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In Search of a Role for the Legal System

*Fernando E. Agrait**

I. INTRODUCTION

The participants in this symposium are concerned about what appears to be a growing gap between the legal and moral orders of our society. Although the gap itself is a problem, more serious is the apparent lack of adequate mechanisms to deal with it. As our society grows more complex and shared values diminish, the greater the need becomes for mechanisms to develop those values. To this end we might ask: "Is there a role to be played by the legal system in identifying values and fostering consensus?"

My thesis is that such a role exists for the legal system. I submit that the gap between the legal and moral orders is caused by the alienation of citizens. Failure to participate in the political process leads people to reject the values it espouses. This phenomenon is explained by a sociological model known as "equity theory." Under this model, the role of the legal system would be to eliminate barriers to participation, thus lessening alienation and closing the gap between the legal and moral orders.

II. ALIENATION IN THE U.S. POLITICAL PROCESS

A significant degree of political alienation exists in the United States.¹ It manifests itself particularly in a low degree of political participation.² Whereas 64 percent of the qualified vot-

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1. See generally R. GILMORE & R. LAMB, *POLITICAL ALIENATION IN CONTEMPORARY AMERICA* 16-21 (1975); Aberback, *Alienation and Voting Behavior Today*, *SOCIETY*, July/Aug. 1976, at 19; Finifter, *Dimensions of Political Alienation*, 64 *AM. POL. SCI. REV.* 389 (1970); Yinger, *Anomie, Alienation and Political Behavior*, in *THE ENCYCLOPEDIA OF POLITICAL SCIENCE* 171, 180 (1970).

2. See Gans, *The Empty Ballot Box: Reflections on Nonvoters in America*, *PUB. OPINION*, Sept./Oct. 1978, at 54; Schwartz, *Political Alienation*, *SOCIETY*, July/Aug. 1976,

ers voted in the 1960 presidential election, only 54.5 percent did in 1976. At the congressional level the decrease was from 46.3 percent in 1962 to 38.2 percent in 1974.³ Alienation is also indicated by opinion polls. From 1966 to 1977 there was a more than two-fold increase in the number of people expressing the opinion "leaders don't care what happens to you" (22 percent to 60 percent).⁴ For the same period, an increase of 37 percent to 61 percent occurred in the opinion that "what you think doesn't count."⁵

Another important manifestation of this alienation is the public's distrust of politicians, which has been increasing greatly in the United States.⁶ One recent study found that "extreme political alienation" had risen from 14.1 percent in 1960 and 23.3 percent in 1972.⁷ Such alienation was twice as high among blacks, women and citizens over 65.⁸ Surprisingly, a high rate of alienation has recently appeared in higher income and education level groups as well.⁹ The alienated tend to withdraw from the political process, to marginally participate or even to abstain entirely. Such people are not intrinsically apathetic but need to be, and can be, mobilized by a charismatic figure, specific issues or a perception of real change.¹⁰

What can we do to deal with this problem? First, we must recognize that political alienation is a "reaction to perceived inability to influence events."¹¹ This statement is consistent with the fact that participation has been found to be lower in large, urban areas,¹² where one person's voice counts for less. It is also consistent with the fact that one may be alienated in one field where he is ineffective, but be active in other fields where he is

at 27.

3. Gans, *supra* note 2, at 54.

4. PUB. OPINION, May/June 1978, at 23.

5. *Id.*

6. See Citrin, *Comment: The Political Relevance of Trust in Government*, 68 AM. POL. SCI. REV. 973 (1974); Miller, *Political Issues and Trust in Government: 1964-1970*, 68 AM. POL. SCI. REV. 951 (1974); PUB. OPINION, Jan./Feb. 1979, at 24.

7. R. GILMORE & R. LAMB, *supra* note 1, at 20. "Extreme political alienation" refers to persons who expressed political estrangement on at least seven out of nine survey questions. *Id.* at 19.

8. *Id.* at 24-27, 53-55, 63-65.

9. *Id.* at 47-49.

10. See Nie & Verba, *Political Participation*, in 4 HANDBOOK OF POLITICAL SCIENCE (1975).

11. Yinger, *supra* note 1, at 180.

12. Finifter, *supra* note 1, at 404.

effective.¹³

III. THE EQUITY THEORY: A POSSIBLE EXPLANATION

The equity theory provides a framework for understanding and solving the problem of alienation. An explanation of the theory appeared in an article by Walster, Berscheid and Walster:

When individuals find themselves participating in inequitable relationships, they become distressed. The more inequitable the relationship, the more distress individuals feel.

. . . [I]ndividuals participating in inequitable relationships . . . feel distress regardless of whether they are the victims or the beneficiaries of the inequity. . . . [T]hose who receive less than they deserve feel distress (usually in the form of anger) . . . [and] those who receive more than they deserve feel distress (usually in the form of guilt).

. . . .
Individuals who discover they are in an inequitable relationship attempt to eliminate their distress by restoring equity. The greater the inequity that exists, the more distress they feel, and the harder they try to restore equity.

There are two ways that a participant can restore equity to an inequitable relationship: He can restore actual equity to the relationship, or he can restore psychological equity.

A participant can restore "actual equity" by appropriately altering his own outcomes or inputs or the outcomes or inputs of the other participants

A participant can restore "psychological equity" by appropriately distorting his perception of his own or his partner's outcomes and inputs.¹⁴

Specifically, the victim can either fight to obtain compensation (equity in fact) or accept and justify his suffering:

Sometimes a victim finds that it is impossible either to elicit restitution or to retaliate against the harmdoer. The impotent victim is then left with only two options: He can acknowledge that he is exploited and that he is too weak to do anything about it, or he can justify his exploitation. Often, victimized individuals find it less upsetting to distort reality and justify their victimization than to acknowledge that the world

13. Yinger, *supra* note 1, at 189.

14. Walster, Berscheid & Walster, *New Directions in Equity Research*, in 9 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 6 (1976).

is unjust and that they are too impotent to elicit fair treatment.¹⁵

At least one Supreme Court Justice has recognized the possibility of the sufferer accepting his condition. As stated by Professor Ely:

The general idea is one that in some contexts has merit. A sufficiently pervasive prejudice can block its own correction not simply by keeping its victims "in the closet" but also by convincing even them of its correctness. In *Castaneda v. Partida*, [430 U.S. 482 (1977)], the Court held that a prima facie case of intentional discrimination against Mexican-Americans in the selection of grand jurors was not constitutionally affected by the fact that Mexican-Americans enjoyed "governing majority" status in the county involved. Concurring, Justice Marshall gave the reason why: "Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority." Nor does this insight seem relevant only to numerical minorities: slaves outnumbered masters in the antebellum South, and outnumbered whites generally in some states, but that apparently didn't keep many of them from assimilating much of the mythology used to legitimate their enslavement.¹⁶

IV. APPLICATION OF THE EQUITY THEORY TO ALIENATION IN THE UNITED STATES POLITICAL PROCESS

The high degree of alienation in today's political processes may be explained by the equity theory.¹⁷ We can theorize that people perceive their citizen-government relation as fundamentally inequitable, without reciprocity. People perceive that either they receive too little from government or they receive too much. Another perception might be that some people have too much access to the government, and others too little.

Perceiving such inequities, the citizen may try to correct the imbalance or to justify it. One way to correct the imbalance is to actively participate in the process. But many citizens perceive the process as being closed to their input. They feel that cur-

15. *Id.* at 25 (citation omitted).

16. J. ELY, *DEMOCRACY AND DISTRUST* 165-66 (1980).

17. Adams & Freedman, *Equity Theory Revisited: Comments and Annotated Bibliography*, in 9 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 43 (1976).

rently there is no effective way by which an individual can meaningfully influence the process. Viewing as closed the opportunity to actually reduce the inequity, the citizen rationalizes the inequity away. The rationalization might take the form of one of the following: "I am not part of that process," "They are all crooks," or "I don't count." Finding no equity in his relation with the government and believing the avenues closed for equalizing the relation through participation, the citizen simply drops out.

It is possible that the public has chosen to withdraw from both politicians and political institutions because the public was confronted with unacceptable conduct on the part of the politicians. To disassociate from those who misbehave can be seen as a positive decision not to be part of their activities.¹⁸

V. CONSISTENCY OF EQUITY THEORY WITH POLITICAL PARTICIPATION STUDIES

Equity theory is consistent with studies made concerning citizen political participation. Kenneth Langton has concluded that belief in one's political efficacy varies from situation to situation and the element of prior, positive experience is of great importance.¹⁹ The more equitable each relation to government has been, the more inclined a person will be toward equalizing future relations. However, if most of an individual's experiences have been negative, he will likely move toward inaction.

Similarly, Wolfinger and Rosenstone indicate that the decision to vote, just as any other major decision, involves a cost-benefit analysis.²⁰ If the cost (in terms of time or foregone opportunities) outweighs the benefits to be derived from government, then one will not participate. Accordingly, the perception of an incapacity to alter results or to have an impact will increase non-participation.

Another study finds that the breakdown of political party organizations has eliminated an intermediary between the individual voter and the government. This produces a greater distance between the two and reduces the voter's perception about

18. In a different setting, the withdrawal from interaction is used as a sanction. See Schwartz, *Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements*, 63 YALE L.J. 471, 490 & n.26 (1954).

19. K. LANGTON, *POLITICAL PARTICIPATION AND LEARNING* 21-23, 131, 134-35 (1980).

20. R. WOLFINGER & S. ROSENSTONE, *WHO VOTES?* 6-10, 87-88 (1980).

the degree to which his contribution can be felt.²¹

Anthropological studies also indicate that active participation in the political process establishes reciprocal relations in the community. This reciprocity creates a stronger community and legal bond. The Ashantis in Africa²² and the Tobriand Islanders in the Pacific²³ illustrate this principle. Concerning anthropological studies Walster, Berscheid and Walster state:

[Anthropological] authors observed that some societies have worked out exchange systems in which everyone can be both a donor and a receiver. (The kula ring is an example.) Harmonious stable relations are said to be the result. They contrasted these societies with those in which no mechanisms for getting rid of obligations by returning gifts is provided. . . . Volatile and unpleasant relations are said to be the result of such continuing inequities. . . . [T]he ability to reciprocate is an important determinant of how nations will respond to help from their neighbors.²⁴

Historical examples illustrate the relation between respect for the results of the process and participation in the political process. For example, colonial powers imposing their laws on the colonized confirms the low effectiveness of political systems established without participation.²⁵

An examination of contemporary American subcultures confirms the importance of group solidarity and social cohesion.²⁶ Akin to the primitive experiences, we find in our modern society a similar development in what has been called "the culture of poverty."²⁷ A deep sense of commitment to the group and active participation in the community helps the poor survive their economic misery.

Jean Piaget's study of moral development in children also illustrates the principle of equal relations. He indicates that respect for authority and autonomy depends on reciprocity:

21. N. NIE, S. VERBA & J. PETROCIK, *THE CHANGING AMERICAN VOTER* 345-56 (1979).

22. E. HOEBEL, *THE LAW OF PRIMITIVE MAN* 211-54 (Atheneum ed. 1972).

23. *Id.* at 177-210.

24. Walster, Berscheid & Walster, *supra* note 14, at 29.

25. Prof. Merlin Myers' comment to this paper, Utah Endowment for Humanities—Brigham Young University Law School Symposium, in Provo, Utah (Oct. 25, 1980). The American War for Independence is a prime instance of colonial rebellion because of lack of respect for the system.

26. See generally E. HOEBEL, *supra* note 22, at 67-254.

27. O. LEWIS, *LA VIDA*, at xlii (1966). See generally O. LEWIS, *ANTROPOLOGIA DE LA POBREZA* (1961).

It would seem, then, that the evolution of the answers with age marks a definite progress in the direction of reciprocity. Unilateral respect, the source of the absolute command, taken literally, yields the place to mutual respect, the source of moral understanding. . . .

. . . .
Autonomy therefore appears only with reciprocity, when mutual respect is strong enough to make the individual feel from within the desire to treat others as he himself would wish to be treated.

. . . .
The conclusion which we shall finally reach is that the sense of justice, though naturally capable of being reinforced by the precepts and the practical example of the adult, is largely independent of these influences, and requires nothing more for its development than the mutual respect and solidarity which holds among children themselves. . . . And as the solidarity between children grows we shall find this notion of justice gradually emerging in almost complete autonomy.²⁸

Why should we expect societies to behave differently than Piaget's children? Of the two examples cited earlier, the Ashantis lost their social effectiveness when their system became bureaucratic in nature and the sense of participation disappeared.²⁹

Piaget's findings suggest that authority cannot be the sole source of reciprocal equity relations. Equitable relations grow when participation, cooperation and mutual respect exist.³⁰ Moreover, greater participation in the process of government will develop if it is based on such cooperation and mutual respect.

In summary, we have assumed that the equity theory can be applied to citizen-government relations. Under this theory, if citizens perceive their relation with government as being inequitable, then the relation necessarily will create stress both in the citizens and in the government. In the process of eliminating such stress, citizens will either withdraw or move to equalize the relation.

28. J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* 171, 196, 198 (2d ed. 1965).

29. E. HOEBEL, *supra* note 22, at 231-34.

30. *See* J. PIAGET, *supra* note 28, at 319.

VI. THE ROLE OF THE LEGAL SYSTEM IN SOLVING THE PROBLEM OF ALIENATION

The legal system plays an important role in solving the problem of alienation. The road must be paved to facilitate a closer interrelationship between the citizen and his government. Participation must exist not only in the limited and important act of voting but also in the process of determining needs, establishing priorities and solving problems.

Under equity theory, the role of the courts is to remove any obstacle to political participation. One such obstacle is a lack of education about political processes, which education qualifies the person to participate in the governmental process. I am proposing that the courts should be activist-interventionist in those cases involving participation processes, particularly electoral processes. By opening up the process, then the courts could abstain or take a more passive role in intervening in particular value choices. Individual value choices should be left to the "marketplace of ideas," but only as long as it is a free market that is functioning normally. In addition, the court should maintain a protective attitude when "discrete and insular minorities"³¹ are affected. Professor Ely observes:

Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.³²

This view of the role of courts fits perfectly within the principles of the Constitution. No one can criticize the courts for opening up the participation process, because it is precisely that process which, if operating properly, will leave value decisions to the political arena and not to the courts.³³

As more meaningful avenues of participation become available, more people will participate. The more effective each participatory experience becomes, the greater the participation will

31. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

32. J. ELY, *supra* note 16, at 103.

33. *See id.* at 87-88.

be in the future.³⁴ In addition, the courts will focus more on the process than on the particular results. This in turn will result in emphasis being placed on the morality of the process which after all is "the highest morality."³⁵

Professor Sandalow's ideas mesh perfectly with this theory. He asserts that decisions by Congress and the states should be given substantial deference by the courts if those decisions are "deliberate and broadly based."³⁶ Such decisions are not merely evidence of societal norms, they are the ultimate source of the law's legitimacy in a democratic society. Deference to these decisions by the courts encourages political responsibility among the citizenry. Furthermore, the courts' recognition of the majority's will, when a decision is deliberate and broadly based, places courts in a better position to protect minorities. Professor Sandalow reasons:

Accepting deliberate and broadly based political decisions as authoritative may . . . purchase a significant gain in the legitimacy of judicial efforts to protect minorities from the most serious hazards they confront in the political process and, in doing so, contribute substantially to the effectiveness of those efforts. The most serious threats to minorities, as a survey of the *United States Reports* will reveal, come from governmental action that does not rest upon such decisions. . . . [A]lso, experience demonstrates that state and local governments are typically less sensitive to minority interests than the Congress. Conventional constitutional analysis . . . regards the decision-making process that underlies challenged governmental action as irrelevant to the validity of that action. [As a result] it treats a determination that a local ordinance, a state statute, or inadequately considered federal legislation is unconstitutional as establishing that similar legislation subsequently enacted by Congress would also be invalid, however deliberate might be the process leading to its enactment. Courts are thus led to approach the former with a deference they do not deserve. Doctrines that would permit courts to take account of differences in the decisionmaking processes leading to challenged governmental action would, thus, contribute to the courts' ability to protect minorities in those situations in which that protection is most likely to be needed. But . . . the analysis that leads to

34. See Finifter, *supra* note 1, at 400; K. LANGTON, *supra* note 19, at 22-23, 131.

35. A. BICKEL, *THE MORALITY OF CONSENT* 123 (1975).

36. Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1186-95 (1977).

taking account of such differences also requires that courts must defer finally to deliberate decisions by broadly representative political institutions.³⁷

Besides serving as guarantors of the accessibility of the process, the courts can also serve as a catalyst for mobilization. Scheingold states that "it is possible to capitalize on the perception of entitlement associated with rights to initiate and to nurture political mobilization."³⁸ The courts are in an ideal position to capitalize on entitlement.

A model could be constructed to evaluate legislative, judicial and other government decisions in terms of the participation effect they will have. In the same manner that cost-benefit ratios are calculated and environmental impact statements are prepared, this model would measure the extent to which a particular scheme will increase or hinder the participatory process. The effect on participation would be considered of prime importance even if the result be less "efficient" government.

It should be clear that participation in the sense it is used here means much more than merely voting. It includes establishing or eliminating units of government in order to create a direct relation among the citizens, their input and the results. Clearly, certain government services will always exist which require central (as opposed to local) operation, regardless of the high cost of nonparticipation. Two examples are foreign relations and defense. But even in those instances, participation could be increased by allowing input on particular policies or by making certain information available to the public. The Vietnam War is an example of what can happen when little congruence exists between a foreign policy and the beliefs of the citizens. Actual physical participation is also important. In defense, a more intense use of state militia could help resolve the lack of motivation in today's army.

Under equity theory, the role of the legislature should also undergo change. I would call this new role "zero-based government bureaucracy legislation." Its aim would be to identify the units of government that most directly relate to the people affected by a particular government activity. These units would be responsible for conducting the activities. Examples of direct, effective reciprocity arrangements in our system are the jury sys-

37. *Id.* at 1192-93.

38. S. SCHEINGOLD, *THE POLITICS OF RIGHTS* 131 (1974).

tem and the primarily privately controlled labor-management relations field. Moreover, whenever possible, government activities would be placed directly in the hands of the people.³⁹

Another group that should take responsibility in facilitating participation is the political parties. Studies demonstrate that strong party leadership can account for as much as a 10 percent spread in voter turnout. If every state had voter registration laws as permissive as those of the most permissive states, turnout may have increased in the 1972 presidential election by as much as 9 percent.⁴⁰ Legislation in this area would have a real effect on participation.

The above changes have promise because of man's natural need to get involved. Participation breeds participation. The experience of efficacy motivates people to further action. We learn by doing, and if norms are learned autonomously rather than dictated, we come to understand and respect the reasons underlying them.⁴¹

VII. CONCLUSION

This proposed model is consistent with our Constitution. It cannot be criticized for violating democratic values because it improves the democratic process by increasing citizen participation.

Professor Ely has stated two arguments that favor this approach:

The first is that a representation-reinforcing approach to judicial review, unlike its rival value-protecting approach, is not inconsistent with, but on the contrary (and quite by design) entirely supportive of, the underlying premises of the American system of representative democracy. The second is that such an approach, again in contradistinction to its rival, involves tasks that courts, as experts on process and (more important) as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials.⁴²

39. Examples include self-help programs and community action grants which facilitate the development of cooperative movements to take over government activities. Also, home rule legislation, referendum and recall provisions, and sunshine laws can increase participation.

40. Crotty, *Party Effort and Its Impact on the Vote*, 65 AM. POL. SCI. REV. 439 (1974); Katz & Eldersveld, *The Impact of Local Party Activity Upon the Electorate*, 25 PUB. OPINION Q. 11, 12, 24 (1961).

41. R. WOLFINGER & S. ROSENSTONE, *supra* note 20, at 88.

42. J. ELY, *supra* note 16, at 88.

The model also reserves for the courts the special role identified in the famous footnote 4 of *United States v. Carolene Products Co.*:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.⁴³

This model is particularly well tailored to the political situation in the United States. Along with the high degree of alienation present here, Almond's and Verba's findings indicate that Americans voice a pervasive desire not to alter the basic premises underlying their system:

[W]hen respondents were asked to mention the "things about this country that you are most proud of," 85% of Americans mentioned aspects of the political system such as the Constitution, political freedom, or democracy. These sources of pride are all strongly associated with the norms of equality, responsibility, and responsiveness which have been suggested here as providing the point of reference for answers to the questions constituting this component. In no other country studied did even as many as half of the respondents mention political characteristics as a source of pride.⁴⁴

Public Opinion has reported that over 70 percent of those polled found the political system "basically good"; 47 percent said the same for the system of justice; and 69 percent expressed the same for business and industry.⁴⁵

One may thus predict that by improving on the basic premise of democracy and by providing new opportunities for participation, the body politic will respond positively. The solution lies

43. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

44. Finifter, *supra* note 1, at 396 (quoting G. ALMOND & S. VERBA, *THE CIVIC CULTURE* 102 (1963)).

45. *PUB. OPINION*, Jan./Feb. 1979, at 26.

in reinforcing the political process in a constructive and creative way.⁴⁶

Finally, the model is appropriate for the development of conviviality in our society. As Ivan Illich says:

I choose the term "conviviality" to designate the opposite of industrial productivity. I intend it to mean autonomous and creative intercourse among persons, and the intercourse of persons with their environment; and this in contrast with the conditioned response of persons to the demands made upon them by others, and by man-made environment. I consider conviviality to be individual freedom realized in personal interdependence and, as such, an intrinsic ethical value. I believe that, in any society, as conviviality is reduced below a certain level, no amount of industrial productivity can effectively satisfy the needs it created among society's members.⁴⁷

46. See *id.*; Wallace, *Revitalization Movements*, 58 AM. ANTHROPOLOGIST 264 (1956).
47. I. ILLICH, *TOOLS FOR CONVIVIALITY* 11 (1973).