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A Tribute to Judge Frank X. Altimari

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Frank X. Altimari -- Humanist Judge

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Frank Xavier Altimari cared about people more than he cared about legal doctrine. Although his opinions demonstrate a mastery of the law that will be long-remembered,[1] it was the impact of those opinions upon the people affected by them that was most important to him. In his exchanges with counsel at oral argument, in his conferences with colleagues following oral argument, in his voting memoranda and in ordinary friendly discourse, his humanist concerns always were at the forefront of his discourse. For Judge Altimari, decision-making involved not only the need to apply law to facts but also the need to be satisfied that the result was fair to every person touched by the decision. He knew that there were stories behind every case, and those who peopled the stories were the objects of his curiosity. He was a student of people, and strove mightily to understand them. Informed by his understanding of human conduct, his strong ethical principles and his deep moral strengths, as well as by his knowledge of the law, Frank Altimari crafted his opinions to advance human welfare, values and dignity.

In the first sentence of his obituary in the New York Times, Judge Altimari was described as "a senior Federal appeals judge who wrote the ruling that affirmed the ban on begging in city subways and transit terminals."[2] The reference was to what was

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perhaps his most celebrated opinion -- Young v. New York City Transit Authority.[3] At issue was a regulation prohibiting panhandling and begging in the New York City subway system. The United States District Court for the Southern District of New York had sustained a First Amendment challenge to the regulation.[4] In a carefully reasoned opinion for the Second Circuit Court of Appeals that was a veritable exegesis of First Amendment jurisprudence, Judge Altimari reversed the judgment of the district court. Characterizing begging as expressive conduct despite "grave doubt as to whether begging and panhandling in the subway are sufficiently imbued with a communicative character to justify constitutional protection,"[5] Judge Altimari applied to the regulation the "more lenient level of judicial scrutiny"[6] described by the Supreme Court in United States v. O'Brien.[7] This sort of examination, he wrote, "requires us to weigh the extent to which expression is in fact inhibited against the governmental interest in proscribing particular conduct."[8] Judge Altimari found that the regulation was within the constitutional power of government to adopt, that it advanced substantial government interests and that those interests were unrelated to suppressing free expression.[9] In this case he found that "on balance, the governmental interests must prevail."[10] The opinion generated widespread public comment[11] as well as a number of law review articles.[12]

Concern for human welfare shone through the opinion in Young as much as any concern for First Amendment jurisprudence. Ever

mindful of the impact of law on the citizenry, Judge Altimari wrote:

> The subway is not a domain of the privileged and powerful. Rather, it is the primary means of transportation for literally millions of people of modest means, including hard-working men and women, students and elderly pensioners who live in and around New York City and who are dependent on the subway for the conduct of their daily affairs. They are the bulk of the subway's patronage, and the City has an obvious interest in providing them with a reasonably safe, propitious and benign means of public transportation. In determining the validity of the ban, we must be attentive lest a rigid, mechanistic application of some legal doctrine gainsays the common good. In our estimation, the regulation at issue here is justified by legitimate, indeed compelling, governmental interests. We think that the district court's analysis reflects an exacerbated deference to the alleged individual rights of beggars and panhandlers to the great detriment of the common good.[13]

In his analysis in Young, Judge Altimari thought it to be of significant importance that subway passengers felt themselves intimidated, threatened and harassed as a captive audience for beggars in the closed confines of subway platforms and terminals.[14] Finding that begging in the subway is disruptive and startling to passengers and therefore creates the potential for serious accidents in an environment that is crowded and fast moving, he opined that it was "not unreasonable" for the Transit Authority to conclude "that begging is alarmingly harmful conduct that simply cannot be accommodated in the subway system."[15] The phrase "common good" appears three times in the opinion,[16] signalling the author's notion of the weight to be given to this objective in the adjudicatory process.

Shortly after the publication of my opinion in Loper v. New

York City Police Department,[17] Judge Altimari called to discuss that decision with me. The opinion invalidated a provision of the New York State Penal Law prohibiting loitering for the purpose of begging. The district court had certified a class consisting of all "needy persons who live in the State of New York, who beg on the public streets or in the public parks of New York City."[18] The opinion determined that the statute did not square with the First Amendment because it prohibited verbal speech as well as communicative conduct in quintessential public fora -- the streets and parks of the City of New York. Judge Altimari told me that he agreed with the opinion although he knew that there were those who considered it in some ways inconsistent with his opinion in Young. He did not see any inconsistency. He thought that begging in the streets implicated different interests than begging in the confined spaces of the subways. He agreed with the public forum analysis in Loper, but also thought that human values dictated that indigent persons should be permitted to solicit alms in a peaceful way and in a setting where underground train tracks are not close by.

Frank Altimari's humanist concerns surfaced in almost every one of his opinions, and he was just as occupied with individual rights and human dignity as he was with the "common good" and the general welfare. In his opinion in Valmonte v. Bane,[19] he was constrained to deal with a provision of the New York Social Services Law governing the reporting and recording of suspected child abuse and the administrative process for review of the

reports of abuse. The State maintained a Central Register with an "indicated" listing of abusers whose names were entered upon a finding by local social services departments of "some credible evidence" to support the maltreatment complaints. The procedures allowed for a hearing after a request for expungement was denied, but the "some credible evidence" standard was again to be applied. A second administrative hearing was allowed to those who were denied employment in the child care field on the basis of their placement in the Central Register. The standard of proof in that hearing was "fair preponderance of the evidence." Apparently, seventy-five percent of the those seeking expungement from the Register pursuant to the established administrative procedures ultimately were successful.[20] Valmonte was accused of excessive corporal punishment after having slapped her daughter with a open hand. Child protective proceedings were dismissed in Family Court, but Valmonte was listed in the Central Register, and a request for an expungement was twice denied. Valmonte never sought or was denied employment in the child care field and therefore never was eligible for the "fair preponderance" hearing.

Valmonte argued on appeal that, by disseminating to potential child care employers her placement on the Central Registry, she would be deprived of a liberty interest. She also argued that the procedures allowing her to challenge the placement were constitutionally inadequate. Judge Altimari found that Valmonte had standing to sue and a protected liberty

interest. He concluded that the procedural safeguards provided were insufficient to protect her interest, in view of the risk of erroneous deprivation. In his opinion, Judge Altimari recognized the significant interest of the State in maintaining the Central Register. However, he concluded that the welfare of the individual injured outweighed the State interest, concluding his opinion as follows:

> We hold that the high risk of error produced by the procedural protections established by New York is unacceptable. While the two interests at stake are fairly evenly balanced, the risk of error tilts the balance heavily in Valmonte's favor. The crux of the problem with the procedures is that the "some credible evidence" standard results in many individuals being placed on the list who do not belong there. Those individuals must then be deprived of an employment opportunity solely because of their inclusion on the Central Register, and subject to the concurrent defamation by state officials, in order to have the opportunity to require the local DSS to do more than merely present some credible evidence to support the allegations.[21]

Human dignity, as well as the constitutional right to privacy, was the object of Frank Altimari's concern in Doe v. City of New York.[22] In that case, the plaintiff had filed a complaint with the City of New York Human Rights Commission accusing an airline of refusing to hire him because he was a single gay male suspected to be HIV seropositive. The Commission, the plaintiff and the prospective employer entered into a "Conciliation Agreement" settling the claim. A confidentiality clause was made part of the agreement, but the Commission issued a press release disclosing the terms of the agreement. Although the release did not identify the plaintiff,

the plaintiff considered that the release included information that allowed him to be identified by those he knew and worked with. His action against the Commission for breach of his constitutional right to privacy by the disclosure of his HIV status in the press release was dismissed by the district court for failure to state a claim. In his opinion to reverse, Judge Altimari found a constitutional right of privacy in HIV status and determined that the plaintiff had set forth facts supporting his claim that his right to confidentiality was not waived by filing his claim with the Commission and agreeing to the Conciliation Agreement.

Addressing the issue of confidentiality in HIV status, Judge Altimari wrote the following:

> Extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over. Clearly, an individual's choice to inform others that she has contracted what is at this point invariably and sadly a fatal, incurable disease is one that she should normally be allowed to make for herself. This would be true for any serious medical condition, but is especially true with regard to those infected with HIV or living with AIDS, considering the unfortunately unfeeling attitude among many in this society toward those coping with the disease. An individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to discrimination and intolerance, further necessitating the extension of the right to confidentiality over such information. We therefore hold that Doe possesses a constitutional right to confidentiality . . . in his HIV status.[23]

In this opinion, as much as in any other, Frank Altimari demonstrated his understanding of human nature as well as the

part (albeit small) that courts can play in promoting societal concepts of human ethical conduct.

Judge Altimari strongly believed that human values could be promoted by the judicial system and that it was essential to this purpose that the court be open to the public at all times. In Ayala v. Speckard,[24] he was confronted with a situation in which a state trial judge closed the courtroom during the testimony of an undercover police officer in a drug case. At a closed hearing, the officer described a general fear for his safety if he were to be recognized in the courtroom. He also said that he sought closure of the courtroom every time he testified. Judge Altimari thought that the officer had failed to present evidence sufficient to justify closure, noting the officer's failure to state a particularized fear referable to the pending case and his failure to suggest that his undercover status would be revealed during his testimony in open court. Stressing the importance of the Sixth Amendment right to a public trial, Judge Altimari wrote the following:

> It is clear . . . that the State failed to establish the existence of a substantial probability that an overriding interest would likely have been prejudiced by [the officer's] testimony in open court. While it is undisputed that the State has an overriding interest in protecting the safety, as well as the confidentiality, of its undercover officers, nothing in the record below evinces a substantial probability that testifying in Ayala's trial would have endangered [the officer's] safety or blown his cover.[25]

As an alternative ground for remanding for the issuance of a writ of habeas corpus in Ayala, Judge Altimari found error in the failure of the state trial judge sua sponte to consider

alternatives to complete closure of the courtroom. Judge Altimari felt very strongly about this and wrote that, "prior to abridging a defendant's Sixth Amendment rights, trial courts are under an absolute duty to consider possible alternatives to complete courtroom closure."[26] On a petition for rehearing, the Ayala panel filed a per curiam opinion confirming the issuance of the writ. The principal basis for the opinion on rehearing was the trial court's failure to consider alternatives to closure sua sponte.[27] On rehearing, the panel recognized the existence of an argument that the State might be able to establish a substantial possibility of prejudice to its interest in minimizing the risk of compromising the officer's effectiveness -- an argument not raised or addressed in the original appeal. The thoughts of Frank Altimari rang through the conclusion of the panel opinion on rehearing:

> Efficient law enforcement and the right to a public trial may at times be incompatible. The guarantees found in the Bill of Rights carry societal costs. The costs of the public trial right are most dramatic where, as here, the trial court did not take proper steps at the time the courtroom was closed. But having failed to have considered, and adopted if feasible, less drastic alternatives, the courtroom closure in this case violated the Constitution. We are aware of the scourge of illegal drugs in our society, and the importance of governmental efforts to fight their proliferation. But those efforts do not independently justify improper courtroom closure.[28]

Ultimately, Judge Altimari (and Judge Cardamone) joined in a dissent written by Judge Parker in Ayala and two other cases joined for rehearing in banc on the courtroom closure issue.[29] The in banc court majority concluded that

> in all three cases the prosecution sufficiently justified the courtroom closure, and . . . a trial judge, having already considered closure during the testimony of one witness as an alternative to complete closure, is not required to consider sua sponte further alternatives to closure but needs to consider only further alternatives suggested by the parties.[30]

The dissenters reiterated Judge Altimari's thesis that Supreme Court precedent "requires a trial judge to consider sua sponte alternatives to courtroom closure in a case where alternatives are not suggested by a party otherwise objecting to closure."[31]

A unique practice in the United States Court of Appeals for the Second Circuit is the exchange of voting memoranda by the judges.[32] These memoranda are now used from time to time by three judge panels and are always used in in banc panel voting. The "voting memos," as they are called, set forth not only a judge's vote on case disposition but also the thoughts and reasoning of the judge in arriving at the vote. The memos circulated by Judge Altimari always were interesting, illuminating, thoughtful and often humorous. In voting on the suggestion for in banc review of the Ayala trilogy of cases, Judge Altimari drew on many years of experience as a trial judge to inform his colleagues of courtroom closure consequences and alternatives. The "Memorandum of FXA," setting forth his opinion that "it might be prudent to in banc" the three cases, included the following practical observations:

> Having sat on the bench for many years in both state and federal trial courts, I can tell you that even absolute closure of the courtroom will not protect the identity of an undercover cop. Should the defendant, who has a constitutional right to be present during the trial, want to harm the officer, there is

> nothing to prevent him from describing the officer, in great detail, to his friends and family during visiting hours . . . .
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> . . . .
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> If the prosecution presented a good argument for closure of the courtroom, I considered alternatives to complete closure. Frequently the officer's identity would be hidden by a screen; and on more than one occasion, I would direct that the officer be disguised in such a way (wig, hat, fake mustache or beard, dark glasses, etc.) that even his own mother would not recognize him.[33]

Experience on the trial bench helped to make Frank Altimari the outstanding appellate judge and humanist that he was. For it was on the trial bench, more than on the appellate bench, that he was able to get close enough to people to be able to observe their traits and foibles. It was there that he developed his understanding of human behavior, and it was there that he became acutely aware of individual sensibilities and sensitivities. In Nassau County, New York, he served as a District Judge, a County Judge and a state Supreme Court Justice. From 1982 to 1985, he served as a United States District Judge for the Eastern District of New York. Before he served on these trial courts, he was a trial lawyer. For many years, he taught courses in trial tactics to law students and practicing lawyers. Frank Altimari very much enjoyed being of service to people in what he described as "the courts closest to the people." He was especially respectful of the work of trial judges and, in reviewing their work when he was an appellate judge, he always said that he "didn't want to second-guess a trial judge."

People mattered to Frank Altimari. Those who mattered the

most to him were his wife, Angela and his four children -- Anthony, Nicholas, Michael and Vera. His colleagues mattered. The litigants in the cases before him mattered. He was an unusual man, a talented man. Late in life, he took up the art of sculpture and his untutored work drew gasps and praise from professional sculptors. His works of sculpture had religious themes, for he was a religious man. The sculpture named "Lady Justice" was in that category, for he approached justice with a religious fervor. I was proud to be his friend, for his friends mattered very much to Frank Altimari. He was always there to inquire about a friend's health, family and work. He touched many lives, and mine was one of them. Now, as I discuss cases with colleagues and as I draft opinions, memoranda and law review articles, I hear him speak to me: "The people, Roger, what about the people? They are all that truly matters."

1. See Chau Lam, Obituaries: Frank Altimari, Federal Judge Who Made Major NYC Decision, NEWSDAY, July 21, 1998, at A42.

2. Wolfgang Saxon, Frank X. Altimari, 69, Judge Who Affirmed Ban on Begging, N.Y. TIMES, July 21, 1998, at D1.

3. 903 F.2d 146 (2d Cir. 1990).

4. See Young v. New York City Transit Auth., 729 F. Supp. 341 (S.D.N.Y. 1990).

5. Young, 903 F.2d at 153.

6. Id. at 157.

7. 391 U.S. 367, 377 (1968).

8. Young, 903 F.2d at 157.

9. See id. at 158.

10. Id. at 157.

11. See, e.g., Ruth Marcus, Justices Allow New York Subway Ban on Beggars, WASH. POST, Nov. 27, 1990, at A4; Deborah Squiers, Ban on Begging in Subways is Upheld, N.Y.L.J., May 11, 1990, at 1.

12. See, e.g., Grace L. Zur, Note & Comment, Young v. New York City Transit Authority: Silencing the Beggars in the Subways, 12 PACE L. REV. 359 (1992); Paul G. Chevigny, Begging and the First Amendment: Young v. New York City Transit Authority, 57 BROOK. L. REV. 525 (1991).

13. Young, 903 F.2d at 158.

14. See id.

15. Id.

16. Id. at 156, 158.

17. 999 F.2d 699 (2d Cir. 1993).

18. Loper v. New York City Police Dep't, 802 F. Supp. 1029, 1033 (S.D.N.Y. 1992).

19. 18 F.3d 992 (2d Cir. 1994).

20. See Valmonte, 18 F.3d at 1004.

21. Id. at 1004-05.

22. 15 F.3d 264 (2d Cir. 1994).

23. Doe, 15 F.3d at 267.

24. 89 F.3d 91 (2d Cir. 1996).

25. Ayala, 89 F.3d at 95 (citations omitted).

26. Id. at 96.

27. See Ayala v. Speckard, 102 F.3d 649, 652 (2d Cir. 1996) (per curiam).

28. Id. at 654.

29. See Ayala v. Speckard, 131 F.3d 62, 75 (2d Cir. 1997) (in banc) (Parker, J., dissenting).

30. Id. at 64.

31. Id. at 75.

32. See Wilfred Feinberg, Unique Customs and Practices of The Second Circuit, 14 HOFSTRA L. REV. 297, 298-303 (1986).

33. Memorandum of FXA to In Banc Court (March 26, 1997) (on file with author).