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## A PORTRAIT OF AN ARTIST AS A WISE MAN: JUDGE ALTIMARI'S JURISPRUDENCE

*Robert M. Rosh\* and Joseph R. Rand\*\**

Almost all law clerks begin their clerkships with the hope that they will have a profound influence on the thinking of their judges, only to ultimately find that they are the ones more changed from the experience. Judge Altimari's law clerks were no exception. As we ponder the effect that Judge Altimari had on our lives and on our view of the law and its purposes, we come away with the realization that Judge Altimari not only embraced us as a part of his family,<sup>1</sup> he invited his clerks to drink of his world view, and in so doing indelibly etched his jurisprudence into our psyches. This article seeks to convey some of the wisdom that he tried to impart to its authors by analyzing some of the more influential opinions<sup>2</sup> written by Judge Altimari and

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Judge Altimari was loved and revered by his law clerks, and we were no exception. It was our privilege to serve as his clerks. We were all profoundly influenced by him in both our professional and personal lives, and he was a father figure to all of us. Like all of his clerks, we grew in stature immediately upon our departure from his service. Similarly, while we were clerks, we were regaled with stories by the Judge of the brilliance of our predecessors. At a party thrown for Judge Altimari by his law clerks to celebrate his tenth anniversary on the federal bench, the Judge remarked that he loved us all the same, but for different reasons. While we mourn his loss, we celebrate his life and accomplishments.

<sup>2</sup> A number of decisions written by Judge Altimari have had a profound effect on our society. Indeed, as Alexis de Tocqueville observed, in the United States federal judges "almost always acting alone" decide the most

placing them within the framework of his philosophy of the law; it is not intended to be an exhaustive and critical analysis of his hundreds of authored opinions.

Judge Altimari's jurisprudence is in some ways difficult to categorize. Late in life, he discovered and developed a prodigious talent for sculpting,<sup>3</sup> and like any sculptor he employed different tools as the need arose.<sup>4</sup> Similarly, he viewed the law pragmatically, and did not feel compelled to use a hammer when another tool was more appropriate.<sup>5</sup> Nevertheless, like any artist, he viewed the canvas, a piece of marble, or the law through a prism of life experience and learning.

Judge Altimari's world view was shaped by his deep religious faith and his long-standing relationship with the Catholic Church, his love and devotion to his family, and his love of learning. It is clear that his faith and his love of learning led him to the teachings of St. Thomas Aquinas. Similarly, his traditional "old

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important issues involving the nature and limits of governmental power, including conflicts over rights. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 276 n.7 (J.P. Mayer ed. & George Lawrence trans., 1969). Judge Altimari's concurrence with this view can be found in his powerful dissent in *Doherty v. Thornburgh*, 943 F.2d 204, 212 (2d Cir. 1991) (Altimari, J. dissenting):

[i]t is a bitter irony that in this era in which totalitarian regimes are adopting the language of freedom and looking to the United States as a model of liberty and justice, we today find it acceptable that a man who has not been charged with a crime in this country may remain incarcerated here indefinitely. I have always believed that a major difference between our Constitution and those that speak of justice in bold terms, but fail to provide it in reality, is that our Constitution provides for a judicial branch that is charged with the task of safeguarding individuals' rights, be they citizens or not.

*Id.*

<sup>3</sup> Indeed, a work remembering the Holocaust has a proud place at Touro.

<sup>4</sup> Aquinas referred to God as an artist, and Judge Altimari was clearly a loving apprentice. F.C. COPLESTON, *AQUINAS* 220 (1970).

<sup>5</sup> As Judge Altimari himself has written, "it should always be remembered that a doctrinaire fixity of views is a judge's anathema. Judges cannot and should not be staunch apostles or advocates of any creed no matter how lucid the vision--and yes, we all have a vision we know to be absolute truth." Frank X. Altimari, *The Practice of Dissenting In The Second Circuit*, 59 *BROOK. L. REV.* 275, 277 (Summer 1993).

school” values and his critical respect for traditional values and institutions, including the doctrine of *stare decisis*, is indicative of a conservative of Burkean bent.<sup>6</sup> Finally, Judge Altimari had a libertarian streak that often reared its head and was reminiscent of John Stuart Mill’s teachings.<sup>7</sup> These three sources of inspiration were the tools alive in the Judge’s hands as he carved out his judicial legacy on the federal bench.

### SOURCES OF INSPIRATION

From Aquinas, Judge Altimari developed his faith in natural law, and his belief in a rational evaluation of law as an instrument to achieve human fulfillment. Aquinas believed that knowledge could be obtained by both faith and reason, and that law is “an ordinance of reason made for the common good by him, who has charge of the community, and promulgated.”<sup>8</sup> For Aquinas, “the primary precept of the law is that good should be done and pursued and evil avoided; and on this are founded all the other precepts of the law of nature.”<sup>9</sup> Because he viewed law as an

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<sup>6</sup> Judge Altimari has expressly acknowledged the importance of prior precedent, and the fact that he was bound not only by Supreme Court precedent but by prior Second Circuit panels. Altimari, *supra* note 5, at 278. Judge Altimari specifically referred to *Dunlap-McCuller v. Riese Org.*, 980 F.2d 153, 157-58 (2d Cir. 1993), where “[e]ven though the members of the panel that heard *Dunlap-McCuller* were frustrated by the fact that precedent precluded us from reviewing the district court’s grant of a new trial, we were bound to apply this precedent to the facts at hand. The opinion, however, does express the panel’s frustration in the hope that the rule in the Second Circuit may someday be modified.” Altimari, *supra* note 5, at 278 n.9.

<sup>7</sup> Some theorists view Burkean conservatism and libertarianism to be a “blood feud” that cannot be reconciled. See, e.g., STEPHEN L. NEWMAN, *LIBERALISM AT WIT’S END: THE LIBERTARIAN REVOLT AGAINST THE MODERN STATE*, 32-33 (1984). However, Judge Altimari took seriously the difference between self-regarding and other-regarding actions, and in so doing he was able to carve out an appropriate place for pragmatic intervention by state institutions. Nevertheless, Judge Altimari saw the need for strict limits on government conduct.

<sup>8</sup> T. AQUINAS, *I SUMMA THEOLOGICA*, q. 90, art. 4, at 495 (Dominican Fathers’ ed. 1947).

<sup>9</sup> *Id.* q. 94.

ordinance of reason, Aquinas believed that the common good of the community could be rationally discerned as universal principles of morality. The common good aggregated the individual good of each member of the community, and depended upon the realization of human fulfillment. Laws are "just" if under rational examination they promote the realization of this human fulfillment; because human fulfillment is a tenet of the natural law, it becomes a rational method of determining the morality of law.<sup>10</sup> A law that hinders human fulfillment would be unjust or immoral. But Aquinas cannot be classified as a utilitarian or a relativist, since he viewed natural moral law is unalterable,<sup>11</sup> promulgated by the very fact that God instilled man's mind to recognize these laws naturally.<sup>12</sup>

Judge Altimari's faith in the justness of law, though, was tempered by his distrust of external regulation derived from John Stuart Mill. For Mill, whose espousal of libertarianism may be at odds with his earlier writings on utilitarianism, liberty is essential to human fulfillment.<sup>13</sup> Mill's antipathy toward intrusive government regulation is founded on the belief that human beings can achieve intellectual and moral fulfillment only in a sphere free from external regulation that allows them to explore their individuality.<sup>14</sup> "It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it and calling it forth, within the limits imposed by the rights and interests of

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<sup>10</sup> Aquinas did recognize, however, that the powers of human reason and persuasion are limited, and so must often be supplemented by the exercise of formal authority in determining the very content of law. See, e.g., T. AQUINAS, *TREATISE ON LAW* 78 (Gateway ed., 1965). This observation is similar to Edmund Burke's desire to make the world safe for human beings of limited rationality, "by suggesting ways of operating and preserving a political system that do not require unrealistic rational faculties in either the governors or the governed." Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, N.C. L. REV. 619, 645 (March 1994).

<sup>11</sup> See *supra* note 3, at 226.

<sup>12</sup> T. AQUINAS, *I SUMMA THEOLOGICA* 614-15 (Modern Library College ed., 1945).

<sup>13</sup> JOHN STUART MILL, *ON LIBERTY* 54 (David Spitz ed., 1975) (1859).

<sup>14</sup> *Id.* at 58.

others, that human beings become a noble and beautiful object of contemplation . . . .” Mill differentiated self-regarding from other-regarding actions, and argued that only to the extent that an individual’s actions affect others should that individual be subjected to regulation or punishment.

[T]here is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest: comprehending all that portion of a person’s life and conduct which affects only himself or, if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly and in the first instance; for whatever affects himself may affect others through himself; and the objection which may be grounded on this contingency will receive consideration in the sequel. This, then, is the appropriate region of human liberty.

. . . [T]he principle requires liberty of tastes and pursuits, of framing the plan of our life to suit our own character, of doing as we like, subject to such consequences as may follow, without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong . . . No society in which these liberties are not, on the whole, respected is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.<sup>15</sup>

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<sup>15</sup> State v. Erickson, 574 P.2d 1, 24 (Alaska 1978) (Mathews, J., concurring) (quoting JOHN STUART MILL, ON LIBERTY (1848)).

Mill deferred to individual rights and warned against the tyranny of the majority, but only in the context of self-regarding actions.<sup>16</sup>

Edmund Burke similarly wished to protect society from a tyranny of the majority. For Burke, though, the best protection against tyranny was the reliance on traditional institutions that were rooted in the societies in which they had developed. Burke was not opposed to change, rather he was opposed to the wholesale revamping of societies based upon abstract theorization. Burke viewed prudence and pragmatism as virtues, and unfettered revolutionary zeal as a vice.

Burke's thinking must be clearly distinguished from that of Aquinas, because for Burke there were no universals that could be rationally affirmed on any moral or any political subject. Burke's pessimism stands in stark contrast with the general optimism of Aquinas. While both saw limits to human rationality, Burke saw stark limits to human potential, and believed that human beings should not be experimenting with different forms of governments. Burke was not seeking to make the world safe for either democracy or self-regarding actions, but rather was attempting to make the world safe for human beings of limited rationality, by suggesting ways of operating and preserving a political system that do not require unrealistic rational faculties in either the governors or the governed.

An ignorant man, who is not fool enough to meddle with his clock, is however sufficiently confident to think he can safely take to pieces, and put together at his pleasure, a moral machine of another guise, importance and complexity, composed of far other wheels, and springs, and balances, and counteracting and co-operating powers. Men little think how immorally

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<sup>16</sup> See MILL, *supra* note 13, at 67. For Judge Altimari, abortion was clearly not a self-regarding action. He viewed the human fetus as a human being from conception, and, consequently, saw abortion as an act of murder. The teachings of Aquinas suggested to him that this was a violation of natural law. Nevertheless, Judge Altimari most seriously undertook his duty to uphold the Constitution, and he recognized that he had to enforce the law of the land.

they act in rashly meddling with what they do not understand. Their delusive good intention is no sort of excuse for their presumption. They who truly mean well must be fearful of acting ill.<sup>17</sup>

Burke saw a prescriptive wisdom inherent in long-standing institutions, and believed that reform must occur gradually, and each step made cautiously.

By a slow but well-sustained progress, the effect of each step is watched; the good or ill success of the first, gives light to us in the second; and so, from light to light, we are conducted with safety through the whole series. We see that the parts of the system do not clash. The evils latent in the most promising contrivances are provided for as they arise. One advantage is as little as possible sacrificed to another. We compensate, we reconcile, we balance. We are enabled to unite into a consistent whole the various anomalies and contending principles that are found in the minds and affairs of men.<sup>18</sup>

The gradual development and progression of the common law in the United States, with its reliance on the principle of *stare decisis* and its respect for long-standing principles and institutions, is clearly an evolutionary process that Burke would applaud. Judge Altimari was a student of the common law, and his prudent and pragmatic application of the common law for the common good and the protection of individual liberties — as long as they did not intrude upon the common good — suggest an

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<sup>17</sup> EDMUND BURKE, *An Appeal from the New to the Old Whigs*, in 1 THE WORKS OF THE RIGHT HON. EDMUND BURKE 535 (Harry G. Bohn ed., 1841) (1791).

<sup>18</sup> EDMUND BURKE, *Reflections on the Revolution in France*, in 8 THE WRITINGS AND SPEECHES OF EDMUND BURKE 217 (Paul Langford ed., Clarendon Press 1989) (1791).



enlightened and well-meaning, if imperfect, meshing of the philosophies of Aquinas, Burke, and Mill.<sup>19</sup>

### JUDGE ALTIMARI'S JUDICIAL SCULPTURES

#### *Young v. New York City Transit Authority*

The most well known of Judge Altimari's opinions is *Young v. New York City Transit Authority*.<sup>20</sup> In *Young*, the issue on appeal was whether the prohibition of begging and panhandling in the New York City subway system violated the First Amendment.<sup>21</sup> The New York City Transit Authority ("TA") and Metropolitan Transportation Authority of the State of New York ("MTA") were appealing from a permanent injunction prohibiting the TA from enforcing a regulation prohibiting begging in the subways.<sup>22</sup>

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<sup>19</sup> Many, if not most, of the decisions rendered by Second Circuit panels on which Judge Altimari sat while we were clerks were dictated by prior precedent, general principles of law, and/or statutory or regulatory mandate such as the Federal Sentencing Guidelines. Judge Altimari's clerks devised a methodology for dividing up the preparation of bench memorandum for these cases. Cases would be categorized by the senior clerk, who had a minimum of one year of experience, as hard, medium, and easy, based on the number of issues raised, the length of the briefs, the standard of review, and the reputation of the district court judge. The senior clerk would pick first, and choose a hard case to begin with. A case, for example, involving an issue of whether a well-respected judge abused his or her discretion in applying the federal sentencing guidelines would typically be categorized as an easy case. A federal diversity case raising a number of issues involving choice of law and issues of contract interpretation to be reviewed de novo would be categorized as a medium case. Easy and medium cases could typically be resolved in Burkean fashion by reference to prior precedent and general principles of law. There were, however, cases that required both judge and clerk to look beyond the four corners of the briefs and record on appeal, and to evaluate the effect of a decision on the common good of a society and the potential impingement on individual liberty. Nevertheless, Judge Altimari read every brief for every case, as well as the bench memorandum and proposed recommendations drafted by his clerks, and prepared himself thoroughly for oral argument.

<sup>20</sup> 903 F.2d 146 (2d Cir. 1990).

<sup>21</sup> *Id.* at 147.

<sup>22</sup> N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6 (1989).

The district court had concluded that begging constituted speech that warranted full First Amendment protection.<sup>23</sup>

In January 1989, the MTA and TA began a rule-making process to amend the existing regulation, which prohibited anyone from soliciting "alms, subscription or contribution for any purpose."<sup>24</sup> After four public hearings, an amendment was added that permitted greater utilization of the subways for certain non-commercial activities such as: "public speaking; distribution of written materials; solicitation for charitable, religious or political causes; and artistic performances, including the acceptance of donations." In particular, the amendment allowed solicitation for charitable, religious, or political causes only in certain places in the subway system.<sup>25</sup>

The TA then commenced "Operation Enforcement," a program designed to enforce the prohibition on begging and panhandling in the subway. The TA initially distributed 1,500,000 pamphlets that summarized 11 TA rules, including "No panhandling or begging," and displayed the rules on 15,000 posters throughout the subway system. Both the pamphlets and the posters warned that violation of the TA rules could lead to arrest, fine or ejection.<sup>26</sup>

Subsequently, the Legal Action Center for the Homeless ("LACH") filed suit in the district court on behalf of itself and two homeless men, William B. Young and Joseph Walley, as representative plaintiffs for a class of homeless and needy persons who begged and panhandled in the New York City subway system. The complaint alleged that the prohibition of begging and panhandling in the subway contravened plaintiffs rights to free speech, due process, and equal protection of the law.<sup>27</sup> Specifically, the plaintiffs argued that the extension of a hand by a homeless and needy person was protected speech, and that there was no legitimate distinction between solicitation for charitable,

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<sup>23</sup> *Young*, 903 F.2d at 148.

<sup>24</sup> N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(b).

<sup>25</sup> § 1050.6(c)(1) and (2).

<sup>26</sup> *Young*, 903 F.2d at 149.

<sup>27</sup> *Id.*

religious or political causes and solicitation of alms by private individuals.<sup>28</sup> They maintained that the total ban on begging and panhandling in the system was constitutionally impermissible.”<sup>29</sup>

District Judge Leonard Sand, upon initial oral argument, appeared to agree that the distinction between solicitation for alms and solicitation for charitable purposes was impermissibly vague; consequently, the TA amended the regulation on December 15, 1989, to read: “No person shall panhandle or beg upon any facility or conveyance.”<sup>30</sup> The revised regulation also prohibited all solicitation for charity except by specified organizations.<sup>31</sup>

Despite these revisions to the statute, the district court granted the request for a preliminary injunction,<sup>32</sup> stating that there was no distinction between charitable solicitation and begging, and concluding that begging could therefore be protected by the First Amendment. The district court held that the total ban on begging and panhandling was not “tailored narrowly to serve a state interest,” and that reasonable time, place, and manner restrictions should be promulgated.<sup>33</sup> The court subsequently converted a preliminary injunction against enforcing the prohibition of begging and panhandling to a permanent injunction and directed that begging and panhandling be permitted on subway platforms and mezzanines except when under construction, repair, or maintenance, while simultaneously prohibiting such behavior temporarily on subway trains and in the restricted areas where

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(b)(2) (1989).

<sup>31</sup> Specifically, organizations that: (1) have been licensed for any public solicitation within the preceding twelve months by the Commissioner of Social Services of the City of New York under Sec. 21-111 of the Administrative Code of the City of New York or any successor provision, or (2) are duly registered as charitable organizations with the Secretary of State of the State of New York under Sec. 172 of the New York Executive Law or any successor provision, or (3) are exempt from federal income tax under Sec. 501(c)(3) of the United States Internal Revenue Code or any successor provision. § 1050.6(c).

<sup>32</sup> 729 F. Supp. 341 (S.D.N.Y. 1990).

<sup>33</sup> *Young*, 903 F.2d at 153.

organized charitable solicitations were prohibited under 21 N.Y.C.R.R. Sec. 1050.6(c).

In his opinion reversing the district court and upholding the regulations against the First Amendment challenge, Judge Altimari began by colorfully discussing the realities of the subway system:

The New York City Subway System transports approximately 3,500,000 passengers on an average workday, operates twenty-four hours a day, seven days a week, and consists of 648 miles of track, 468 subway stations and over 6,000 subway cars. Many parts of the subway system are almost one hundred years old. In a timeworn routine of New York City life, each day a multitude descends the steep and long staircases and mechanical escalators to wait on narrow and crowded platforms bounded by dark tunnels and high power electrical rails.<sup>34</sup>

He placed particular emphasis on a research study that revealed that two-thirds of the subway riders had been intimidated into giving money to beggars. Passengers perceived that beggars pervaded the subway system, considering beggars to be a significant problem. Begging caused passengers to feel harassed and intimidated, and generated "high levels of fear in the passengers, thereby discouraging use of the system."<sup>35</sup>

Judge Altimari noted that there was a significant difference between begging in the subway and begging on the streets of New York:

Open city streets allow pedestrians what sociologists term "fate-control", or the ability to avoid and move away from an intimidating person. To the contrary, subway riders enjoy considerably less fluidity of movement and ability to control what happens to them.

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 149-50.

Whether standing in the crush of riders in a speeding subway car, waiting among the pressing masses on a platform, or swarming with the throng through a maze of mezzanines, staircases and ramps, the rider feels “captive”.<sup>36</sup>

Judge Altimari began his legal analysis by expressing “grave doubt as to whether begging and panhandling in the subway are sufficiently imbued with a communicative character to justify constitutional protection,” stating that “the real issue here is whether begging constitutes the kind of “expressive conduct” protected to some extent by the First Amendment.”<sup>37</sup>

The Judge observed that “[c]ommon sense tells us that begging is much more ‘conduct’ than it is ‘speech.’”<sup>38</sup> Begging is not “inseparably intertwined with a ‘particularized message.’” This is because common sense suggests that beggars are not seeking to convey any particular social or political message, but rather are seeking to collect money. While Judge Altimari acknowledged that a beggar may have an intent to convey a message, such as “I am homeless” to the subway passenger, there is a likelihood that this message will be lost as a result of the threat of the action itself.<sup>39</sup> “In the subway, it is the conduct of begging and panhandling, totally independent of any particularized message, that passengers experience as threatening, harassing and intimidating.”<sup>40</sup> Judge Altimari distinguished begging from the burning of a flag or the wearing a black arm-band, which are actions intended to convey a particular message: “[T]he object of begging and panhandling is the transfer of money. Speech simply is not inherent to the act; it is not of the essence of the conduct.”<sup>41</sup>

Judge Altimari also drew a First Amendment distinction between solicitations for charity and begging. In particular,

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<sup>36</sup> *Id.* at 150.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 153.

<sup>40</sup> *Id.* at 154.

<sup>41</sup> *Id.*

Altimari focused on the Supreme Court's decision in *Village of Schaumburg v. Citizens for a Better Environment*,<sup>42</sup> for its reasoning that appeals of organized charities "involve a variety of speech interests" including "communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes."<sup>43</sup> Solicitation for charities, according to the Supreme Court in *Schaumburg*, also involves informative and persuasive speech designed to seek support for particular causes or particular points of view.<sup>44</sup> "Canvassers in such contexts are necessarily more than solicitors for money" and do "more than inform private economic decisions."<sup>45</sup> Judge Altimari, therefore, concluded that the TA's allowing of solicitation by organized charities in certain areas of the subway system, while totally prohibiting begging and panhandling, was consistent with the rule of law promulgated by the Supreme Court in *Schaunberg*.<sup>46</sup> The Judge held that the TA had reasonably concluded that while solicitation by organized charities could be contained to certain areas of the system, the problems posed by begging and panhandling could be addressed by nothing less than the enforcement of a total ban.

*Young v. New York City Transit Authority* was one of those difficult cases that put Judge Altimari's personal and philosophical beliefs in opposition. While Judge Altimari, like Mills, was always cautious about permitting unnecessary government intrusion, he saw begging in the close confines of the New York City subway system as an other-regarding action that impinged upon the well-being of the vast number of people who used the system to commute to and from work each day. Judge Altimari's decision was grounded in the pragmatic reality of everyday life, and the need for law to be an instrument of human fulfillment.<sup>47</sup> The subway system, at the time, was filled with

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<sup>42</sup> 444 U.S. 620 (1980).

<sup>43</sup> *Id.* at 632.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Young*, 903 F.2d at 154.

<sup>47</sup> As Oliver Wendell Holmes noted, "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, *Book Notice*, 14 AM. L.

aggressive beggars and was viewed as a dangerous place by numerous commuters who shunned the subways for more cumbersome forms of transportation.

Given the Judge's strong charitable impulses, and his Aquinian concern for the common good, he must have seen the decision as splitting the difference, allowing charitable appeals by organizations but not by individuals. Moreover, the regulations at issue did not preclude begging on city streets or in other less-confined areas. Judge Altamari was, therefore, not sentencing beggars to death and starvation; rather, he was upholding the right of a governmental entity, which had studied the issue, to promulgate regulations designed to promote the common good. This decision was grounded, like good Burkean jurisprudence, on prior Supreme Court and Second Circuit First Amendment decisions and was limited to the issue at hand. It was clearly Judge Altamari's intent to promote the safety, security, and convenience of a vast number of commuters without unnecessarily impinging upon the human fulfillment of beggars, who could continue to operate in less confined quarters.

### *Doe v. City of New York*

In *Doe v. City of New York*,<sup>48</sup> a plaintiff sued the New York City Commission on Human Rights alleging that his constitutional right to privacy was violated when the Commission revealed to the public that he was infected with the Human Immunodeficiency Virus ("HIV"). The Commission had publicly revealed a conciliation agreement Doe had reached with Delta Airlines, settling a discrimination complaint.<sup>49</sup>

In 1989, Doe learned that he was infected with HIV, the virus that eventually causes Acquired Immune Deficiency Syndrome ("AIDS"). According to Doe, "his HIV status was an intensely personal matter which he did not share even with his family, his

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REV. 233, 234, reprinted in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 103 (Sheldon M. Novick ed., 1995) (1880).

<sup>48</sup> 15 F.3d 264 (2d Cir. 1994).

<sup>49</sup> *Id.* at 265.

friends, or his colleagues at work for fear of ostracism and discrimination.” Only his doctor, his attorney, and others involved in prosecuting his case knew of his condition.

Doe worked for Pan American World Airways during Pan Am’s 1991 bankruptcy and Delta’s subsequent acquisition of many of Pan Am’s services. Doe applied for a position with Delta but his application was denied. Doe subsequently filed charges with the Commission against Delta, alleging that Delta had not hired him because he was a single gay male and because it suspected that he was HIV positive.

Delta and Doe subsequently entered into the conciliation agreement, and Delta hired Doe as a customer-services agent. The agreement contained a confidentiality provision stating that “[e]xcept as required by any court or agency or upon the written consent of Doe or his attorney, Delta and the [Commission’s Law Enforcement] Bureau agree not to disclose Doe’s given name through any oral or written communication which identifies Doe by his given name as the plaintiff in this lawsuit or as a settling party to this Conciliation Agreement to any person that is not a party to or involved with this proceeding.”<sup>50</sup>

Notwithstanding this provision, the Commission subsequently issued a press release disclosing the terms of the agreement, without the knowledge or consent of Doe or Doe’s counsel. A number of New York newspapers published articles based upon the press release. Although the press release did not expressly name Doe, Doe alleged that it contained enough information to allow those who knew or worked with Doe to identify him as the individual described in the press release. According to Doe, his colleagues at Delta became aware of his HIV status, and this caused him to suffer discrimination and embarrassment at work, resulting in emotional distress.<sup>51</sup>

Doe brought suit against the Commission and the City of New York seeking damages and alleging violations of his constitutional rights and breach of contract. The district court dismissed the complaint, finding that the settlement was a public record in

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*



which there could be no reasonable expectation of privacy,<sup>52</sup> and further held that Doe's HIV status had been made a matter of public record once Doe filed a complaint with the Commission.<sup>53</sup>

Judge Altimari's opinion centered on whether Doe had a constitutional right to privacy regarding his HIV status and whether that right was waived when he brought a discrimination complaint to the Commission.<sup>54</sup> The Judge quickly concluded, in one of the first judgments of its kind in the jurisprudence, that "[i]ndividuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition." According to Judge Altimari, HIV status was a personal matter, and, was, therefore, entitled to constitutional protection as confidential information about one's health.<sup>55</sup>

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

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<sup>52</sup> 825 F. Supp. 36 (S.D.N.Y. 1993). The District Court cited to the Administrative Code of the City of New York, Sec. 8-115(d) (Cum.Supp.1991) ("Administrative Code"), which provides that "[e]very conciliation agreement shall be made public unless the complainant and respondent agree otherwise and the commission determines that disclosure is not required to further the purposes of this chapter."

<sup>53</sup> *Id.*

<sup>54</sup> 15 F.3d at 265.

<sup>55</sup> *Id.* (citing *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (recognizing that there exists in the United States Constitution a right to privacy protecting "the individual interest in avoiding disclosure of personal matters."); *Nixon v. Administrator of General Services*, 433 U.S. 425, 457 (1977) (reaffirming existence of right to privacy in personal information)).

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.<sup>56</sup>

Judge Altimari then evaluated whether this right to confidentiality was waived by Doe's entering into a conciliation agreement that, pursuant to the City of New York's Administrative Code, became a public document. While Judge Altimari noted that an individual cannot expect to have a constitutionally protected privacy interest in matters of public record, he questioned whether Doe's HIV status automatically needed to become a matter of public record or whether it became such a matter simply because the Commission chose to make it public. Judge Altimari rejected the City's argument that Doe had no reasonable expectation of privacy once he filed a claim with the Commission and entered into the agreement, simply because the administrative code automatically required public disclosure of all conciliation agreements.

According to Judge Altimari, the statute authorizing disclosure did not require, without exception, publication of a conciliation agreement. Indeed, the applicable administrative code states that conciliation agreements "shall be made public unless the complainant and respondent agree otherwise and the commission determines that disclosure is not required."<sup>57</sup> Consequently, Judge Altimari pointed out, the statute contemplates exceptions to the general rule in cases where the parties and the Commission agree or where the Commission exercises its discretion in a situation where an individual might expect that his privacy would be protected. Judge Altimari's opinion went on to note that:

the city's argument ignores the very nature of a Commission on Human Rights. The city essentially

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<sup>56</sup> *Id.* at 268.

<sup>57</sup> NEW YORK, N.Y., ADMINISTRATIVE CODE § 8-115(d).

contends that any individual seeking assistance from the particular public agency specifically authorized to vindicate his human and civil rights automatically relinquishes any rights of privacy he might have regarding his claim. This ignores the fact that the purpose of the Commission is to protect the human rights of the people of New York, which include the right to privacy in certain types of personal information. An Orwellian statute that mindlessly and indifferently mandated that any and all information provided to the Commission automatically became a public record—even in cases where the reason the complainant went to the Commission was because of a violation of a right to privacy—would be patently inconsistent with the protection of individual privacy rights, and thereby inconsistent with the purposes of the Commission. . . . To claim . . . that because the Commission is a public agency all information provided to it is automatically a matter of public record is to undermine entirely the purpose of a Commission on Human Rights, and to heedlessly make public that which is often surely intended to remain private. We refuse to believe that the statute could have been intended to yield such a result.<sup>58</sup>

Given this reading of the administrative code, Judge Altimari's opinion reversed the district court's dismissal because Doe could prove at trial that the confidentiality provision of his agreement led him to believe that the Commission would exercise its discretion to keep his HIV status private. The opinion noted that there were numerous issues still to be resolved, including whether the City had a substantial interest in issuing the press release announcing the Agreement that outweighed Doe's privacy interest.

In *Doe v. City of New York*, Judge Altimari's libertarian streak is clearly visible. Indeed, he cites Justice Brandeis' dissent in

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<sup>58</sup> *Doe*, 15 F.3d at 268-69.

*Olmstead v. United States*,<sup>59</sup> for the proposition that “the right to be let alone” is “the right most valued by civilized men.” Doe’s right to privacy as an HIV positive gay male was viewed by Judge Altimari as an important right that deserved Constitutional protection, but Judge Altimari also recognized the possibility that there might be countervailing state interests at issue. Judge Altimari’s decision in *Doe* seems consistent with the principle outlined by John Stuart Mill that “[e]ach is the proper guardian of his own health, whether bodily or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.”<sup>60</sup> While we knew that Judge Altimari viewed certain conduct that often led to the transmission of the HIV virus as “foolish, perverse, or wrong”,<sup>61</sup> he nevertheless concluded that one’s status as an HIV sufferer was a private matter, and that the government should only disseminate this information if it had a compelling interest to do so, if an individual had given his or her consent to disseminate this information, or if an individual had clearly waived the right to privacy.<sup>62</sup>

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<sup>59</sup> 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

<sup>60</sup> *State v. Erickson*, 574 P.2d 1, 24 (Alaska 1978) (Mathews, J., concurring) (quoting JOHN STUART MILL, ON LIBERTY (1848)).

<sup>61</sup> *Id.*

<sup>62</sup> In a later opinion, *Doe v. Marsh*, 105 F.3d 106 (2d Cir. 1997), Judge Altimari concluded that reasonable state officials could have concluded that plaintiffs had waived their right to privacy concerning their HIV status. Plaintiffs had previously identified themselves before seminar and conference audiences as persons living with HIV and one of the individuals disclosed her HIV-positive status in an educational video tape. The plaintiffs alleged that the New York State Department of Education had violated their right to privacy by publishing their condition in an HIV prevention education manual. However, based on the prior dissemination of their HIV status, Judge Altimari concluded that the state officials had acted in an objectively reasonable manner by publishing their status.

*Valmonte v. Bain*

The third case that illustrates some of Judge Altimari's judicial and personal values was *Valmonte v. Bain*,<sup>63</sup> which involved a challenge by a suspected child abuser to the New York State Central Register of Child Abuse and Maltreatment (the "Central Register"). The case presented difficult issues concerning the sufficiency of procedural protections for those accused of child abuse and neglect, and the Judge's opinion in this case not only demonstrates his overriding sense of justice and his keen belief in the value of fair processes, but also his courage to take a bold, innovative, and principled stand in favor of unsympathetic parties.

New York's Central Register contained a list of individuals that the state or county departments of social services had found were in some way abusive or neglectful of children.<sup>64</sup> The main legal issues in the case concerned the procedural protections that were in place to protect individuals from being unfairly placed on the list, particularly with regard to the standard of evidence that was sufficient to support a person's inclusion.<sup>65</sup> Individuals were initially placed on the list based on a complaint to the Register's hotline alleging child abuse or neglect.<sup>66</sup> Operators passed that report on to the local social services department, prompting an investigation to determine whether a complaint was "indicated," meaning that it was supported by at least "some credible evidence."<sup>67</sup> If the report was "indicated," the subject of the report was automatically listed on the Central Register.<sup>68</sup>

Although the names of individuals on the Central Register were generally kept confidential, there were statutory provisions that required certain employers in the child care field to consult with

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<sup>63</sup> 18 F.3d 992 (2d Cir. 1994).

<sup>64</sup> *Id.* at 995.

<sup>65</sup> *Id.*

<sup>66</sup> The statutory scheme for the Central Register is more complicated than we need for our analysis, but is discussed in greater depth in Judge Altimari's exhaustive opinion. See 18 F.3d at 995-97.

<sup>67</sup> 18 F.3d at 995.

<sup>68</sup> *Id.*

the Register to determine whether potential employees were listed.<sup>69</sup> The purpose of this statutorily-required consultation was to ensure that individuals included on the Central Register did not become employed in positions where they would have contact with children. Indeed, an employer wishing to hire the listed individual in spite of the report on the Register would have to maintain a written record as to why the employer thought it was appropriate to hire the individual.<sup>70</sup>

There were ways for the individual to challenge her inclusion on the Central Register, but at each step of the appeals process within the social service bureaucracy, the adjudicating body only had to find that the report was supported by "some credible evidence," the same standard applied for the initial determination. For example, the listed individual could appeal to the state department of social services to ask for the expungement of the report, but state DSS would deny the expungement request if there was some credible evidence supporting the allegation.<sup>71</sup> After denial, the listed individual could ask for an administrative hearing before the state's department of social service's commissioner's office, but again the commission would only require the local county department to prove the allegations by "some credible evidence."<sup>72</sup>

The allegations needed to meet a higher standard of proof only after the listed individual lost her job because of her placement on the Central Register, or lost prospective employment because of the employer's statutorily-required consultation of the list. The subject then had the right to a "post-deprivation hearing" before the state department of social services.<sup>73</sup> At this hearing, the state would have to prove the charges against her by a "fair

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> The state department of social services would actually conduct a two-part review, the second part determining whether the acts alleged could be "relevant and reasonably related" to child-care employment. 18 F.3d at 996. This second part of the review, present throughout the appellate process within the social services department review, was not materially at issue in *Valmonte*.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 997.

preponderance of the evidence,” not the “some credible evidence” standard. If the state failed to meet this higher standard of proof, the state would not inform employers of the individual’s inclusion on the Register.

Anna Valmonte got involved with this system when someone reported to the Central Register that she had slapped her young daughter.<sup>74</sup> Her name was placed on the Register by the county department of social services, and her subsequent appeals to the state department and the commissioner under the “some credible evidence” standard were unsuccessful.<sup>75</sup> Because she was never actually denied employment in the child care field, she never had the opportunity for a post-deprivation hearing under the higher preponderance standard.

Valmonte subsequently brought an action in the Southern District of New York challenging the constitutionality of the statutory scheme on numerous grounds including due process allegations that the procedural protections for inclusion on the Register did not adequately protect Valmonte’s liberty interest.<sup>76</sup> The district court initially dismissed all of the case except for the due process claims, finding that the some credible evidence standard left open too great a possibility of error.<sup>77</sup> Ultimately, though, the district court dismissed the entire action, finding that there was no implication of liberty interests if the Central Register was available only to prospective employers, not to the public at large.<sup>78</sup>

In his long and thorough opinion, Judge Altimari ultimately reversed the holding of the district court, finding that Valmonte

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<sup>74</sup> Valmonte claimed in her appeal that she was disciplining her daughter for stealing. *Id.* This may be important insofar as the factual context supported the general theory of the appeal that an “Orwellian” state was interfering in the choices made by a mother in raising her child. Since child abusers generally make for unsympathetic plaintiffs, it was clearly a benefit for the putative class action to have a named plaintiff with whom the Court could identify and perhaps empathize with.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 998.

<sup>77</sup> 788 F. Supp. 745 (S.D.N.Y. 1993).

<sup>78</sup> 812 F. Supp. 423 (S.D.N.Y. 1993).

did have a liberty interest that was implicated by the Central Register, one that was not adequately protected by the “some credible evidence” standard used by the state social services departments.<sup>79</sup> There were two very close due process issues raised in *Valmonte*, the first regarding whether there was a protectible liberty interest, and the second involving whether, if there was such an interest, the procedural protections were sufficient. For both issues, Judge Altimari engaged in a nuanced, innovative analysis of the facts that went beyond the easy surface issues to examine the relationship of the individual and the state in modern society.

The first question addressed was whether *Valmonte* could have a protectible liberty interest implicated by inclusion on the Central Register if she never actually suffered anything other than the defamation, given that she had never lost employment from an employer’s consultation with the list. Under prevailing Supreme Court and Second Circuit precedent, damage to reputation alone was insufficient to invoke the procedural protections of the Due Process Clause.<sup>80</sup> Rather, a plaintiff alleging a violation of liberty needed to show “stigma plus,” meaning that there was loss of reputation coupled with some other, more tangible, deprivation.<sup>81</sup> The Court found that there was no question that inclusion on the list damaged *Valmonte*’s reputation by “branding her as a child abuser,”<sup>82</sup> but also had to face the tougher question of whether there was any additional tangible deprivation since *Valmonte* had not applied for any position with a child care agency since her inclusion on the list, and thus had not lost any existing or prospective employment because of the employer’s statutorily-required consultation with the list. The state argued that *Valmonte* was unable to secure employment in her chosen field simply because of her damaged

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<sup>79</sup> *Valmonte*, 18 F.3d at 1005.

<sup>80</sup> See *Paul v. Davis*, 424 U.S. 693, 701 (1976) (holding that reputational damage is not “by itself sufficient to invoke the procedural protection of the Due Process Clause.”).

<sup>81</sup> *Id.* See also *Neu v. Corcoran*, 869 F.2d 662, 667 (2d Cir. 1989) (establishing “stigma plus” analysis).

<sup>82</sup> *Valmonte*, 18 F.3d at 1000.



reputation, which is insufficient to support a substantive due process claim.

It would have been very easy for the court to look at the fact that Valmonte had not actually lost existing employment, and affirm the dismissal of her claim on that basis. But in looking at the actual statutory scheme in place, and how it realistically affected the lives of people included on the Central Register, Judge Altimari formulated a bold and carefully-crafted argument that the operation of the Register did cause a tangible deprivation of Valmonte's liberty:

The Central Register does not simply defame Valmonte, it places a tangible burden on her employment prospects . . . [B]y operation of law, her potential employers will be informed specifically about her inclusion on the Central Register and will therefore choose not to hire her. Moreover, if they do wish to hire her, those employers are required by law to explain the reasons why in writing. This is not just the intangible deleterious effect that flows from a bad reputation. Rather, it is a specific deprivation of her opportunity to seek employment caused by a statutory impediment established by the state. Valmonte is not going to be refused employment because of her reputation; she will be refused employment simply because her inclusion on the list results in an added burden on employers who will therefore be reluctant to hire her.<sup>83</sup>

This was a rather remarkable interpretation of the "stigma-plus" test. It was not enough for Valmonte to assert that employers would be unlikely to hire someone who was included on the list. What made her inclusion on the Central Register an infringement on her liberty interest was the statutory requirement that employers not only consult with the Register -- which would only "publish" the defamation -- but also provide written documentation as to why they would hire someone listed there.

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<sup>83</sup> *Id.* at 1001.

That is, the requirement that employers, if they hire someone on the list, explain their reasoning in writing was the tangible infringement on Valmonte's liberty, since it put a burden on the employer's choice to hire her.

Having established that the Central Register implicated Valmonte's liberty interest, the Court still had to determine whether the procedural protections set up by the State were sufficient to protect that interest. Applying the familiar *Mathews v. Eldridge*<sup>84</sup> test requiring a balancing of the nature of the private interest, the state interest, and the risk of error and effect of additional procedural safeguards, the Court quickly determined that both Valmonte and the state had legitimate interests at stake, but that there was a serious problem with the procedural safeguards and their risk of error.<sup>85</sup> Judge Altimari found that, according to Valmonte's unchallenged figures,

nearly 75% of those who seek expungement of their names from the list are ultimately successful. Half of that number obtain expungement only after they have lost employment or prospective employment because of their inclusion on the Central Register. This means that roughly one-third of those initially placed on the Central Register are eventually removed once the local DSS is required to prove the charges against the subject by a fair preponderance of the evidence. The fact that only 25% of those on the list remain after all administrative proceedings have been concluded indicates that the initial determination made by the local DSS is at best imperfect.<sup>86</sup>

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<sup>83</sup> 424 U.S. 319, 335 (1976).

<sup>85</sup> 18 F.3d at 1003.

<sup>86</sup> *Valmonte*, 18 F.3d at 1004. Judge Altimari also noted that in oral argument Valmonte had asserted without challenge that a staggering 2,000,000 individuals were listed on the Central Register: "We find it difficult to fathom how such a huge percentage of New Yorkers could be included on a list of those suspected of child abuse and neglect, unless there has been a high rate of error in determinations." *Id.*

Judge Altamari was colorfully skeptical of the state's claims that the "extraordinarily high percentage of reversals" demonstrated that the procedures were working to correct initial mistaken determinations, noting that "[o]ne does not normally purchase a car from a dealer who stresses that his repair staff routinely services and repairs the model after frequent and habitual breakdowns."<sup>87</sup>

The Judge held that this high rate of error resulted from the application of the "some credible evidence" standard throughout the Central Register process until the post-deprivation hearing, finding that the standard was "especially dubious in the context of determining whether an individual has abused or neglected a child," since such determinations were "inherently inflammatory" and "open to [] subjectivity when the fact finder is not required to weigh evidence and judge competing versions of events."<sup>88</sup> The Judge, true to his conservative instincts, did not prescribe what standard of proof should apply at different stages of the process, but the Court's holding invalidated a statutory scheme that only required a preponderance of the evidence in a post-deprivation hearing.

Judge Altamari's opinion in *Valmonte* is a good illustration of his judicial and philosophical temperament. First, the Judge's reasoning in finding that Valmonte had a liberty interest implicated by the Central Register was a remarkable extension of the "stigma-plus" test to a case where a plaintiff had not actually lost anything at the time of suit, and demonstrates Judge Altamari's sophisticated view of stare decisis in a case that had no direct precedent.<sup>89</sup> There was strong precedent holding that an individual who had not actually been deprived of anything tangible such as existing employment could not sustain a substantive due process claim.<sup>90</sup> Similarly, Second Circuit law was clear that defamation alone was insufficient to support a

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<sup>87</sup> *Id.* at 1004.

<sup>88</sup> *Id.* at 1004.

<sup>89</sup> As the Judge acknowledged, "this is a unique situation, not previously considered in the case law." *Id.* at 1001.

<sup>90</sup> See, e.g., the discussion in *Valmonte*, 18 F.3d 1002 on the Second Circuit decisions in cases where plaintiffs asserted only simple defamation.

deprivation of a liberty interest.<sup>91</sup> Judge Altimari's resolution of the problem on the narrow facts, finding that this situation was different because by operation of law Valmonte's employers would have an added burden of being required to keep a written record of why they would hire someone listed on the Central Register, was a slender ground upon which to find a protectible interest. After all, the requirement that employers make a written justification for hiring someone listed on the Register was the least likely way that Valmonte would have been deprived. Realistically, it is unlikely that any child-care employer would ever hire someone listed on something called the "Central Register of Child Abuse and Maltreatment," not only for the implied danger but also for the potential liability if the employee lived down to the sullied reputation -- employers would rarely be called upon to provide a written justification for hiring such an unlikely candidate for employment. Valmonte was thus aggrieved far more seriously by the requirement that employers consult the list, but her tangible constitutional deprivation was in the more mild and unassuming statutory requirement that an employer willing to take the chance on hiring her would have to provide written documentation as to why.

It is on this slender ground that Judge Altimari found cause to question the entire statutory framework. Using Burkean reasoning, extending the "stigma-plus" line of cases from those that only found a deprivation if the individual had actually lost something to a case where, by operation of law, the plaintiff would automatically lose something if she applied for a job, was an innovative yet pragmatic way of resolving the case -- innovative because there was no direct precedent for the holding, pragmatic because the result reached in the case reflected the real harm that Valmonte would have endured had she chosen to work in her chosen career.

Second, *Valmonte* also demonstrates the Judge's strong libertarian streak, reminiscent of his influence from Mill that liberty is essential, and state restrictions on that liberty should be

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<sup>91</sup> See the Judge's discussion of defamation cases in *Valmonte*, 18 F.3d at 1000.

narrowly circumscribed. This could have been an easy case, a decision based entirely on the district court opinion that directly if narrow-mindedly followed the “stigma-plus” line of case. But instead of reading precedent literally, without regard to the real-world ramifications, Judge Altimari examined what the Central Register was really doing to Anna Valmonte, and found a narrow yet legitimate reason for holding that her inclusion implicated her liberty. Although he was rarely results-oriented, preferring instead to follow the law wherever it led him, one is tempted to think that the Judge found the entire statutory scheme too great an imposition on personal liberties by the state, and found a subtle if legitimate way to invalidate it through the back door.

Finally, *Valmonte* is revealing because the Judge was unafraid to take a bold technical stand in favor of extremely unsympathetic plaintiffs. There are few parties who engender as little public sympathy as suspected child abusers, especially in the legal environment of the past 10 years or so that has, for example, witnessed the rise of post-incarceration registration of sex-offenders. Moreover, we know how the Judge – a devoted father of four and grandfather of eleven who ceaselessly preached to his clerks the blessings of parenthood<sup>92</sup> – would be personally enraged by anyone who would dare mishandle what he viewed as God’s gift of a child. But the Judge, true to his judicial instincts, rarely let such personal feelings intrude on his principled views of personal liberty. Although he would have been appalled personally by the types of people who deserved inclusion on the Central Register, he still was suspicious of a government infringement on personal liberty that did not have adequate procedural protections.

It is in such a context that the philosophies of Burke and Mill arguably intersect, because both were concerned about the tyranny of the majority and neither would have been satisfied

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<sup>92</sup> Indeed, some of the Judge’s encouragement of his clerks to marry and have children bordered on, dare we fondly say, intimidation. It would make an interesting sociological study to determine whether Judge Altimari’s clerks had a higher marriage and birth rate than the average federal clerks, particularly during the clerkship itself.

with the institutional safeguards in place. Furthermore, a Central Register that improperly tainted the reputation of 75% of the people on it because of the lack of procedural safeguards is unjust and does not serve the common good of the community, therefore violative of the principles enunciated by Aquinas.

### Conclusion

It is difficult to assess the judicial legacy of a United States Court of Appeals judge. Unlike colleagues in the United States District Court or the appellate courts of discretionary jurisdiction, who have some control over their dockets and have more freedom to choose cases upon which to write opinions, judges on the Courts of Appeals will hear more than 300 cases every year of varying degrees of importance and interest, and will write more than 30 or 40 opinions every year usually assigned to them by senior judges on their panels.

It is especially difficult to assess the legacy of Judge Altimari, because his philosophical and judicial temperament was such that he never intended to even create a legacy. He was a "judge's judge," a professional judge who wore the robe in state courts, the federal district court, and the Second Circuit Court of Appeals for almost 30 years, who had a deep understanding of the role of the appellate courts. He looked upon judicial opinions as resolutions of the disputes before him, not as opportunities to put his individual stamp on the federal judiciary. He decided the case that was before him, as he saw it, just as when he was sculpting he would work with the stone before him, not try to create something out of the stone that was not meant to be.

Thus, this essay's attempt to explain some of Judge Altimari's noteworthy opinions in light of his judicial and personal philosophies does something that the Judge would never have done: look at his cases as extensions of himself. As such, we think that the Judge would have been proud to think that the philosophies with which he was imbued in his traditional "old-school" education guided him in the exercise of his official duties. We also think that the three cases we have highlighted show Judge Altimari's greatest strengths as a judge: his

overriding sense of fairness and justice, his belief in the rights of the individual in the modern community, and his judicial preference for prudence, pragmatism, and precedent in resolving disputes.

Finally, we would be seriously remiss if we did not briefly acknowledge our personal feelings for Judge Altimari, and how enormously grateful we are for the opportunity we had to work at his side for too brief a time. He was a man with an unbounded capacity for love for his family, his friends, his colleagues, and even his clerks, and we were blessed in our chance to share in some small part of his life, to have him slip his arm in ours in his familiar, affectionate way as we would walk to the courthouse, or to see his welcoming smile when we would return to chambers long after finishing our clerkships just to wish him well. He was a wonderful man, and he will be missed.