer Heaven.

I begin at a pinnacle of the pinnacle—October 14, 2011, when the Capital District Women's Bar Association presented a Continuing Legal Education program, "Portrait of a Judge," in the courtroom of Court of Appeals Hall, 20 Eagle Street, Albany, the most beautiful courtroom anywhere. The program featured Judge Susan Read's introduction to the Court's portrait collection—including mine, the first of a woman—remarks by Judge Juanita Bing Newton and Brooklyn Law School Professor Susan Herman, and an engaging panel of women lawyers "of a certain age" presided over by Albany Law School Professor Patrick Connors. The panelists, having like me spent decades in the law, echoed my message and added to it: hang in—and by all means, don't fail to speak up. At the end of the program, someone looked out the window and noticed that there was a rainbow over the courthouse. It was immediately evident that the pot of gold was right there.

For Opportunity in Law, I rest my case on Professor Herman's fabulous remarks, which evolved into a magnificent article, *Portrait of a Judge: Judith S. Kaye, Dichotomies, and State Constitutional Law*.³ Could I possibly better describe the opportunities of the Chief Judge, administratively and substantively? No way, and I won't try. Do by all means read the entire article, which I hereby embrace with delight and incorporate by reference.

Professor Herman centers her head-to-toe portrait of me, ending with my passion for shoes (especially red shoes⁴), with focus on the subject of state constitutional law—an opportunity I seized soon after my arrival on the bench in September 1983. The National Center for State Courts offered a program on state constitutions in Williamsburg, Virginia—a trail had been blazed by Justice William Brennan's article, *State Constitutions*

³ Susan N. Herman, *Portrait of a Judge: Judith S. Kaye, Dichotomies, and State Constitutional Law*, 75 ALB. L. REV. 1977 (2012).

⁴ I frequently repeated the line that we need more people wearing red shoes on the bench, meaning more women judges.

and the Protection of Individual Rights⁵—and I happily was able to attend. Talk of opportunity in law!

Would that I could paper my walls with Professor Herman’s gripping description of New York state constitutional law writings, culminating in her discussion of state courts as laboratories for new policies and models of rights nationally. She persuasively summarizes my theory of “dynamic dual constitutionalism,” incorporated into the constitutional text itself through the Ninth Amendment.⁶

Indeed, Professor Herman cites two recent examples to illustrate this theory—certain aspects of the death penalty⁷ and consensual sodomy⁸—where the Supreme Court of the United States actually counted noses, looking at what was happening in state courts across the nation in order to determine federal constitutionality. “And because so many states have made the decision in their own enclaves, in their own states, to say, ‘This is not something that the government should be permitted to do . . . ,’ that liberty now has become enshrined as part of federal constitutional law.”⁹

Since the publication of Professor Herman’s article there has, of course, been yet another prominent example of noting (if not actually counting) noses: *Obergefell v. Hodges*.¹⁰ Beginning with Hawaii in 1993, Justice Kennedy in his writing for the Supreme Court traces the state and federal judicial opinions on same-sex marriage.

In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider.¹¹

⁵ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

⁶ Herman, *supra* note 3, at 1999. The Ninth Amendment reads: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

⁷ Herman, *supra* note 3, at 2000 (citing *Atkins v. Virginia*, 536 U.S. 304 (2002) (mental retardation); *Roper v. Simmons*, 543 U.S. 551 (2005) (juveniles); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (unintended death)).

⁸ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁹ Herman, *supra* note 3, at 2001. For a relevant backward look at the evolutionary process, consider the passage of the Nineteenth Amendment in 1920, prohibiting any U.S. citizen from being denied the right to vote on the basis of sex. Beginning with Wyoming in 1869, individual states were amending their constitutions to allow women rights the federal government was unwilling to recognize.

¹⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹¹ *Id.* at 2597.

Included is *Hernandez v. Robles*,¹² where the New York Court of Appeals regrettably went the other way, leaving it for the Legislature to right the wrong in denying loving couples of the same sex the right to marry. Fortunately, Governor Andrew Cuomo succeeded in having the wrong righted in New York State and helping the Supreme Court to explain and formulate the principles underlying its decision favoring same-sex marriage.

Actually, it's a quote from Governor Andrew Cuomo in Maureen Dowd's June 28, 2011, *New York Times* column that best captures my choice of subject for Opportunity in Law:

My father was against the death penalty, and that was hard in the Son of Sam summer when fear was driving the desire for the death penalty. You can see a line of continuity from the death penalty to choice to marriage equality. You could argue there's a 30-year span of the pressing social, moral and legal issues of the day.¹³

The death penalty, to choice, to marriage equality. Now there was a memorable time in my own tenure on the bench, having arrived in Albany in late 1983 by appointment of Mario Cuomo just in time for the very last vestige of the pre-Pataki death penalty—*People v. Smith*, 468 N.E.2d 879 (N.Y. 1984), *cert. denied*, 469 U.S. 1227 (1985)¹⁴—and having left in late 2008 in the aftermath of *Hernandez v. Robles*. Indeed, it was a decades-long “span of the pressing social, moral and legal issues of the day.”¹⁵

And yes, like our Governor, I too see a line of continuity, evolution, and progress over the decades, and surely the courts have had a role in maintaining and advancing that line. Courts do not themselves instigate or create cases so they can impose their views. Through cases, parties bring issues, often hot-button issues, to the courts for resolution under laws the courts are bound to interpret and apply. While confident that I would have written a creditable opinion in *Hernandez v. Robles* earlier in my tenure, I cannot help but think back to the many lessons learned over my years in the law, my work with families and children, and of course, my own life experience as a woman, wife, daughter, mother, and grandmother.¹⁶ *Hernandez* and our

¹² *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (Kaye, C.J., dissenting).

¹³ Maureen Dowd, *Utopia on the Hudson*, N.Y. TIMES (June 28, 2011), <http://www.nytimes.com/2011/06/29/opinion/29dowd.html> [<http://perma.cc/7KWS-N9KP>].

¹⁴ Mario Cuomo's open opposition to the death penalty was a major factor in the 1983 gubernatorial election, which he lost to George Pataki. Governor Pataki spent little time getting the death penalty restored in New York State.

¹⁵ Dowd, *supra* note 13 (quoting Governor Andrew Cuomo).

¹⁶ “The nature of injustice is that we may not always see it in our own times.” *Hodges*, 135 S. Ct. at 2598 (Kennedy, J.).

constitutions for me epitomize the challenge, the role, the opportunity of courts to assure wisdom, fairness, stability, rationality, and modern-day significance in the law. In a word: Justice.

OPPORTUNITY TO REWRITE LAW

Having moved the discussion this close to the New York State Constitution brings me to my final example of opportunity. Fundamental in our lives, of course, is the Constitution, widely presumed to refer to our glorious United States Constitution, soon to celebrate its 230th anniversary. Always I carry a copy of the Constitution in my purse. Lesser known, but highly significant as well, is our New York State Constitution. Indeed, every state has its own constitution, part of the system of dual federalism designed by our Founders, with the federal government and the states constituting separate sovereignties, each supreme within its own sphere.¹⁷

In New York, our Constitution was actually drafted by a small committee headed by John Jay and adopted on April 20, 1777, under the stress of war and revolution. Unlike our federal Constitution, amended a mere 27 times in its entire history, the New York State Constitution has undergone three wholesale revisions since 1777 (1821, 1846, and 1894), the latest extensive (but not wholesale) revision in 1938, with scores of piecemeal revisions during the years in between and since. It takes the vote of two successive legislatures and the people to secure even piecemeal constitutional revisions. What we refer to today as the New York State Constitution (“As Revised, Including Amendments Effective January 1, 2015”) is fundamentally the extensive revision adopted in 1938.

Our State Constitution fills 43 densely printed pages—not transportable in my purse—more than six times the length of the Federal Constitution, with provisions that stretch all across the spectrum of life. Some provisions are unique to New York, some duplicative of the federal Constitution, some unconstitutional. I refer you to the first part of the two-part article by Peter Galie and Christopher Bopst, *Constitutional “Stuff”: House Cleaning the New York Constitution*, for a full discussion of the oddities, anachronisms, redundancies, archaic language, incoherencies,

¹⁷ See *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247-48, 250 (1833). Indeed, through the eighteenth and much of the nineteenth centuries, “state constitutions were really the most important sources of law in the country.” Herman, *supra* note 3, at 1986.

and outdated, conflicting, and confusing public policy provisions.¹⁸ “By trivializing its content, these provisions have done more than discourage reading: They have derogated from the constitution’s character as a fundamental document, engendering disrespect if not ridicule.”¹⁹

Two facts are especially relevant to the subject of opportunity. First, the fact that we have a State Constitution is not widely known, even within the legal profession. Some years ago, after I spoke about our State Constitution at the City Bar Association,²⁰ a lawyer came up to me, aglow, and said, “That speech was great. I never even knew we had a State Constitution. I feel like I’m swimming in a whole new sea of culture.” This from a member of the New York Bar, where the oath of admission includes a promise to support both the Constitution of the United States and the Constitution of the State of New York! I appreciate every opportunity to better inform the public about our State Constitution.

The second relevant fact is that the penultimate article—Article XIX (“Amendments to Constitution”)—in Section 2 provides that

[a]t the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question “Shall there be a convention to revise the constitution and amend the same?” shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed.²¹

Thus, while the state legislature can propose amendments, subject to voter approval—as it has done countless times, resulting in the innumerable piecemeal, even extensive revisions—the State Constitution additionally mandates that at least once every 20 years New Yorkers decide for themselves whether there should be

¹⁸ See Peter J. Galie & Christopher Bopst, *Constitutional “Stuff”: House Cleaning the New York Constitution—Part I*, 77 ALB. L. REV. 1385 (2014).

¹⁹ Galie & Bopst, *supra* note 17, at 1388.

²⁰ Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN’S L. REV. 399 (1987); see also Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1 (1995).

²¹ N.Y. CONST. art. XIX.

a convention to amend our Constitution. That vote is on the horizon: Tuesday, November 7, 2017. This will be the sixth time in the last century that the question has been posed to the voters (1914, 1936, 1957, 1965, 1977, and 1999), three times answered in the affirmative (1915, 1937, and 1967), none resulting in a fully rethought, rewritten State Constitution approved by the voters. The closest we came was in 1967, but it was an “all or nothing” revision that failed at the polls.

The first relevant fact—informing the public that we *have* a State Constitution—I do not rank high among the reasons I am grateful for this opportunity to write for the *Brooklyn Law Review*. *Brooklyn Law Review* readers surely know of the existence of our State Constitution, and a lot more about it. But the second relevant fact—the question that will be put to voters on November 7, 2017—especially underscores the importance of this opportunity. It is for all of us to utilize the upcoming days and months to inform ourselves, as well as the public, so we can cast an informed vote, one way or the other, next November.²² The opportunity for a convention to comprehensively study and rewrite our State Constitution is otherwise not assured to arise again until November 2, 2037.

The City and State Bar Associations each has established a Committee charged with studying the question;²³ I am a member of the State Bar Committee.²⁴ Indeed, the State Bar House of Delegates on November 7, 2015, approved our Committee’s Report and Recommendation urging immediate, intensive public education about the relevant issues. Plainly many more such groups should be formed to assure that this important subject receives the attention it deserves.

CONCLUSION

Clearly, opportunity—personal, professional, societal—is to be cherished, always to be critically evaluated and often to be seized. Thank you, Lily!

²² See Robert Moses, *Another New York State Constitutional Convention*, 31 ST. JOHN’S L. REV. 201, 204 (1957) (“A program of public education is essential to insure understanding of the importance of the Convention proposal . . .”).

²³ *Welcome to the Committee on the New York State Constitution Homepage*, N.Y. ST. B. ASS’N, <http://www.nysba.org/nyconstitution/> [<http://perma.cc/97W2-JPPC>] (last visited Jan. 15, 2016).

²⁴ The State Bar Committee on the New York State Constitution is chaired by Henry (Hank) M. Greenberg, of Greenberg Traurig LLP. I extend special thanks to Hank, and to Jennifer L. Smith, Esq., with whom I have the pleasure of working at Skadden, for their comments and contributions to this article.