Changing Equalities

Speech Delivered by Hon. Jack B. Weinstein, United States District Court for the Eastern District of New York

At the Sidney Shainwald Public Interest Lecture on April 29, 2009

It is a great honor to participate in this series of Sidney Shainwald lectures established by Sybil Shainwald, Esq.[1] Ms. Shainwald has devoted a large part of her professional life to providing psychological support to, and obtaining compensation for, the daughters of mothers who were prescribed DES (Diethylstilbestrol) during their pregnancies. These people were born with profoundly injured reproductive organs. They were literally created unequal through no fault of their own because of the negligence of pharmaceutical companies.

President Lincoln had a "prudential approach" to the Founders' statement that "all men are created equal." Professor Thomas Owens writes that the Great Emancipator concluded that:

> [The Founders] did not mean to assert the obvious untruth, that all men were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them . . . . They meant to set up a standard maxim for a free society, which should be familiar to all, and revered by all . . . constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.[2]

1 This was the Fifth Sidney Shainwald Lecture, delivered at New York Law School on April 29, 2009. In preparing this speech I have relied on, in addition to other readings and a lifetime's experience, the citations and discussion in Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For The People: Notes for the Fifty-Eighth Cardozo Lecture,* 30 Cardozo L. Rev. 1 (2008); R. Kent Greenawalt & Jack B. Weinstein, Readings for Seminar on Equality and Law (Columbia Univ. Sch. of Law 1978); 2 Kent Greenawalt, Religion and the Constitution (Princeton Univ. Press 2008); Michael J. Perry, Toward a Theory of Human Rights: Religion, Law, Courts (Cambridge Univ. Press 2007); and the ephemera of past and current events in government and society. The discussion by various philosophers led by Judge Henry J. Friendly, Annual Judicial Conference Second Judicial Circuit of the United States, 74 F.R.D. 219 (1976) [hereinafter Annual Judicial Conference], is useful for the interested reader. For a description on how Supreme Court decisions by the Rehnquist Court have served to diminish equality, see We Dissent: Talking Back to the Rehnquist Court, Eight Cases That Subverted Civil Liberties and Civil Rights (Michael Avery ed., New York Univ. Press 2009). For a brief and useful discussion on the meaning and challenges of equality, see Mackubin Thomas Owens, *Lincoln and the Meaning of Equality: How I Became a "Lost Cause" Apostate, in* Lincoln Lessons: Reflections on America's Greatest Leader 110–21 (Frank J. Williams & William D. Pederson eds., 2009); *see also* Richard B. Morris, The Forging of the Union, 1781–1789 8, 9, 15 & 163 (Henry S. Commager & Richard B. Morris eds., Harper & Row 1987); Kevin Phillips, The Politics of Rich and Poor: Wealth and the American Electorate in the Reagan Aftermath (1990).

2 Owens, *supra* note 1, at 118.

The equality that the Founders referred to was primarily political and religious. Political, in the sense that it supported abolition of formal status differentials such as that of the clergy and the nobility of England and Europe. Religious, as reflected in the constitutional provision forbidding religious requirements for office and the First Amendment's protection against inequalities of treatment based on religious belief.

It possibly also included what Lincoln documented in his Cooper Union address: that signers of the Declaration of Independence believed the federal government could outlaw slavery in parts of the country.[3] He pointed to the Northwest Ordinance, which excluded slavery from a vast territory that would eventually form new states, including Illinois.[4] Were it not for the cotton gin and other slavery-based economic developments in the South, it is likely that Jefferson and his peers would have been gratified to see this peculiar institution ended long before the Civil War.

If we are to understand the modern struggle with the concept of equality, we must consider a series of attempts at equalizations in such matters as politics, religion, socio-economics, education, and compensatory justice. As Aristotle recognized, we have to inquire: Equal in what respect?[5] He would put it this way: No distinction ought to be made between people who are equal in all respects *relevant to the kind of treatment in question*, even though in other (irrelevant) respects they may be unequal. We must ask: Which respects should we now consider relevant in measuring equality in this country?

Equality has a chameleon-like quality. It is envisioned as "justice as fairness" by John Rawls, with attention to leveling social entitlements;[6] as "distributive justice" by Robert Nozick, with emphasis on freedom to acquire and dispose of property (which itself produces inequalities in economic power);[7] as "compensatory justice" by H.L.A. Hart, with accent on providing remedies for those wrongly injured;[8] as a formal unitary legal status based on the nineteenth century philosophers' search

3 President Abraham Lincoln, Cooper Union Address (Feb. 27, 1860).

4 *Id.*; Northwest Territory Ordinance of 1787 (Northwest Ordinance), ch. 8, § 1, 1 Stat. 51 (1789).

5 *See generally* Aristotle, Nicomachean Ethics, Book III (Harvard Univ. Press 1939) (350 B.C.).

6 *See* John Rawls, Justice as Fairness: A Restatement 72, 78 (Erin Kelly ed., The Belknap Press of Harvard Univ. Press 2001) (1971).

7 *See* Robert Nozick, Anarchy, State, and Utopia 149–50 (Basic Books, Inc. 1974).

8 *See* H.L.A. Hart, The Concept of Law 159–60 (Clarendon Press 1961).

for political and religious freedoms;[9] as the opportunity for an "equal start," as articulated by Abraham Lincoln;[10] and as "equal right to pursue individual tastes, life styles and moral convictions" different from those of the majority, by Professor Ronald Dworkin.[11]

Professor Charles Frankel[12] emphasized the lack of social rigidity as the engine driving us toward equality. It was the "opportunity for equality through upward mobility" and economic freedom that brought—and still bring—immigrants to our shores, Professor Richard Morris points out in his *The Forging of the Nation*.[13] Morris was probably right when he wrote:

> What the Founding Fathers were committed to was equality of opportunity, an equality made possible by the availability of freehold land under a national land system devised for an expanding frontier . . . . The reformers did not aim at social leveling, which the Founding Fathers[, a well educated and relatively wealthy group,] would have looked on with abhorrence.[14]

As Lincoln declared in his July 4, 1861 message to Congress in Special Session:

> This is essentially a People's contest . . . . [I]t is a struggle . . . of government, whose leading object is, *to elevate the condition of men*—to lift artificial weights from *all* shoulders—to clear the paths of laudable pursuit for *all*—to afford *all*, an unfettered start, and a fair chance, in the race of life.[15]

How to proceed in a real world in which individuals have different characters and backgrounds, and face different obstacles remains as perplexing now as it has ever been in our nation's history.

9 *See generally* Greenawalt & Weinstein, *supra* note 1.

10 *See* President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 The Collected Works of Abraham Lincoln 439 (Roy P. Basler ed., Rutgers Univ. Press (1953) [hereinafter Lincoln's Message to Congress: July 4, 1861]); *see also* Michael Lind, What Lincoln Believed: The Values and Convictions of America's Greatest President 282 (Doubleday 2004).

11 *See generally* Annual Judicial Conference, *supra* note 1, at 256 (statement of Ronald Dworkin).

12 *See generally* Charles Frankel, *Equality of Opportunity*, 81 Ethics 191 (1971).

13 *See generally* Morris, *supra* note 1, at 15.

14 *Id.* at 163.

15 Lincoln's Message to Congress: July 4, 1861, *supra* note 10, at 438 (emphasis added).

Considering equalities in their various respects requires taking account of our changing views of the subject; of our need to protect conflicting liberties; of the necessity of freedom to innovate and to foster the efficiency of our system in producing goods; and of widely varying ethical views in our heterogeneous population, as they have developed historically, with roots in religion, philosophy, law, and sociology.

It would be interesting to develop and apply an "Equalitarian Index" so we could grade ourselves. I prefer the term "equalitarian" to "equality" in naming such an index because it incorporates all elements of the French triad—liberty, equality, and fraternity. Such an index would have to measure deep-seated social forces such as our sense of self-esteem, mobility through hard work and merit, and optimism or pessimism about our future condition and that of our children. The *New York Times* illustrates daily the sharp changes in perceptions of equality among different racial and ethnic groups today.[16]

In the 1830s, during Andrew Jackson's presidency,[17] Alexis de Tocqueville, the French sociologist who wrote *Democracy in America*, would have given this country a high grade for equalitarianism. He saw our people as appropriately balancing liberty, equality, and concern for the individual as well as the community, with an emphasis on hard work and opportunity as the great levelers of condition.

Has the index gone up or down since Jefferson's or Jackson's time? For an optimistic conclusion, recall that on August 14, 1862, Lincoln summoned to the White House, for the first time, a group of African-Americans. He told them that there was virtually no chance that, even as free men, they would ever achieve genuine equality within American society and that, in Lincoln's words, "not a single man of your race is made the equal of a single man of ours," but "it [is] a fact with which we have to deal."[18]

16 *See, e.g.*, Sheryl Gay Stolberg & Marjorie Connelly, *Obama Is Nudging Views on Race, a Survey Finds*, N.Y. Times, Apr. 27, 2009, at A1.

17 Commonly referred to as the Jacksonian Era.

18 President Abraham Lincoln, Address on Colonization to a Committee of Colored Men, Washington, D.C. (Aug. 14, 1862), *in* Abraham Lincoln, Lincoln: Speeches and Writings 1859–1865 353 (Literary Classics of the United States, Inc. 1989).

Almost twenty years later, in his inaugural address on March 4, 1881, while Reconstruction was failing, President James Garfield proclaimed: "[F]ifty years hence our children will not be divided in their opinions . . . that both races [are] made equal before the law."[19] As President Obama's arrival in the White House reflects, this prediction was premature, but correct.

Yet, arguably, we have been slipping. As Kevin Phillips, in his book on the politics of rich and poor, and many economists warn us, there has been in recent years a huge shift of income and property to a small group of elites; higher education is becoming too costly for many; the route to the middle class for those who relied on high union wages in the automotive and other industries has been disrupted; the hope for home ownership has been dashed for many; and there has been created a large, permanent underclass of prisoners, former prisoners, and undocumented aliens.[20]

Despite setbacks, this nation's record over the past near quarter of a millennium remains positive, with notable contributions by government. The Supreme Court has recognized that a "prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded."[21] Consider briefly some of our changing views of equality.

Equalizing status, as reflected in the right to vote and to seek office, has been extended from that of a relatively few white propertied men in 1776 to former slaves, women, the poor through the abolition of poll taxes, people above eighteen, urban and rural populations by one-person-one-vote rulings, and the like. Further, equalization of voting power has been constrained by First Amendment free speech freedoms, largely negating congressional attempts to restrict the monied classes' extra weight in the political system. Nevertheless, even the power of the upper crust to unduly influence government has been reduced by technological changes—most significantly the Internet's money-raising and organizing capacities, which enhance democracy and, with it, equality.

19 President James A. Garfield, Inaugural Address (Mar. 4, 1881).
20 *See generally* Phillips, *supra* note 1.
21 United States v. Virginia, 518 U.S. 515, 557 (1996) (citing Morris, *supra* note 1, at 193).

The status of women and men and their right to hold property has largely been equalized. The right to be free of gender, race, and other discrimination in the workplace is now protected by statute.[22]

Individuals' right to religious equality has run into other First Amendment liberties. Professor Kent Greenawalt, considering the Establishment Clause and Fairness in his recent book on religion and the Constitution, has analyzed, for example, the perplexing question of when government can limit the availability of public property and facilities to religious groups, and whether religious and secular groups must be treated equally for that purpose.[23]

Miscegenation laws that restricted the right of people to enter into deeply personal relationships have been abolished. Still unresolved is the right of same-sex or heterosexual partners to equal application of tax and family laws. Despite religious objections, our strong historical push toward equalization will probably resolve these issues in favor of equality.

For us, here today, law students and professors, lawyers and judges, one of the most fascinating developing stories of equalization—equal access to justice—is reflected in the Old Testament's Deuteronomy 1:17: "Do not give anyone special consideration when rendering judgment. Listen to the great and small alike . . . ."[24] And in Leviticus 19:15: "[Y]ou shall not be partial to the poor nor defer to the great . . . ."[25] Chief Justice Earl Warren put the matter this way: "It is not enough merely to open the courthouse doors to everyone. The proceedings . . . must . . . be open on equal terms to all who enter; otherwise the word 'justice' is a sterile one which cannot command the respect we claim for it."[26] We have still a long way to go to provide true equality in the courthouse.

22 *Cf.* Sarah M. Morris, Note, *The Intersection of Equal and Environmental Protection: A New Direction for Environmental Alien Tort Claims After* Sarei *and* Sosa, 41 Colum. Hum. Rts. L. Rev. 275, 289–99 (2010) (discussing prohibition of systematic racial discrimination under customary international law).

23 *See generally* 1 Greenawalt, *supra* note 1.

24 *Deuteronomy* 1:17.

25 *Leviticus* 19:15.

26 Chief Justice Earl Warren, Chief Justice of the United States, All Men Are Created Equal, The Twenty-Seventh Annual Benjamin Cardozo Lecture Delivered Before the Association of the Bar of the City of New York 364 (Apr. 9, 1970) (transcript available in the Record of the Association of the Bar of the City of New York).

Only relatively recently has the Supreme Court required defense counsel to be paid for by the state in criminal cases where the defendant is too poor to afford a lawyer. In our federal courts in New York, counsel for the indigent in criminal cases is adequate. But services for the vulnerable are regularly jeopardized by state budgetary cuts to Legal Aid and similar organizations.

In civil litigations, contingency fees attract representation for plaintiffs with a good chance of winning a monetary award. But, in much of our civil court and administrative litigations, a lawyer is not available to the poor or lower-middle class. We do not yet meet the equality mandates of the Old Testament in, for example, family matters, mortgage defaults, and immigration cases.

In mass torts, our system often denies equal justice. The DES litigations I referred to earlier were able to provide reasonable compensation only because some courts, like the New York Court of Appeals, modified the substantive-procedural law so that a daughter, who could not know which of many manufacturers supplied DES to her mother, could sue all manufacturers and have them share compensation in a ratio equal to the percentage of the drug they manufactured.

But in cigarette cases, where millions were arguably injured by the fraud of the manufacturers, the courts have refused to allow effective class actions to go forward, insisting on individual proof of reliance.[27]

In education, we have enormously improved equality of access since *Brown v. Board of Education*.[28] Aid to children with disabilities has helped a great deal. Nevertheless, the cases I have dealt with on segregation and the pushing out of "difficult" special needs children have demonstrated how far we have to go to

27 The cigarette cases raised a critical issue of whether the industry's fraudulent advertising related to "light" cigarettes was relied upon by individual smokers. The Court of Appeals for the Second Circuit found lack of commonality with respect to reliance on the ads, loss causation, and injury for purposes of the Federal Rule of Civil Procedure 23's class action certification analysis. *See* McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 222 (2d Cir. 2008).

28 347 U.S. 483 (1954); *see* Goodwin Liu et al., Keeping Faith With the Constitution 49 (Am. Constitution Soc'y for Law and Policy 2009) ("*Brown* understood the Constitution to guarantee equality not as an abstract formalism, but as a lived experience in social context.").

provide equal educational opportunities.[29] And the gap between whites and blacks has not been significantly narrowed by the "No Child Left Behind" legislation.[30]

Despite enormous difficulties, our society struggles on in seeking to provide as level an economic playing field as is practicable. The Americans with Disabilities Act—designed to ensure equal access to gainful employment and public life to the disabled—is but one example of our country's devotion to equality and to providing each of us the opportunity to develop and enjoy our capacities to the fullest.

We move forward. We slip back. We push forward again. The present fiscal crisis, for example, has cut recently expanded housing, education, and assistance for the poor in many states.

President Obama seeks to shift the equalitarian index sharply up through governmental policy by making health insurance available to all, financing equal educational opportunities, shifting taxes to those most able to pay, checking excessive executive compensation, providing federal public financing for such projects as road and bridge building, and encouraging non-fossil fuel generation of energy. These programs may well increase basic wealth and well-being for all.[31]

29 *See* Jennifer Medina, *Number of Students Leaving School Early Continues to Increase, Study Says*, N.Y. Times, Apr. 30, 2009, at A22; Andrew Delbanco, *The Universities in Trouble*, N.Y. Rev. Books, May 14, 2009, at 36, 38 ("[T]he college-going rates of the highest-socioeconomic-status students with the lowest achievement levels is the same level as the poorest students with the highest achievement levels. In short, bright and focused kids from poor families are going to college at the same rate as unfocused or low-scoring kids from families much better off." (internal quotation marks omitted)). For further cases in which I have dealt with these issues see *D.S. v. New York City Dep't of Educ.*, 255 F.R.D. 59 (E.D.N.Y. 2008) (addressing violations of right to education of regular education and special education students through class action); *Hart v. Cmty. Sch. Bd. of Brooklyn, New York Sch. Dist. No. 21*, 383 F. Supp. 699 (E.D.N.Y. 1974); *Hart v. Cmty. Sch. Bd. of Brooklyn, New York Sch. Dist. No. 21*, 383 F. Supp. 769, 774 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975) (finding unconstitutional desegregation at public junior high school and ordering procedures to remedy violation); *Soc'y for Good Will to Retarded Children, Inc. v. Cuomo*, 572 F. Supp. 1300 (E.D.N.Y. 1983) (long-standing litigation involving lawsuit seeking improvement of conditions at state institution for mentally retarded children, expansion of community resources and support services, and transfer of most residents to smaller community residences).

30 *See* Sam Dillon, *'No Child' Law Is Not Closing a Racial Gap*, N.Y. Times, Apr. 29, 2009, at A1.

31 *See* Susan Saulny, *In Obama Era, Voices Reflect Rising Sense of Racial Optimism*, N.Y. Times, May 3, 2009, at A1.

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It is not easy to change a nation's direction. There are too many vested expectations, institutional rigidities, and sociological realities to permit accomplishment of peaceful major shifts in society in less than a generation. It is like trying to change the direction of a huge, loaded supertanker: inertia will carry it forward for many miles in the direction it was heading in spite of even the most vigorous attempts to change its course.

While we must recognize that people are not created wholly equal, we remain dedicated to the sometimes-conflicting goals of expanding equalities, while maintaining an efficient and fruitful society based on individual differences and initiatives.

Despite all the theoretical and practical obstacles to meeting the impossible goal of full equality for all, we ennoble our great land by constantly expanding equalities and by treating each other with the respect and solicitude we want for ourselves.