RUTGERS LAW REVIEW

VOLUME 61 *Summer 2009* NUMBER 4

THE 2009 CHIEF JUSTICE JOSEPH WEINTRAUB LECTURE

REFLECTIONS UPON *HERRING V. UNITED STATES*: THE DANGERS OF NARROWING PROTECTIONS OF CIVIL RIGHTS IN THE PRESSURE COOKER ENVIRONMENT IN WHICH WE LIVE

Judge Dickinson R. Debevoise

Rutgers School of Law–Newark

April 22, 2009

Dean Deutsch, Penny Venetis:
Fellow Admirers of the great Chief Justice Joseph Weintraub:

It is both an honor and a pleasure to deliver the Rutgers Law School Chief Justice Weintraub Lecture. It is a particular pleasure to do so on the occasion of the Law School's centennial year.

I am old enough to have encountered the Chief Justice during his years on the Supreme Court. On occasion I argued before him.[1] On occasion I met him at social events. I do not know which occasion was more unnerving.

He questioned lawyers with a penetrating gaze, and as he tested my arguments he seemed to know far more about my case than I did. At a social event, what could one say to such an intellectual and judicial giant that would either interest or amuse him? In a moment

1. *See, e.g., In re* Supervision and Assignment of the Petit Jury Panels in Essex County, 292 A.2d 4 (N.J. 1972); N.J. Highway Auth. v. Sills, 278 A.2d 489 (N.J. 1971); Jackman v. Bodine, 208 A.2d 648 (N.J. 1965); O'Brien v. Virginia-Carolina Chem. Corp., 206 A.2d 878 (N.J. 1965); Burton v. Montclair, 190 A.2d 377 (N.J. 1963); *In re* Armour's Will, 166 A.2d 376 (N.J. 1960).

I will touch on a few of his contributions to the law.

As for Rutgers Law School, my associations go far back. In the troubled years of the 1960s, your Dean, Willard Heckel, served as President of the United Community Corporation, the umbrella organization that funneled federal funds into the Johnson anti-poverty campaign. This corporation played a key role during the period before, during and after the riots, helping to empower the people of this community to take over the City government from a totally corrupt regime.

As just one of his initiatives, Dean Heckel asked me to assemble a group of lawyers to form the Newark Legal Services Project, the pioneer legal services project in New Jersey.

No one has adequately recorded the sustained, critical role that Willard Heckel and his administrators, faculty, and students played in salvaging this City. I would be glad to turn over my archives on the Newark riots to any faculty member or historian who wished to write a definitive work about this subject.

My second major encounter with Rutgers Law School was more recent.

For ten years, starting in 1997, I felt as if I were living with Rutgers Law School's Legal Clinic. In a case before me, under the leadership of Penny Venetis, the Clinic represented a group of asylum seekers who had been detained in appalling conditions at the detention center in Elizabeth.[2] This case involved the most complex substantive and procedural issues. It probed the limits of the Alien Tort Claims Act.[3] The Law School should be proud of the quality of the Clinic's work and its steadfast persistence as it advocated year after year, ultimately successfully, against tough and skillful adversaries. This case has particular relevance today as we read of inhumane treatment of undocumented aliens held in public and privately run detention centers.

This brings me to the subject about which I would like to talk this afternoon—reflections arising from the recent Supreme Court case, *Herring v. United States*.[4]

In that case, Investigator Mark Anderson learned that Bennie Dean Herring, a person well known to the law enforcement officials, was in the vicinity of the Coffee County Sheriff's Department headquarters.[5] Anderson asked the County's warrant clerk to check

2. *E.g.*, Jama v. U.S. Immigration and Naturalization Serv., 343 F. Supp. 2d 338 (D.N.J. 2004).

3. *See* Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

4. *See* Herring v. United States, No. 07-513, slip. op. at 1 (U.S. Jan. 14, 2009).

5. *Id.* at 2.

for outstanding arrest warrants.[6] "When she found none, [he] asked [her] to check with . . . her counterpart in neighboring Dale County."[7] The Dale County computer database reflected "that there was an active arrest warrant for Herring's failure to appear on a felony charge."[8]

This information was forwarded to Anderson who asked for a faxed copy and then proceeded to arrest Herring.[9] "A search incident to the arrest revealed methamphetamine in [his] pocket, and a pistol (which as a felon he could not possess) . . . ."[10]

The Dale County computer clerk, searching for the physical arrest warrant, was unable to find it.[11] She discovered that the warrant had been recalled five months earlier, but the recall had not been entered in the computer records.[12] The information was immediately forwarded to Investigator Anderson.[13] However, the arrest and seizure had already been effected.[14] All this had unfolded in ten to fifteen minutes.[15] On the basis of the evidence seized during a warrantless arrest, Herring was indicted for illegally possessing the gun and drugs.[16]

Without going through all the procedural steps challenging the use of the seized evidence, suffice it to say that, affirming the decision, the Court of Appeals for the Eleventh Circuit concluded that the error in failing to delete the arrest warrant from the computer base was negligent, but not reckless or deliberate.[17] It upheld the trial court's refusal to exclude the evidence.[18]

Agreeing that there was a Fourth Amendment violation, the United States Supreme Court split five to four on whether the exclusionary rule should be applied, the majority holding that it should not be.[19]

Chief Justice Roberts, speaking for the majority, noted the Court's prior focus "on the efficacy of the [exclusionary] rule in

---

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 3.
17. *See* United States v. Herring, 492 F.3d 1212, 1218 (11th Cir. 2007).
18. *Id.* at 1219.
19. *See Herring*, No. 07-513, slip op. at 12-13 (U.S. Jan. 14, 2009).

deterring Fourth Amendment violations in the future."[20] He cited "the rule's costly toll upon truth-seeking and law enforcement objectives," which, he wrote, "presents a high obstacle for those urging its application."[21] He concluded that "to trigger the exclusionary rule, police conduct must be sufficiently deliberate," reckless, or grossly negligent so "that exclusion [of evidence] can meaningfully deter it."[22] Merely negligent conduct, as in *Herring*, did not rise to that level.[23]

Justice Ginsberg wrote for the minority.[24] She noted the eminent voices that agreed with the majority opinion – Judge Friendly and Justice Cordozo.[25] Included among these was Chief Justice Weintraub. He was a champion of fairness in criminal proceedings;[26] he nevertheless was a severe critic of the Warren Court's decisions in the field of criminal law.[27] In *State v. Gerardo*, he emphasized the values that are affected by application of an exclusionary rule, i.e., the ability to ascertain the truth is impaired; the toll of victims is increased; the deterrent effects of the criminal law are lessened.[28]

Recognizing these legitimate concerns, the minority, nevertheless, found that the exclusionary rule serves important objectives other than deterrence, such as respect for the law and preserving the judicial process from contamination.[29] It noted that "the exclusionary rule is often the only remedy effective to redress a Fourth Amendment violation;"[30] if negligence excuses application of this rule, an incentive is removed to keep accurate records and update complex computer systems.[31]

---

20. *Id.* at 5-6.

21. *Id.* at 6 (quoting Pa. Bd. of Probation & Parole v. Scott, 524 U.S. 357, 364-65 (1998)).

22. *Id.* at 9.

23. *Id.* at 12-13.

24. *Id.* at 1 (Ginsburg, J., dissenting).

25. *Id.* at 4.

26. For example, the Weintraub Court expanded the areas in which criminal defendants could obtain pretrial discovery. *See, e.g.*, New Jersey v. Johnson, 145 A.2d 313, 318 (N.J. 1958) (holding that a defendant who cannot recall details of statements made at the time of defendant's arrest is entitled to inspect statements prosecutor intends to use at trial), *appeal dismissed*, 368 U.S. 145 (1961).

27. For a full discussion of Chief Justice Weintraub's critique of the decisions of the United States Supreme Court in the area of criminal justice, see Dominick A. Mazzagetti, *Chief Justice Joseph Weintraub: The New Jersey Supreme Court 1957-1973*, 59 CORNELL L. REV. 197, 203-08 (1974).

28. *See* 250 A.2d 130, 133 (N.J. 1969).

29. *See Herring*, No. 07-513, slip op. at 5-6 (Ginsburg, J., dissenting).

30. *Id. at* 6.

31. *Id. at* 7-8.

There are those who view *Herring*, particularly in light of Justice Scalia's opinion in *Hudson v. Michigan*,[32] as a step toward the total abolition of the exclusionary rule.[33] My purpose here is not to debate the merits of *Herring*. Rather, it is to reflect on the social climate in which the challenges to judicial and legislative procedural safeguards are being made.

In *Fedorenko v. United States*, the Supreme Court reviewed a denaturalization proceeding which required consideration of the horrors of the Holocaust.[34] Justice Stevens made a cautionary observation: "[t]he gruesome facts recited in this record create what Justice Holmes described as a sort of 'hydraulic pressure' that tends to distort our judgment."[35]

We must bear in mind that present day challenges to our judicial and legislative safeguards are being leveled in the context of extraordinary social pressures. There are the pressures caused by the threat of terroristic attacks, pressures arising from the economic collapse, and pressures that may arise from the horrors of individual cases. These provide the hydraulic pressures to which Justice Holmes and Justice Stevens referred that may distort our judgment and of which we should be mindful when basic constitutional protections are at stake. I shall give three examples.

Presently, efforts are underway to restore integrity to the Department of Justice.[36] This began before disclosure of our country's authorization of torture as an investigative technique. Efforts are underway to ensure procedural safeguards even in proceedings involving persons seized as suspected terrorists. Then comes the hydraulic pressure. Former Vice President Cheney says of these efforts: "[President Obama] is making some choices that, in my mind, will, in fact, raise the risk to the American people of another attack."[37] Then, of course, if another attack occurs, which is not improbable, the Cheney response will be "I told you so." This is the ultimate in hydraulic pressure.

A horrible crime creates its own hydraulic pressure. I think it is generally agreed that New Jersey has one of the finest court systems

---

32. 547 U.S. 586 (2006).

33. *See, e.g.*, David G. Savage, *Who's Policing the Fourth Amendment?: Two Cases Push the Unevenly Enforced Exclusionary Rule Closer to Repeal*, 95 ABA J. 19 (2009).

34. 449 U.S. 490 (1980).

35. *Id.* at 538 (Stevens, J., dissenting).

36. Eric H. Holder, U.S. Att'y Gen., Address to the United States House of Representatives Judiciary Committee (May 14, 2009), *available at* http://www.usdoj.gov/ag/testimony/2009/ag-testimony-090514.htm.

37. CNN, *Cheney Says Obama's Policies 'Raise the Risk' of U.S. Terror Attack*, Mar. 15, 2009, http://www.cnn.com/2009/POLITICS/03/15/cheney.interview/index.html.

in the nation. Yet even here, under pressure, mistakes occur. Some years ago a terrible rape resulted in an innocent man, Earl Berryman, being sentenced to fifty years in prison, an injustice the state system failed to correct.[38]

A young woman driving home from her birthday party stopped at a traffic light.[39] A man opened her car door and seized her at knife point.[40] Another man entered the car and they drove to a shopping center where a third man in a blue car waited.[41] The three men then drove the victim to a burned out building, took her inside, and serially raped her.[42] Afterward, the men drove the young woman back to her car at the parking lot.[43] These events could not help but create hydraulic pressure to seize and punish the perpetrators of this horrible crime.

In a state of shock and shame, the victim waited two days to report the rape to the police.[44] When she did, she was asked to examine mug shots arranged alphabetically in sleeves.[45] First she looked through the "A" sleeve.[46] After viewing 100-150 "A" photographs, the victim could not pick any of the rapists.[47] After moving to the "B" sleeve, she made three identifications: Earl Berryman, Anthony Lee Bludson and Michael Bunch.[48] She did not review sleeves marked "C" to "Z."[49] The detective in charge wrote the three suspects and asked them to come in for questioning.[50] The letter to Berryman was returned undelivered.[51] The detective did not pursue the men for more than a year because his sergeant told him to "lay off."[52] The sergeant did not want to interfere with an investigation of one of the suspects, Bunch, for a homicide in connection with a bank robbery.[53]

After a year had passed, the case was reactivated and the three

---

38. *See Inmate Is Freed, 10 Years After Rape Conviction*, N.Y. TIMES, July 22, 1995, at 24.

39. *See* Berryman v. Morton, 100 F. 3d 1089, 1091 (3d Cir. 1996).

40. *Id.*

41. *Id.*

42. *Id.* at 1091-92.

43. *Id.* at 1092.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

men were arrested.[54] Bludson was tried first.[55] His first trial resulted in a hung jury.[56] His second trial resulted in an acquittal.[57] In both trials, the victim testified that Berryman was the person who waited at the supermarket in the blue car in which the victim and the three men drove to and from the building in which she was raped.[58] However, her identification testimony at the two trials was totally inconsistent, and it was quite apparent that she could not distinguish between the three men or recall who did what.[59] Thus, the acquittal.

Berryman and Bunch were tried together.[60] Berryman had a steady employment history and had no prior criminal records.[61] At trial, Berryman denied participation in the crime and testified that he did not own a car, had never even driven a car, and had never met the other two men charged with the rape.[62] Bunch, on the other hand, had a checkered past and was actively being investigated for homicide in connection with a bank robbery.[63]

Berryman's attorney's defense was so incompetent it was almost as if he were seeking his client's conviction. His theory of defense wavered back and forth between the contention that there was no rape, it was all consensual, and the concession that there was a rape, but the identification was faulty.[64]

The first trial of Berryman and Bunch ended in a mistrial and a second trial was required.[65] Thus, Berryman's attorney had four trials, at each of which the victim gave inconsistent statements about the actions and appearances of the three men.[66] The attorney failed to cross-examine her on any of these inconsistencies.[67] He failed to produce Bludson, who simply by standing next to Berryman and Bunch would have demonstrated the errors in the victim's testimony.[68] There was a one-foot difference between the heights of

---

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 1097.
59. *Id.* at 1097-98.
60. *Id.* at 1092.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 1096.
65. *Id.* at 1092.
66. *Id.* at 1093.
67. *Id.*
68. *Id.* at 1101.

the tallest and shortest of the three men.[69]

The attorney's most egregious fault was his association of his client with the suspected homicide and bank robbery of co-defendant Bunch.[70] The police detective testified at the trial.[71] In an attempt to establish that the detective did not believe the victim, Berryman's attorney asked him on cross-examination why he had waited a year to arrest the three suspects.[72] The detective responded that his sergeant had asked him to lay off so as not to interfere with an ongoing investigation.[73] Blundering on, Berryman's attorney asked him what investigation could be more important than a rape case.[74] The detective stated that the investigation of Bunch for homicide in connection with a bank robbery was deemed more important.[75]

Then the attorney called as a defense witness the sergeant who had given the instruction to lay off.[76] This enabled the sergeant to confirm that he had instructed the detective to lay off and, on cross-examination by the prosecutor, to spell out the details of the Bunch investigation and all the reasons why the police believed he had committed the bank robbery and murder.[77]

The attorney, having associated his client, Berryman, with a bank robber and murderer, might have been saved from the disastrous consequences of his ineptness. The first trial ended in a mistrial.[78] However, at a second trial, despite a warning from the trial judge, the attorney pursued exactly the same line of inquiry, again linking his client to an alleged murderer and bank robber, a linkage of which the prosecutors took full advantage during closing argument.[79] Berryman was convicted and sentenced to fifty years in prison.[80]

It is difficult to understand how any court could find that Berryman had received constitutionally mandated effective assistance of counsel. Yet on post-conviction review proceedings, this slipped by an able trial court, it slipped by the Appellate Division, and it slipped by the New Jersey Supreme Court[81] – no doubt

69. *Id.* at 1097.
70. *Id.* at 1093.
71. *Id.* at 1099.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 1099-1100.
80. *Id.* at 1092.
81. *See id.* at 1093.

undetected among the huge number of petitions for certification.

Fortunately, this case was picked up by the Innocence Project, an organization that is less concerned with constitutional niceties per se and more concerned that innocent people not serve lengthy prison terms.[82] Through the able representation of attorney Jean D. Barrett, Berryman, after serving ten years of his sentence, was released and never retried.[83] I use this as an example of the pressure that a serious crime can have upon application of the law's protection. I also use it as an example of pressure exerted on Congress to limit the ability of federal courts to address violations of constitutional rights committed in state courts; for example, the Anti-Terrorism and Effective Death Penalty Act of 1996 that was urged as a reason why the federal courts should not hear the *Berryman* case.[84] The very name of the Act suggests the sources of the hydraulic pressures that were its genesis. If successful in limiting federal court jurisdiction, the Berrymans of this world will serve their fifty years despite their innocence.

My third example of the effects of hydraulic pressure arises in the context of the anxieties caused by the threats from terrorist attack. The effects of these anxieties are not limited to strangers seized in a foreign land. They are also directed toward our own people. James Yee was born and brought up in Springfield, New Jersey.[85] As a lad he attended Jonathan Dayton High School and was on the wrestling team. He, like his brother, attended West Point and became an Army officer.

He was a Muslim with intensive religious training and volunteered for the Chaplain Corps. Captain Yee was assigned to Guantanamo to serve the needs of the prisoners and American personnel who were Muslims. Within the limits of military requirements he did the best he could to enable the prisoners, most of whom were Muslims, to observe their religious practices. He conducted orientation sessions for non-Muslim American personnel, informing them of Muslim traditions and practices.

From the outset, Chaplain Yee and the other Muslims among the American military found themselves the subject of rumors and suspicion. Disturbing reports were received that Muslim soldiers

---

82. *See* The Innocence Project, http://www.innocenceproject.org (last visited Aug. 21, 2009).

83. *See Berryman*, 100 F. 3d at 1091 (affirming district court's grant to Berryman of habeus corpus); *see also Inmate Is Freed, 10 Years After Rape Conviction*, *supra* note 38.

84. *See Berryman*, 100 F. 3d at 1102-04.

85. *See* JAMES YEE, FOR GOD AND COUNTRY: FAITH AND PATRIOTISM UNDER FIRE 13 (2005). Information in this speech about James Yee and his story can be found in his book.

who returned to the States were arrested, and some simply disappeared.

On September 8, 2003, Captain Yee received a glowing Officer Evaluation Report, stating that his role in conducting religious and cultural awareness briefings for all troops was instrumental in making the detainee operation in the war on terror successful.

On September 10, Captain Yee was scheduled to commence a two-week leave with his wife and young daughter in Seattle. He was to take a charter flight to Jacksonville, catch a flight to Atlanta, and then connect through to Seattle. Awaiting him at Jacksonville Airport was a battery of five law enforcement and security agencies. His bags were seized and searched. He was handcuffed and shackled, taken to a naval hospital, and locked in a maximum security cell. After several days of confinement he learned that Guantanamo's Commanding General Miller was accusing him of a multitude of offenses, including mutiny and sedition, aiding the enemy, spying, and espionage – all punishable by death.

After six days he was placed in the covered back of a truck; blackened goggles were placed over his eyes and ear muffs over his ears. After six hours of driving, he was removed from the truck and lodged in an isolated prison cell at the naval brig in Charleston. For ten weeks, he was held there in solitary confinement. On the occasions when he was taken from the cell, he was strip searched with all the indignities that such a procedure entails. So severe was his isolation that the guards and a chaplain sent to see him refused to tell him the hour or the direction of Mecca so that he could pray in accordance with his practice.

He was allowed to communicate with his wife after two weeks of confinement. Anonymous government sources leaked to the press that Captain Yee had had contact with the Syrian governmental officials, he was affiliated with al-Qaeda and the Taliban, and that he had been found with maps of Guantanamo and the names of detainees and interrogators.

These totally false allegations were reported in the legitimate press and newscasts and exploited to the fullest by the *New York Post* and Fox News.[86] Even Senator Schumer, in a letter to Secretary of Defense Rumsfeld, referred to the "successful infiltration of the Guantanamo facility by Captain Yousef [sic] Yee."[87]

Time does not permit a recounting of the manner in which government agents engaged in deceitful conduct and abusive investigation of Captain Yee's wife, the work of the dedicated civilian and military lawyers who represented him, the downgrading of the

86. *Id.* at 166.
87. *Id.* at 167.

charges against him and the substitution of lesser but equally false charges, and his release after seventy-six days of solitary confinement. For that you will have to read Captain Yee's book—*For God and Country – Faith and Patriotism Under Fire.*

All of us live in an area of the country that is undoubtedly one of the foremost, if not the foremost, likely targets of a terrorist attack. In the past, fear has, on occasion, caused our country to depart from its ideals of freedom and justice. But it is at just such times that we must take particular care that our passions do not result in terrible injustice.

As an aside, after his ordeal, I communicated with Chaplain Yee on occasion. He had been brought up in the Lutheran tradition and is familiar with the Bible. I noted God's instructions to the children of Israel contained in the Torah and the Old Testament to commit terrible violence on their enemies. I noted similar instructions in the Qur'an and asked Chaplain Yee if there followed, as in the Bible, more merciful admonitions. He provided me with the following verses from the Qur'an:

> O mankind, We [meaning God] have created you male and female, and appointed you races and tribes, that you may know one another. (49:13).[88]

> O ye who believe! Stand out firmly For justice as witnesses To God . . . . (4:135).[89]

Now you might well ask, what do former Vice President Cheney's remarks, the *Berryman* case, and the case of Captain Yee have to do with *Herring v. United States*? The relationship, I think, is this: *Herring* is but one of the cases in which important constitutional and statutory protections are under review, both in the courts and in Congress and the state legislatures. This review will take place in the context of the fears and passions of our times, fears and passions that may well become more intense.

Whether one agrees with the majority or minority opinion in *Herring*, each was a reasoned and rational explanation of its position, unaffected by fears and passion; a contrast to Cheney's remarks and the *Berryman* and Yee situations. As we address Constitutional questions that affect our traditional liberties, may we resist the hydraulic pressures of fear and passion.

---

88. A.J. ARBERRY, THE KORAN INTERPRETED 232 (Simon & Schuster 1996) (interpreting the Holy Koran, verse 49:13).

89. ABDULLAH YUSUF ALI, THE MEANING OF THE GLORIOUS QUR'AN 223 (2001) (translating The Holy Qur'an, verse 4:135).

***