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Way Beyond Candor

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Scott Altman's excellent article, *Beyond Candor*,[1] causes me to pose this query: Does his theory contain not only the seeds of its own rejection, but perhaps also (if I am not careful) the seeds of the rejection of its rejection?

Altman tells us of the orthodox view that judges should be encouraged to be both honest with the public and honest with themselves about how they arrive at their decisions. Through this combination of public candor and critical introspection, judges will produce better judicial opinions and ultimately a better legal system, or so the argument runs.

Altman rejects the orthodox view at least insofar as it encourages critical introspection among judges. Significantly, however, he does not directly attack the underlying values embodied in it. He does not attack the virtues of candor at all — either in the specific context of judicial opinions or more generally. Nor does he attack introspection in general. He appears willing to accept the notion that critical examination of one's own motivations and beliefs is beneficial. His sole attack is on the particular case of introspection in judicial decisionmaking. He thus appears to be arguing for an exception for judicial decisionmaking to a moral precept that he otherwise has no particular quarrel with — that critical self-examination is valuable and should be encouraged or, more generally, that the pursuit of truth is valuable and ought to be encouraged.

Altman's argument runs this way: Judges tend to overestimate the extent to which their decisions are the product of constraint imposed upon them by the law. In many instances, they deceive themselves into believing that they are acting under constraint of law when in fact they are acting according to their own personal preferences. In some of these cases, the judge is simply mistaken as to the reach of the law. The law actually may impose no constraint upon the judge at all. In other cases, the error is more serious. The law would have been inter-

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1. Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990).

preted by most to constrain the judge to reach a result contrary to the one she reached — a constraint the judge blithely ignores.

Altman regards this self-deception as beneficial. He fears that correcting it may have a serious perverse consequence, in that judges' newly enlightened views on the degree to which their decisions are the product of constraint in the law may operate as a self-fulfilling prophecy. For example, if a previously self-deceiving judge learns that she has been mistaken about her faithfulness to the rule of law, she may become not simply chastened but thoroughly disillusioned. Previously, she had unwittingly strayed from legal constraint only on rare occasions when her personal preferences were particularly strong. Her self-deception permitted her to arrive at conclusions she was hell-bent on arriving at anyway, without affecting her devotion to the rule of law in other cases. Recognizing her faithlessness may not make her any more likely than before to submit herself to the law's constraint in those cases in which she strongly objects to the outcome dictated by law. Instead, once she realizes that she has already tasted forbidden fruit, she may find it easier to do so again in the future, even in cases where her quarrel with the otherwise applicable rule is trivial. Indeed, she may even adopt a new judicial philosophy that purports to legitimize absolute discretion on the part of judges to decide cases as they wish.[2]

Similarly, Altman argues that another judge who previously searched diligently for constraint in the law might search less diligently if she learns that there is less constraint than she had thought. Indeed, such a judge may adopt the opposite practice, searching diligently for ambiguities or inconsistencies in the law. Over time, this too will tend to reduce the level of constraint imposed by the law, for such constraint requires some consensus on the meaning of legal rules and standards. The more aggressively judges seek the ambiguities and inconsistencies, the more rapid the deterioration of consensus, and hence of legal constraint.[3]

Altman would not welcome such a decrease in legal constraint. He makes it quite clear that he believes the legal system would be worse off if it were to become less constraining than it is now. Although he recognizes the costs of constraining legal rules, he has no trouble pointing out their virtues:

> If judges follow law, rather than doing in each case what seems to them best, many difficulties are minimized. Decisions are more predictable, offering notice to potential litigants, permitting planning, deterring liti-

2. *See id.* at 323.

3. *Id.* at 324.

> gation, and promoting stability. If the applicable law was established by a legislature or by many judges over time, following law limits the power of individual judges, promoting the values of decisionmaking by consensus. Finally, if judges hold views aberrant from or unacceptable to the community, constraining judges limits the implementation of unacceptable values.[4]

Rather than risk a decrease in the law's constraint, Altman counsels caution in revealing truth to judges or even in encouraging judges to find the truth in themselves.

The curious aspect of Altman's argument is this: It concerns itself solely with the importance of judicial decisionmaking rules and neglects entirely the importance of other kinds of rules. If one views nonlegal decisionmaking heuristics, such as "Seek the truth," as rules that ought to carry with them a power to constrain similar to that of legal rules, Altman's argument undermines itself. In an effort to protect legal constraint in judicial decisionmaking from deterioration and decay, Altman — without explanation — sacrifices moral constraint.

It is easy to see why Altman is anxious to preserve constraint in judicial decisionmaking. A legal rule that commands the judge to "dismiss any lawsuit not brought within three years of the date the cause of action arose" may well, under certain circumstances, be preferable to a rule that commands the judge to "dismiss any lawsuit not brought within three years of the date the cause of action arose unless, all things considered, that is not the best thing to do." Despite the fact that the latter formulation may be a better reflection of our abstract notions of perfect justice, the former, more rigid formulation may work better in practice. Adopting the more constraining formulation may prevent judges with views that are aberrant from the community from imposing their views on the community. The judge who disagrees fundamentally with the community's basic limitations policy and the reasons for it will not have the same opportunity to circumvent that policy that she would have if the more discretionary rule were imposed upon her. There is a price to pay for this protection against aberrant judges — a price paid in terms of unwanted rigidity in the law — but sometimes this will be a price worth paying. None of this is meant to suggest that the more rigid formulation is or should be absolutely constraining. Although reasonable persons may disagree as to the weight of the presumption in favor of the application of any particular rule, few would dispute that in some circumstances the presumption (and thus the rule) should be overridden (for example, occasions in which application of the rule would result in the destruction of

4. *Id.* at 329.

the universe). The point here is simply that some constraint in the law is beneficial, and the more rigid formulation offers more constraint on the judge than the more flexible and discretionary formulation.

Culturally imposed moral codes are no different. Such precepts as "Be honest," "Work hard," and "Seek the truth" are drilled into children from an early age. Few parents tell their children, "Exercise your own discretion in determining when it is appropriate to be honest," "Work hard when it appears, all things considered, to be the appropriate thing to do," or "Seek the truth when you determine it wise." The reason is clear: these moral codes are meant to have their element of constraint as well. Just as the community benefits from its ability to prevent judges with aberrant or unacceptable views from deciding a case based on them, the community benefits from the ability to prevent moral actors with aberrant or unacceptable views from acting on their views. Some level of constraint is crucial.

Why shouldn't the same analysis Altman uses in discussing the circumstances under which legal rules should be overridden be applied to moral rules? He appears to adopt the method of analysis that Frederick Schauer has called presumptive positivism[5] in analyzing when a legal rule should be overridden by other concerns.[6] According to Altman, a presumptive positivist follows a rule unless the expected outcome from the application of that rule appears very wrong. In that case, she engages in an all-things-considered analysis (including consideration of such rule values as predictability and uniformity) to determine if the rule should be followed. On the other hand, if the expected outcome strikes the presumptive positivist as only somewhat wrong, she will apply the rule.

Would a presumptive positivist dealing with the moral precept "Seek the truth" find sufficient reason in *Beyond Candor* to overcome the presumption in favor of the moral precept in the context of judicial decisionmaking? In other words, would the presumptive positivist find the result occasioned by following the "Seek the truth" rule to be "very wrong," such that she would consider overriding it? It seems entirely possible that the answer is "no."

To begin with, the evidence of potential loss of legal constraint is entirely speculative. Altman is tentative in his empirical conclusions and rightly so. We cannot be sure how judges will react if they learn, through introspection or otherwise, that they are less constrained in their decisionmaking than they previously thought. Perhaps Altman

5. Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POLY. (forthcoming 1991).

6. Altman, *supra* note 1, at 331-32.

is correct that they will react in such a way as to reduce the overall level of constraint in the law. The contrary conclusion, however, is just as plausible. Judges who learn the hidden truth may well react by attempting to *increase* the constraint imposed by law. A judge who finds that she has been faithless to a rule of law may firmly resolve not to behave that way in the future. A judge who previously believed herself to be acting under constraint of law, but who learns that this is not so, may become dismayed over that lack of constraint. Such a judge may react by refusing to look quite so hard for ambiguities and conflicts in the law in the future. Over time, this could create a climate of increased consensus and hence increased constraint.

Second, even if the evidence were irrefutable that encouraging judges to introspect would result in decreased legal constraint, it is not at all clear that a sufficient basis would exist to override the precept. We are, after all, discussing the prime directive of academic life and a vitally important rule of civilized life in general: Seek and disseminate the truth. Loss of some legal constraint may be a small price to pay to protect the constraint imposed by the rule from deterioration.

Thus, the presumptive positivist's response to Altman's argument may well be to disregard it insofar as it recommends a deviation from the rule "Seek and disseminate the truth." Although stimulating, the article may present an insufficient foundation upon which to base such a deviation.

Of course, I am not arguing that Altman's argument presents a threat to moral constraint and hence should not have been written at all. If I were to suggest such a thing, surely I would be open to the same criticism I have made against Altman — a violation without adequate justification of the moral precept "Seek and disseminate the truth." Instead, I argue solely that his warnings should not be acted upon.

Altman, by his own lights, should appreciate the need for constraint imposed upon moral decisionmakers by moral rules just as he recognizes the need for constraint imposed upon judges by legal rules. Specifically, as a supporter of legal constraint, he should recognize that the moral precept "Seek and disseminate the truth" should be followed except in those relatively rare circumstances in which one can argue persuasively that the application of the rule will yield a "very wrong" result. Altman has failed to demonstrate that such a circumstance exists in the context of judicial decisionmaking.