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"Pistol Shots Ring out in the Barroom Night": Bob Dylan's "Hurricane" as an Exam (or Course) in Criminal Procedure

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Article

“PISTOL SHOTS RING OUT IN THE BARROOM NIGHT”: BOB DYLAN’S “HURRICANE” AS AN EXAM (OR COURSE) IN CRIMINAL PROCEDURE

Michael L. Perlin, Esq.*

INTRODUCTION.....	254
I. The Song.....	258
II. The Lyrics.....	259
III. The Federal Opinions	264
IV. The Exam.....	266
V. Therapeutic Jurisprudence	279
CONCLUSION	281

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The author first thanks his wife, Linda Perlin, for suggesting this article years ago (our first Dylan concert together was June 18, 1995, Giants Stadium, Meadowlands, New Jersey, though she had been a Dylan fan, like me, since the Sixties, before we met). He also wishes to thank—for their thoughtful and incisive comments—Susan Abraham (with whom he saw Dylan on August 13, 2008, Asbury Park, New Jersey, Convention Hall, and who was at Carter’s celebration dinner after his successful court fights), Henry Dlugacz (with whom he saw Dylan on June 30, 1998, Le Zenith, Paris, France), Richard Sherwin (with whom he saw Dylan on November 14, 2010, Monmouth College, West Long Branch, NJ, and on December 2, 2014, Beacon Theater, NYC), Stu Levitan (with whom he shared space at the December 5, 2019, concert at the Beacon Theater), and Phil Rosenfelt (with whom he shared space the first time we both saw Dylan, at Gerde’s Folk City, in NYC, in late May, 1963, although we did not know each other at the time), as well as Susan Bandes, the late Paula Caplan, Glenn Moss, Nigel Stobbs and David Wexler (alas, never a concert together with any of this group . . . yet [though, with David, more likely a doo-wop concert . . .]). He also wishes to thank, for their support and kindnesses, his fellow Dylanistas, Kathy Fortier, George Dunn, Jenny Norton, and Cinde Berkowitz, and special thanks to Sam Levine and Bruce Green for including him in the original Dylan-and-the-law symposium that started all of this. And finally, he wishes to thank Rob Stoner, the bass player on *Hurricane* and Dylan’s band leader on the Rolling Thunder tour, for his gracious comments. As always, the article is in memory of his main Dylanista, Michael J. Feuerstein. We *will* meet again someday/on the avenue. . . .

INTRODUCTION

Some years ago, I wrote a law review article about Bob Dylan,¹ in which I said, “Even if Dylan had only written *Hurricane* and *The Lonesome Death of Hattie Carroll*² . . . he would have had more of an impact on the way that the American public thinks about the criminal justice system than all the professors of criminal law and procedure (including myself) put together.”³ I stick by that assertion today.

I was a law professor at New York Law School for 30+ years, and during that time, frequently taught a course in *Criminal Procedure: Adjudication* (called the “bail to jail” course by the students, as it usually was taken sequentially after the *Criminal Procedure: Investigation* course, that dealt with issues that preceded arrest, such as confession and search and seizure).⁴ Before I became a professor, I was a “real lawyer,” and spent three years in the New Jersey Public Defender’s office, running the Trenton (Mercer County) office from 1972–1974, not insignificantly for the purposes of this paper, during the time that Rubin “Hurricane” Carter’s motions for a new trial were before the New Jersey courts.⁵

¹ Michael L. Perlin, *Tangled Up in Law: The Jurisprudence of Bob Dylan*, 38 FORD. URB. L. J. 1395 (2011) [hereinafter Perlin, *Tangled*]. I have since written another law review article about Dylan, focusing on his lyrics about war and international affairs. Michael L. Perlin, “You That Build the Death Planes”: Bob Dylan, War and International Affairs, 37 ARIZ. J. INT’L & COMP. L. 305 (2020) [hereinafter Perlin, *Death Planes*]. I also write frequently about Dylan in other contexts. Michael L. Perlin, *My Front Pages: Tangled Up in Dylan*, JOESENTME.COM (Apr. 27, 2020), <https://basics.joesentme.com/042620.html>.

² *Hattie Carroll*, per Christopher Ricks, is a song that “brings home the falsity of the boast . . . that ‘the courts are on the level.’” CHRISTOPHER RICKS, DYLAN’S VISIONS OF SIN 221 (HarperCollins Publishers ed., 2003). *Hattie Carroll* tells of Hattie Carroll, “a fifty-one-year-old, black hotel worker who was struck with a cane and killed at a Baltimore, Maryland charity ball by William Zantzinger, a twenty-four-year-old, Maryland tobacco farmer. Zantzinger, already intoxicated, demanded another drink and complained when Carroll said, ‘Just a minute, sir.’” Perlin, *Tangled*, *supra* note 1, at 1404–05. Zantzinger was originally charged with murder, but that was subsequently reduced to manslaughter. He was convicted by a three-judge panel and sentenced to six months in jail. Douglas Martin, *W. D. Zantzinger, Subject of Dylan Song, Dies at 69*, N.Y. TIMES (Jan. 9, 2009), <https://www.nytimes.com/2009/01/10/us/10zantzinger.html#:~:text=William%20Devereux%20Zantzinger%2C%20whose%20six,He%20was%2069>.

³ Perlin, *Tangled*, *supra* note 1, at 1404. For the record, I taught Criminal Law at least once a year from 1985 to 2014, and, as I note below, taught criminal procedure from the late 1990s to 2013.

⁴ I had taught the Investigation course as an adjunct at Rider University several times in the early-mid 1970s.

⁵ Carter was convicted, and his conviction was affirmed. *State v. Carter*, 255 A.2d 746, 755 (N.J. 1969). He moved for a new trial based upon the State’s failure to disclose evidence and the testimonial recantation by the star witnesses against him, but his motions were denied. *State v. Carter*, 347 A.2d 383, 388 (Passaic County Ct. 1975); *State v. Carter*, 345 A.2d 808, 829 (Passaic County Ct. 1974). The New Jersey Supreme Court vacated the trial court’s decision based on the failure to disclose key evidence. *State v. Carter* 354 A.2d 627, 635 (N.J. 1976). Carter was again convicted, and that conviction was upheld by the state Supreme Court by a 4–3 vote. *See State v. Carter*, 449 A.2d 1280 (N.J. 1982). Ultimately, his application for a writ of habeas corpus was granted. The court found that his conviction was “predicated upon an appeal to racism rather than reason, and concealment rather than disclosure.” *Carter v. Rafferty*, 621 F. Supp. 533, 534 (D.N.J. 1985), *aff’d* in part, dismissed in part on other grounds, 826 F.2d 1299 (3d Cir. 1987), *cert. den.*, 484 U.S. 1011 (1988). When the case was appealed to the Third Circuit, that Court substantially affirmed the decision below on the question of a so-called *Brady* violation:

In *Tangled up in Law*, I wrote that Dylan's song *Hurricane*⁶ "is a textbook example of how racism can affect every aspect of the criminal justice system: racial disparity in *Terry* stops⁷; accuracy of identifications; one-man "show-up" identifications; suggestive questioning by the police appealing to racial prejudice; conditions of pre-trial confinement; judicial bias; racial bias in jury selection, tainted publicity; and conditions of prison confinement."⁸ Although this was certainly not Dylan's aim, it was a song written to be used as the template for a criminal procedure exam.⁹

Law school exams are difficult to write, as the professor usually seeks to cover as many of the different issues discussed throughout the semester-long course in one fact pattern. The idea is for the students to "spot the issues,"

The major question for decision in this appeal from the district court's grant of a writ of habeas corpus is whether the state of New Jersey violated the requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963), by failing to disclose to the defendant certain reports of a lie detector test administered to an important prosecution witness. The district court determined that this evidence was material to the defendant's guilt or innocence and therefore that its suppression denied him due process. We conclude that the district court did not err and therefore will affirm the judgment.

Id. at 1301.

For the record, I met Carter twice. Once, at a Dylan tribute concert in May 2005 in New York City (given by the "Highway 61 Revisited" Dylan-cover band; Carter joined the back-up singers to sing *Hurricane*; our chat was very brief), and once at a meeting of the Academy of Criminal Justice Sciences in March 2011 (we both attended a play written by Judge H. Lee Sarokin—the judge who granted Carter's habeas petition—titled, *Who is the Enemy?*, a "play about a terror suspect who sues the U.S. president after being detained without charges, without the right to counsel and without a hearing"). Tracey Tyler, *Judge's Play Raises the Curtain on Civil Liberties*, *TORONTO STAR* (Mar. 3, 2011), https://www.thestar.com/news/crime/2011/03/03/judges_play_raises_the_curtain_on_civil_liberties.html. When I told Carter that I was previously a Public Defender in New Jersey (and that my son was then a New Jersey Public Defender), he was very pleased. We spoke for about a half-hour, discussing New Jersey criminal defense lawyers we knew in common.

⁶ Alas, I never heard Dylan sing *Hurricane*. He has not sung it since January 1976. Sony Music Entertainment, *Hurricane*, BOB DYLAN (2018), <https://www.bobdylan.com/songs/hurricane/>. I confess that when I saw Dylan sing at William Paterson College (formerly Paterson State Teachers College) in Wayne, New Jersey in April 1997, a town only eight miles from Paterson, I had hopes, but . . . For that evening's setlist, see Sony Music Entertainment, *Wayne, NJ Recreation Center Set List*, BOB DYLAN (2018), <https://www.bobdylan.com/date/1997-04-13-recreation-center/>. I did hear Rob Stoner—Dylan's bass player on the Rolling Thunder tour—sing *Hurricane* at a Dylan Tribute concert some five years ago. See *infra* note 60.

⁷ "Terry stops"—the name deriving from the Supreme Court case *Terry v. Ohio*—is shorthand for warrantless searches and seizures based upon (allegedly) reasonable suspicion, purportedly limited in scope, to determine whether a person is armed or in the midst of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 27–31 (1968). The scope of what is permissible as a "Terry stop" has expanded significantly since the 1968 decision. See, e.g., *United States v. Chaidez*, 919 F.2d 1193, 1198 (7th Cir. 1990).

⁸ Perlin, *Tangled*, *supra* note 1, at 1405–07.

⁹ See Perlin, *Tangled*, *supra* note 1, at 1406 n.61 ("For years, I have wanted to simply print out the lyrics to *Hurricane* for my *Criminal Procedure: Adjudication* final and ask students to discuss all issues covered in the course in the context of that song. I have not done it, primarily because I acknowledge it would be fundamentally unfair to those students who were not serious Dylan fans. But still. . .").

This, of course, could not be the full exam, since there are many issues pertinent to any criminal procedure exam not discussed in the song as they were not material to the trial of the case as reflected in the published opinions (e.g., grand jury issues; right to a speedy trial; competency to stand trial; bail; double jeopardy). See generally, FRANK MILLER, ROBERT DAWSON, GEORGE DIX & RAYMOND PARNAS, *PROSECUTION AND ADJUDICATION* (Foundation Press, 5th ed., 2000) (this was the book with which I taught).

articulate the legal precedents, and conclude how a court would decide the case based on the facts given.¹⁰ Some professors dreaded writing these; I actually enjoyed it, as it allowed my imagination to run fairly wild. Sometimes I would make the case up entirely, sometimes I would base the question on a scene of a TV show or an obscure story in the local paper or what I had observed in life. And there were always about two dozen (or more) characters in the exam.

Since I was known to the students where I taught as “the Dylan guy” (one visit to my office or a reading of almost any of my articles—that mostly used Dylan lyric or song titles as the opening words of the article title¹¹—would have clinched that for anyone),¹² Dylanistas used to flock to my courses, perhaps thinking it would give them an edge.¹³ And though I confess loving when that happened,¹⁴ the one down side was this—because there were always students who had been listening to this song’s lyrics for years,¹⁵ I was never able to give this exam question:

Below are the lyrics to Bob Dylan’s song *Hurricane*. What topics that we covered in this course are relevant to the lyrics in this song? Had Carter’s original case been tried this year,¹⁶ how would the US Supreme Court have likely decided the issues that are raised? If you see issues that have been raised in other criminal law or procedure courses that you may have taken, feel free to discuss them as well, but only after you discuss the ones covered in this course.¹⁷

¹⁰ A student can disagree with the professor on the latter and will (or, at least, *should*) get full credit as long as she can support her conclusions. I disagreed on just about every issue with the only student who ever received (again, anonymously) 3 A+s from me in three different criminal law and procedure courses.

¹¹ Michael L. Perlin, *Where the Winds Hit Heavy on the Borderline: Mental Disability Law, Theory and Practice*, “Us” and “Them,” 31 LOY. L.A. L. REV. 775, 775 (1998) (“A few years ago, I began to use Bob Dylan titles and lyrics as the embarkation point for all my article and book titles. I decided to do this in large part because it is clear to me that Dylan’s utterly idiosyncratic ‘take’ on the world provides us with a never-ending supply of metaphors for an analysis of any aspect of mental disability law.”).

¹² See Nick Paumgarten, *Ladder of the Law: Another Side of Bob Dylan*, NEW YORKER (Nov. 18, 2002), http://www.newyorker.com/archive/2002/11/18/021118ta_talk_paumgarten.

¹³ Exams were all submitted anonymously, of course, so this was wishful thinking.

¹⁴ Perhaps the high point of my teaching career came on the last day of a Civil Procedure course I taught. Nikki Hirsch (now Nikki Marsh), one of the hard-core Dylan fans in the class (yes, she became my research assistant the next year), distributed Dylan lyrics to about a dozen of her classmates, and when I called on them, they would figure out a way to interpolate the lyrics into their answers. Priceless.

¹⁵ I expect there were others who, on hearing *Make You Feel My Love*, pondered why Dylan was covering an Adele song. . . (for those who don’t know, he didn’t. It’s a Dylan song from the 1997 album, *Time out of Mind*).

¹⁶ I started teaching this course in the late 1990s and taught it until 2013. As I discuss below, see *infra* notes 80–82, the year that I might have given this exam would have been very significant on the question of, for example, the propriety of a *de novo* constitutional challenge on federal habeas corpus.

¹⁷ All students had to take the substantive course in criminal law in their first year. Most of those (not all) who took the *Adjudication* course had previously taken the *Investigation* course. There were also many electives in criminal law and procedure that students might have taken (I taught one of those regularly, *Criminal Law and Procedure: The Mentally Disabled Defendant*). Multiple Dylan lyric titles found their way into that class as well. I have, since retirement, taught this latter course in the Graduate School of Criminology and Justice at Loyola University New Orleans, and as a course for CONCEPT, a continuing

It should go without saying that song lyrics are, inevitably, to some extent fiction (poetic license is the phrase mostly used).¹⁸ As I will discuss below, the facts of the case—as articulated in Judge Sarokin’s magisterial habeas decision¹⁹ and specifically premised on overt and covert racism²⁰—differ in some ways from Dylan’s lyrics.²¹ But for exam purposes, I would have wanted students to assume that the lyrics were an accurate depiction of what happened.²²

I am now retired from full-time teaching and teach other courses occasionally as an adjunct, but I expect to never teach *Criminal Procedure: Adjudication* again.²³ So, I figured, why not do this article? First, I briefly discuss the song, and the significance of its live performances in the 1970s. After this, I reprint the lyrics to *Hurricane*. Then, I discuss Judge Sarokin’s opinion and the Third Circuit opinion substantially affirming it. Next, I consider all the criminal procedure issues raised by the song,²⁴ in a section in which I look at: (1) “the law,” (2) Dylan’s characterization of the issues in question, and (3) as best as I can, the “inside baseball” on what actually happened. Following this, I discuss the cases briefly in the context of the legal school of thought known as therapeutic jurisprudence.²⁵ I conclude with some final thoughts.²⁶

education program, now affiliated with Palo Alto University. I also have taught a course in *Mental Health Issues in Jails and Prisons*, a topic that is certainly touched on in *Hurricane*.

¹⁸ The music critic Clinton Heylin concludes that Dylan “got important material facts in the case wrong.” CLINTON HEYLIN, *REVOLUTION IN THE AIR: THE SONGS OF BOB DYLAN, 1957–1973* 164 (Chi. Rev. Press ed., 2009). My sense is that his errors were mostly insignificant.

¹⁹ *Carter v. Rafferty*, 621 F. Supp. 533, 534–35 (D.N.J. 1985).

²⁰ See *id.* at 534 (“The extensive record clearly demonstrates that petitioner’s convictions were predicated upon an appeal to racism rather than reason, and concealment rather than disclosure.”). This is a position also taken by music critics. See, e.g., MIKE MARQUSEE, *CHIMES OF FREEDOM: THE POLITICS OF BOB DYLAN’S ART* 279 (New PR ed., 2003) (characterizing Carter as “a martyr . . . of institutional racism”).

²¹ Judge Sarokin’s conclusion is crystal-clear: “This court is convinced that a conviction which rests upon racial stereotypes, fears and prejudices violates rights too fundamental to permit deference [to the NJ Supreme Court’s prior decision affirming the convictions] to stand in the way of the relief sought.” *Carter*, 621 F. Supp. at 560.

²² Where relevant, I will subsequently note where Dylan’s lyrics were not an accurate depiction of the facts as found by Judge Sarokin.

²³ Although the focus of the article is on the potential *exam*, a clever professor could also structure a full course around the topics discussed.

²⁴ I listed some of these in my earlier article. Perlin, *Tangled*, *supra* note 1, at 1405–07. There are certainly more.

²⁵ See Perlin, *Tangled*, *supra* note 1, at 1426–28, for my other thoughts on Dylan in this context; see also Perlin, *Death Planes*, *supra* note 1, at 325–28.

²⁶ Before any criminal procedure professor actually *uses* this as an exam, s/he must be fairly sure that there are no Dylanistas in the class, as they would have an unfair advantage. My suggestion is that s/he drop some lyrics innocuously and randomly into mid-semester class discussions (not well-known ones, but not *that* obscure either) to see if there are any *frissons* of recognition.

I. THE SONG

The story of how Dylan came to write *Hurricane* is fairly well known.²⁷ Dylan read Carter's autobiography,²⁸ *The Sixteenth Round: From Number 1 Contender to Number 45472*,²⁹ and was transfixed by the story. When Dylan returned to the United States from a trip abroad, he went to the New Jersey State Prison in Rahway (where Carter was then incarcerated), and subsequently thought "maybe sometime I could condense it all down into a song."³⁰ *Hurricane* became both the first song on the *Desire* album,³¹ and it became a staple on the Rolling Thunder tour,³² giving that tour "a mission beyond its music."³³

Interestingly, music critics were far from unanimous in their praise for the song. While some were effusive, others were seriously hostile. Thus, while Robert Shelton said that it would "stand with Dylan's greatest work,"³⁴

²⁷ 'It Got Me a Little Nervous': Exploring the "Hurricane" Collaboration Between Jacques Levy and Bob Dylan, SOMETHING ELSE REVIEWS! (Apr. 28, 2013), <https://somethingelsereviews.com/2013/04/28/it-got-me-a-little-nervous-exploring-the-hurricane-collaboration-between-jacques-levy-and-bob-dylan/>. Dylan co-authored *Hurricane* with the musical theater songwriter, Jacques Levy. On their collaboration on *Hurricane*, see e.g., BOB SPITZ, DYLAN: A BIOGRAPHY 451 (1989).

²⁸ How he got the book is not entirely clear. Robert Shelton and Sean Wilentz have written that Carter himself sent Dylan a copy. ROBERT SHELTON, NO DIRECTION HOME: THE LIFE AND MUSIC OF BOB DYLAN 460 (Da Capo ed., 1997); SEAN WILENTZ, BOB DYLAN IN AMERICA 148 (Anchor Books ed., 2010). All agree that Dylan read it on a trip to Paris in 1975.

²⁹ RUBIN CARTER, THE SIXTEENTH ROUND: FROM NUMBER 1 CONTENDER TO NUMBER 45472 (Penguin Books Can. ed., 1991).

³⁰ OLIVER TRAGER, KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA 267 (Billboard Books ed., 2004) (paraphrasing LARRY SLOMAN, ON THE ROAD WITH BOB DYLAN 50 (Bantam Books ed., 1978)).

³¹ See Sony Music Entertainment, *Desire*, BOB DYLAN (2018), <https://www.bobdylan.com/albums/desire>.

³² See Sony Music Entertainment, *Setlists 1975*, BOB DYLAN (2018), https://www.bobdylan.com/setlists?filter_year=1975. Dylan only sang *Hurricane* 33 times (from October 30, 1975, through January 25, 1976). Sony Music Entertainment, *Hurricane*, BOB DYLAN (2018), <https://www.bobdylan.com/songs/hurricane/>. For discussions of some of those performances, see SHELTON, *supra* note 28, at 459–62; Jim Jerome, *Bob Dylan: A Myth Materializes with a New Protest Record and a New Tour (1975)*, in CLINTON HEYLIN, THE BOB DYLAN COMPANION: FOUR DECADES OF COMMENTARY 129, 134–51 (Carl Benson ed., 1998).

On the quality of the live performances of *Hurricane*, see PAUL WILLIAMS, BOB DYLAN: PERFORMING ARTIST: THE MIDDLE YEARS: 1974–1986, at 48–50 (Underwood-Miller ed., 1992), and especially *id.* at 49 ("the performance is an expression of love for life, love for freedom, love for justice"), and see TRAGER, *supra* note 30, at 265 (*Hurricane* "may still stand as [Dylan's] single moment of immediate consequential glory as he cried out for justice in a song [of] . . . impassioned, urgent performances").

George Dunn notes that *Hurricane* "decr[ies a] miscarriage of justice" in the context of his article on how Dylan also believes in "moral necessity" of retributive justice "for those who are truly guilty." See George Dunn, "Bury the Rag Deep in Your Face": Retributive Justice in the Songs of Bob Dylan 1 (paper presented at the World of Dylan symposium, Tulsa, OK, June 1, 2019) (unpublished manuscript) (on file with author).

³³ JAMES S. HIRSCH, HURRICANE: THE MIRACULOUS JOURNEY OF RUBIN CARTER 123 (Houghton Mifflin Harcourt Pub. Co. ed., 2000).

³⁴ SHELTON, *supra* note 28, at 461.

Mike Marqusee declared it “epic,”³⁵ Larry Sloman characterized it as “scorching,”³⁶ and Paul Williams focused on its “brilliant new techniques of storytelling.”³⁷ On the other hand, Tim Riley dismissed it as “at best warmed-over, and at worst, disingenuous,”³⁸ and Sean Wilentz called it “stale” and “vastly inferior to *Hattie Carroll*.”³⁹ Astonishingly, some of the major works on Dylan’s *oeuvre* barely mention it in passing.⁴⁰

II. THE LYRICS⁴¹

Pistol shots ring out in the barroom night
Enter Patty Valentine from the upper hall⁴²
She sees the bartender in a pool of blood⁴³
Cries out, “My God, they killed them all!”
Here comes the story of the Hurricane
The man the authorities came to blame
For somethin’ that he never done⁴⁴
Put in a prison cell, but one time he could-a been
The champion of the world

³⁵ MARQUESEE, *supra* note 20, at 279.

³⁶ Larry Sloman, *Bob Dylan and His Friends on the Bus—Like a Rolling Thunder*, in THE DYLAN COMPANION: A COLLECTION OF ESSENTIAL WRITING ABOUT BOB DYLAN COMPANION 198, 203 (Elizabeth Thomson & David Gutman eds., 1990) [hereinafter ESSENTIAL WRITING].

³⁷ WILLIAMS, *supra* note 32, at 49. *See also*, Jerome, *supra* note 32, at 129 (“Hurricane [is] a protest song with the gritty urgency and outrage that had once enflamed a whole generation”).

³⁸ TIM RILEY, *HARD RAIN: A DYLAN COMMENTARY* 247 (De Capo Press ed., 1992).

³⁹ WILENTZ, *supra* note 28, at 154. *See also*, MICHAEL GRAY, *SONG AND DANCE MAN III: THE ART OF BOB DYLAN* 185 (St. Martin’s Press ed., 1981) (discussing the “weakness” of the “ideas behind the words, which he differentiates from the quality of the music”); Lester Bangs, in ESSENTIAL WRITING, *supra* note 36, at 210–11 (“Dylan doesn’t give a damn about Rubin Carter.”).

⁴⁰ *See, e.g.*, RICHARD F. THOMAS, *WHY BOB DYLAN MATTERS* 303 (HarperCollins Publishers ed., 2016) (solely refers to several Dylan songs, including *Hurricane*, as “Homeric in value”); DAVID YAFFE, *LIKE A COMPLETE UNKNOWN* 35 (Yale U. Press ed., 2011) (solely discusses the cinematic feel of the opening lines).

⁴¹ In this section, I will note where Dylan took poetic license with the facts on matters that do not relate to questions of criminal procedure. Also, subsequently, when I cite to the song’s lyrics, I will cite that simply as “Hurricane lyrics.”

⁴² My Dylanista friend Stu Levitan has pointed out to me the cinematic quality of this line, a device of Dylan’s that, I think, sets the stage for the entire saga as it plays out. *See also*, YAFFE, *supra* note 40, at 35 (“The opening lines of ‘Hurricane’ shoot out like a compelling action flick”).

⁴³ Poetic license: “Patricia Valentine lived above the tavern and was awakened by the sound of gunshots at about 2:30 a.m. She ran to her window and saw two men leave the scene in a white car.” *Carter*, 826 F.2d at 1301. There remain serious questions as to whether Patty was alone with her children at that time, or whether there were other adults in her apartment as well. *See* PAUL B. WICE, *RUBIN “HURRICANE” CARTER AND THE AMERICAN JUSTICE SYSTEM* 174–75 (Rutgers U. Press ed., 2000).

See *Valentine v. C.B.S., Inc.*, 698 F.2d 430, 432 (11th Cir. 1983) (on finding that the lyrics that referred to Valentine were, however, substantially accurate). *See* SPITZ, *supra* note 27, at 483–95, for excerpts from Dylan’s deposition in that case (it would not be an over-statement to call it obfuscatory). In my near half-century as a lawyer, the only near-parallel to these examples that I have ever read is the testimony of the former baseball manager Casey Stengel’s testimony before a Congressional committee on antitrust law. S. Anti-Trust and Monopoly Subcommittee Hr’g (1958) (Casey Stengel’s statement).

⁴⁴ On actual innocence, see *infra* text accompanying notes 81–87.

Three bodies lyin' there does Patty see
 And another man named Bello, movin' around mysteriously
 "I didn't do it," he says, and he throws up his hands
 "I was only robbin' the register, I hope you understand"⁴⁵
 I saw them leavin', he says, and he stops
 "One of us had better call up the cops"
 And so Patty calls the cops
 And they arrive on the scene with their red lights flashin'
 In the hot New Jersey night

Meanwhile, far away in another part of town
 Rubin Carter and a couple of friends are drivin' around
 Number one contender for the middleweight crown⁴⁶
 Had no idea what kinda shit was about to go down
 When a cop pulled him over to the side of the road
 Just like the time before and the time before that⁴⁷
 In Paterson that's just the way things go⁴⁸
 If you're black you might as well not show up on the street⁴⁹

⁴⁵ Poetic license: "Bello, who was standing lookout, was either in or outside the bar, and his location at that time is a main point of contention." *Carter*, 826 F.2d at 1301.

On admitting to a lesser offense to avoid prosecution for a more substantial one, see *infra* text accompanying notes 88–91.

⁴⁶ His highest ranking was likely #3. *Rubin "Hurricane" Carter—The Boxer*, BOXING INSIDER (Feb. 28, 2011), <https://www.boxinginsider.com/history/rubin-hurricane-carter-the-boxer/>.

⁴⁷ Carter had been arrested at least twice previously in Paterson on "disorderly persons" charges. In one case, he had been found not guilty; in the other he was fined \$25. It is certainly likely he had other run-ins with Paterson police that did not result in arrests. See HIRSCH, *supra* note 33, at 84.

⁴⁸ See WICE, *supra* note 43, at 19–21, on racial tension in Paterson at the time of the shootings in question. Dylan subsequently commented on law enforcement in New Jersey in the song *Tweeter and the Monkey Man*, which he recorded with the Traveling Wilburys ("In Jersey, anything's legal as long as you don't get caught"). See Bob Dylan, Jeff Lynne, George Harrison, Tom Petty & Roy Orbison, *Tweeter and the Monkey Man*, GENIUS LYRICS (1998), <https://genius.com/Traveling-wilburys-tweeter-and-the-monkey-man-lyrics>. Notes the well-known Dylan critic, Tony Attwood, "Even if the song wasn't officially published by Dylan's Special Rider Music and even if he didn't so obviously sing it, we'd all still know it was a Dylan composition." Tony Attwood, *Bob Dylan's "Tweeter and The Monkey Man": The Origins, the Music and the Meaning*, BOB-DYLAN.ORG (Mar. 21, 2017), <https://bob-dylan.org.uk/arc.hives/3947>. Elsewhere in *Tweeter and the Monkey Man*, Dylan sings, "Some place by Rahway Prison they ran out of gas," perhaps an elliptical reference to the facility where Carter was housed for some of his time in New Jersey prisons.

⁴⁹ See, e.g., Vida B. Johnson, *KKK in the PD: White Supremacist Police and What To Do About It*, 23 LEWIS & CLARK L. REV. 205, 243 (2019) (citing Joe Malinconico, *Paterson Cop Getting \$300k Settlement in Racism Lawsuit*, PATERSON PRESS (Feb. 9, 2018), <https://www.northjersey.com/story/news/paterson-press/2018/02/09/paterson-cop-getting-300-k-settlement-racism-lawsuit/321849002/>; Joe Malinconico, *Three Black Cops Sue Paterson, Claiming Racism in Police Department*, RECORD (July 24, 2017), <https://www.northjersey.com/story/news/paterson-press/2017/07/24/paterson-three-black-cops-sue-city-over-racism-police-department/505458001/>; Jayed Rahman, *Three More Paterson Police Officers Allege Racism in Department, Lawsuit*, PATERSON TIMES (July 21, 2017), <https://patersontimes.com/2017/07/21/three-more-paterson-police-officers-allege-racism-in-department-lawsuit/>) (on racism in the Paterson police department in the context of the treatment of Black police officers)).

‘Less you wanna draw the heat⁵⁰

Alfred Bello had a partner and he had a rap for the cops
 Him and Arthur Dexter Bradley were just out prowlin’ around
 He said, “I saw two men runnin’ out, they looked like middleweights
 They jumped into a white car with out-of-state plates”
 And Miss Patty Valentine just nodded her head⁵¹
 Cop said, “Wait a minute, boys, this one’s not dead”
 So they took him to the infirmary
 And though this man could hardly see
 They told him that he could identify the guilty men⁵²

Four in the mornin’ and they haul Rubin in
 Take him to the hospital and they bring him upstairs⁵³
 The wounded man looks up through his one dyin’ eye
 Says, “Wha’d you bring him in here for? He ain’t the guy!”
 Yes, here’s the story of the Hurricane
 The man the authorities came to blame
 For somethin’ that he never done
 Put in a prison cell, but one time he could-a been
 The champion of the world

Four months later, the ghettos are in flame
 Rubin’s in South America, fightin’ for his name
 While Arthur Dexter Bradley’s still in the robbery game
 And the cops are puttin’ the screws to him, lookin’ for somebody to blame
 “Remember that murder that happened in a bar?”
 “Remember you said you saw the getaway car?”
 “You think you’d like to play ball with the law?”
 “Think it might-a been that fighter that you saw runnin’ that night?”⁵⁴
 “Don’t forget that you are white”⁵⁵

Arthur Dexter Bradley said, “I’m really not sure”
 Cops said, “A poor boy like you could use a break
 We got you for the motel job and we’re talkin’ to your friend Bello

⁵⁰ On *Terry* stops (and on racial disparities in such stops), see *infra* text accompanying notes 92–104.

⁵¹ Apparently, it was Valentine who identified the car as white. HIRSCH, *supra* note 33, at 37. Bello described both men as having a “thin build.” *Id.*

⁵² On accuracy of identifications, see *infra* text accompanying notes 105–11.

⁵³ On one-person “show up” identifications, see *infra* text accompanying notes 111–16.

⁵⁴ Apparently, on the night of the murders, when Carter had been brought into the police station for questioning, an unnamed witness said he *recognized* Carter (who was seen heading for the bathroom,) knowing that he was “the prizefighter,” but indicated that he had not seen Carter leaving the crime scene. HIRSCH, *supra* note 33, at 37.

⁵⁵ On suggestive questioning by the police appealing to racial prejudice, see *infra* text accompanying notes 118–22.

Now you don't wanta have to go back to jail, be a nice fellow
 You'll be doin' society a favor
 That sonofabitch is brave and gettin' braver
 We want to put his ass in stir
 We want to pin this triple murder on him⁵⁶
 He ain't no Gentleman Jim"

Rubin could take a man out with just one punch
 But he never did like to talk about it all that much
 It's my work, he'd say, and I do it for pay
 And when it's over I'd just as soon go on my way
 Up to some paradise
 Where the trout streams flow and the air is nice
 And ride a horse along a trail
 But then they took him to the jailhouse
 Where they try to turn a man into a mouse⁵⁷

All of Rubin's cards were marked in advance
 The trial was a pig-circus,⁵⁸ he never had a chance
 The judge made Rubin's witnesses drunkards from the slums⁵⁹
 To the white folks who watched he was a revolutionary bum
 And to the black folks he was just a crazy [n-word]⁶⁰
 No one doubted that he pulled the trigger
 And though they could not produce the gun⁶¹

⁵⁶ On the implications of police focusing on one suspect and then shaping all evidence to conform with this *a priori* idea, see *infra* text accompanying notes 123–32.

⁵⁷ On conditions of pre-trial confinement, see *infra* text accompanying notes 133–39.

⁵⁸ Compare this language to *Kirk v. Kirk*, 770 N.E.2d 304, 306 n. 3 (Ind. Sup. Ct. 2002), an ugly custody case in which the child's father, on an anonymous website he created to disparage the judge, quoted the "pig-circus" language. Of interest is the fact that in upholding the decisions below (granting custody to the mother), the Indiana Supreme Court, in a remarkable *contretemps*, quoted another (apolitical) Dylan lyric in its conclusion:

A family court judge's task is not easy, but it is terribly important, and at the end of the day those judges "remember children's faces best." See Bob Dylan, "Long Time Gone." *Id.*

See generally, Alex B. Long, *The Freewheelin' Judiciary: A Bob Dylan Anthology*, 38 FORDHAM URB. L.J. 1363, 1382–83 (2011) (discussing *Hurricane* in the context of the *Kirk* case).

⁵⁹ On judicial bias, see *infra* text accompanying notes 139–48.

⁶⁰ When I heard Antony Ellis, Will Forte & Justin Long cover *Hurricane* at a Dylan tribute concert in 2012, they sang "n-word" instead of the common racial epithet that rhymes with "trigger." I will also do so here. Another covering singer whom I heard at another concert subsequently substituted "figure." I prefer the "n-word" substitution as it gives the listener a better sense of what the original was. See RICKS, *supra* note 2, at 175–77, on the significance of Dylan's decision to use this word in this context. When Stoner sang it at the Dylan tribute concert from 2016, see *supra* note 6, he used the phrase "tragic figure", which might be a better choice for those who choose to sing this song in the future.

The [full n-word] is used two times in in this article—in a quote from the court opinion (see *infra* note 71) and a quote from a witness statement (see *infra* note 108).

⁶¹ There have been convictions upheld in murder cases in which the alleged murder weapon was not produced. See, e.g., *Rodriguez v. Young*, 906 F.2d 1153 (7th Cir. 1990); *Castillo v. State*, No. 11-00168, 2017 WL 3089839 (Tex. Ct. Crim. App. July 20, 2017).

The D.A. said he was the one who did the deed
And the all-white jury agreed⁶²

Rubin Carter was falsely tried
The crime was murder “one,” guess who testified?
Bello and Bradley and they both baldly lied⁶³
And the newspapers, they all went along for the ride⁶⁴
How can the life of such a man
Be in the palm of some fool’s hand?
To see him obviously framed
Couldn’t help but make me feel ashamed to live in a land
Where justice is a game

Now all the criminals in their coats and their ties
Are free to drink martinis and watch the sun rise
While Rubin sits like Buddha in a ten-foot cell⁶⁵
An innocent man in a living hell
That’s the story of the Hurricane
But it won’t be over till they clear his name
And give him back the time he’s done
Put in a prison cell, but one time he could-a been
The champion of the world.

⁶² Quasi-poetic license: Although, in Carter’s first trial, there was one non-white person chosen as one of 14, that juror was eliminated (by luck of the draw) when the jury was reduced to 12 for deliberation. See *infra* note 154. On racial composition of juries, see *infra* text accompanying notes 152–57.

⁶³ On prosecutorial use of known-to-be-false testimony, see *infra* text accompanying notes 158–66.

⁶⁴ On prejudicial publicity, see *infra* text accompanying notes 167–73.

⁶⁵ On prison conditions, see *infra* text accompanying notes 174–83. It is little known that prison psychiatrists had characterized Carter as showing “paranoid symptomatology,” and had prescribed Thorazine, a powerful antipsychotic drug for him. HIRSCH, *supra* note 33, at 97. Carter, at this time, was transferred to the Vroom Building, part of the New Jersey state psychiatric hospital system. For a detailed description of Carter’s time at the Vroom Building, see SAM CHAITON & TERRY SWINTON, LAZARUS AND THE HURRICANE: THE FREEING OF RUBIN “HURRICANE” CARTER 137–42 (Penguin Books Can. ed., 1991). I represented individuals at that facility regularly from 1971–74. See Michael L. Perlin, “Half-Wracked Prejudice Leaped Forth”: *Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. CONTEMP. LEG. ISS. 3, 7 (1999). I also filed a class action on behalf of Vroom inmates who were being held illegally in violation of the U.S. Supreme Court case of *Jackson v. Indiana*, 406 U.S. 715 (1972) (class was composed of defendants who would likely never regain their competence to stand trial, not a category in which Carter ever fit). That class action, (see *Dixon v. Cahill*, No. L30977/y-71 P.W. (N.J. Sup. Ct. L. Div. 1973), reprinted in MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 19-8 (3d ed. 2016) (spring 2021 update)), resulted in a ruling that the indefinite incarceration of individuals in the Vroom Building (New Jersey’s maximum-security facility for the “criminally insane” violated *Jackson*, and ordered individual hearings for each inmate. The courts ultimately found that 185 of the 225 patients in that facility were illegally detained). See Michael L. Perlin, “May He Stay Forever Young”: *Robert Sadoff and the History of Mental Health Law*, 33 J. AM. ACAD. PSYCHIATRY & L. 236, 236–37 (2005). On *Dixon*, see Michael L. Perlin, “Your Old Road Is/Rapidly Agin’”: *International Human Rights Standards and Their Impact on Forensic Psychologists, the Practice of Forensic Psychology, and the Conditions of Institutionalization of Persons with Mental Disabilities*, 17 WASH. U. GLOBAL STUD. L. REV. 79, 106 n. 142 (2018).

III. THE FEDERAL OPINIONS

As noted above, Carter's habeas corpus petition was granted for two overarching reasons: the state's improper appeals to racial prejudice by arguing that the killings were motivated by racial revenge,⁶⁶ and the state's violation of the *Brady* case by its failure to disclose results of lie detector test given by the state to an eyewitness.⁶⁷ These were two of a dozen arguments raised by the defense at the habeas corpus stage.⁶⁸

On the racial revenge issue, the court, as noted above, concluded that the trial was "predicated upon an appeal to racism rather than reason."⁶⁹ It rejected the state's reliance on evidence that allegedly supported this theory, concluding that most of it "had little relationship to the petitioners," adding, "Indeed, it is difficult to fathom some of its admissibility as against them."⁷⁰ It noted, dramatically:

Underlying the prosecutor's theory and summation is the *insidious and repugnant argument* that this heinous crime is to be understood and explained solely because the petitioners are black and the victims are white.⁷¹

On the *Brady* issue, the court found that the state failed to disclose preliminary oral reports on polygraph test of a key prosecution witness (that were inconsistent with the final written report and with trial testimony).⁷² It stressed:

[T]o view the withholding of the [polygrapher's] oral report as merely cumulative "is to gloss over the essential nature of that inconsistency and mis-gauge its potential impact," (Clifford, J., dissenting, [449 A. 2d at 1309]). It is sufficient to undermine confidence in the outcome? If the outcome depends in large measure on Bello's testimony, how could it not? "Never

⁶⁶ *Carter*, 621 F. Supp. at 538-47.

⁶⁷ *Id.* at 548.

⁶⁸ *Id.* at 537.

⁶⁹ *Id.* at 534.

⁷⁰ *Id.* at 541.

⁷¹ *Carter*, 621 F. Supp. at 541 (emphasis added). It added that there was "no direct evidence ascribed to the petitioners to support the racial revenge motive." *Id.* at 542. Also:

The evidence did not support the imputation of the racial revenge motive to Carter and Artis. There was no proof that Carter and Artis were black militants with an inclination to kill whites, nor that they had even the slightest hostility toward whites, only that Carter had heard there was unrest and heard there was talk of a possible disturbance. In fact, the only blatantly racial statement placed before the trial court was Bello's testimony that while he was being interviewed by a prosecutor's detective in October 1966, that detective referred to blacks as "niggers" and "animals."

Id. at 544.

⁷² *Id.* at 547. One of the key issues here was that the prosecution never told the defense the critical finding of the polygraph operator Harrelson's test—that Bello was in the bar at the time in question. *See id.* at 548 (citing *State v. Carter*, 449 A.2d 1280, 1306 (N.J. 1982) (Clifford, J., dissenting)).

before could defendants argue so persuasively that Bello was in all respects a complete, unvarnished liar, utterly incapable of speaking the truth.” *Id.*⁷³

On appeal, the Third Circuit affirmed the aspect of the district court’s opinion that dealt with the Brady issue, making it unnecessary—in the Court’s view—to deal with the racial revenge theory.⁷⁴ Noting that the State conceded that, the Third Circuit should have turned the reports in question over to the defense. Maintaining, however, that they were not “material” under Brady,⁷⁵ the Third Circuit quoted the district court on this issue:

Whether the conduct was deliberate or negligent, the consequences to the petitioners were the same: they were deprived of a vital opportunity to totally discredit the key and only eyewitness to the crime. Indeed, if the trial court knew and was satisfied that Bello finally selected one of his many versions merely because he was told that it was independently confirmed by the polygrapher (albeit mistakenly), it might well have stricken his entire testimony.⁷⁶

The Third Circuit further quoted approvingly from the district court’s opinion, concluding that, if Carter’s counsel “had the relevant information, they would have had the means to convince the jury that Bello selected one of several versions, possibly all untrue, merely because he mistakenly believed it had been confirmed by a polygraph test.”⁷⁷ It added, “under any reasonable characterization of the 1976 trial, the critical importance of Bello’s testimony to the prosecution’s case clearly looms large and commanding. Bello’s eyewitness identification testimony was the only direct evidence placing Carter and his co-defendant, John Artis, at the Lafayette Bar & Grill.”⁷⁸ The state’s petition for certiorari was then denied.⁷⁹

⁷³ *Id.* at 554. The court thus concluded that, “considering the totality of the circumstances . . . had the evidence withheld by the state involving [the polygrapher’s] oral report been disclosed to the defense, there is a reasonable probability that the result of the trial would have been different.” *Carter*, 621 F. Supp. at 558 (citing *United States v. Bagley*, 473 U.S. 667, 682–83 (1985)).

The court also declined to consider petitioners’ other claims: “While the court has reviewed all the claims in the petitions, the two grounds cited above are, in the opinion of the court, the petitioners’ most powerful arguments for the granting of the writ and are clearly supported by the record. Accordingly, the court finds it unnecessary to reach the merits of the remaining claims.” *Id.*

⁷⁴ *Carter*, 826 F.2d at 1303.

⁷⁵ *Id.* at 1305.

⁷⁶ *Id.* at 1307 (quoting *Carter*, 621 F. Supp. at 553).

⁷⁷ *Carter*, 826 F.2d at 1308 (quoting *Carter*, 621 F. Supp. at 553).

⁷⁸ *Id.* at 1309. It concluded:

We therefore conclude that Bello’s testimony was critical to the prosecution’s case. His credibility was a crucial issue for the jury. From this, it must necessarily follow that there is a “reasonable probability” that the “result of the [trial] would have been different” had the prosecution properly disclosed to Carter Harrelson’s oral reports, see *Bagley*, 473 U.S. at 682, 105 S. Ct. at 3384, because Bello’s believability was all important. Accordingly, we hold that the district court did not err in concluding that the reports were “material” under *Brady*.

Id.

⁷⁹ See generally *Rafferty v. Carter*, 484 U.S. 1011 (1988).

IV. THE EXAM

So here are the issues that a student's A+ exam essay would have included.⁸⁰ In each instance, I will briefly discuss the prevailing law, then Dylan's characterization of what happened in Carter's case, and then what really happened. I am discussing them in the order in which they appeared in the song, as I expect that is what 99% of students would have done.

- Actual innocence:

The law: The best answer to this depends on the year this exam was given. Procedurally, had Carter's case been tried after 1996, when the Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted,⁸¹ it is likely that Carter would not have been freed on the grounds found by the federal courts.⁸² However, more recently—coincidentally, the last year I taught criminal procedure—the Supreme Court ruled that a plea of actual innocence can overcome the habeas statute of limitations in AEDPA.⁸³

Dylan's characterization: As noted, and as is crucial to the heart and soul of the song, Dylan was clear: "The man the authorities came to blame/ For somethin' that he never done."⁸⁴

What really happened: The focus on innocence in the federal proceedings in Carter's case dealt solely with the question of whether the state's failure to disclose to the defendant the results of a lie detector test administered to an important prosecution witness, a failure determined to be material to "the defendant's guilt or innocence,"⁸⁵ and thus a due process violation.⁸⁶ Nothing in either reported federal opinion deals with the question of actual innocence.⁸⁷

After prosecution efforts ended at that time, Myron Beldock—Carter's lead attorney—was quoted as saying, "The real story . . . is the fact that good triumphs over evil, and how hard it is to get there." Robert D. McFadden, *Myron Beldock, Civil Rights Lawyer Who Fought for Lost Causes, Dies at 86*, N.Y. TIMES (Feb. 1, 2016), <https://www.nytimes.com/2016/02/02/nyregion/myron-beldock-civil-rights-lawyer-who-fought-for-lost-causes-dies-at-86.html>.

⁸⁰ Of course, students might have found issues that I didn't see when I wrote the exam. When that happened (as it did more than rarely), they always got extra credit.

⁸¹ See Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254 (1996).

⁸² See Judith L. Ritter, *After the Hurricane: The Legacy of the Rubin Carter Case*, 12 HASTINGS RACE & POVERTY L. J. 1, 10–15 (2015) (under pre-AEDPA habeas law, petitioner's constitutional challenges to his state court conviction received federal de novo review, which would not have been possible under the current scheme); Molly Clayton, *Forgiving the Unforgivable: Reinvigorating the Use of Executive Clemency in Capital Cases*, 54 B.C. L. REV. 751, 771 (2013) ("If the [AEDPA] had been in place in 1985, . . . Rubin 'Hurricane' Carter . . . would still be in prison serving three consecutive life sentences for a triple homicide that he did not commit.").

⁸³ *McGuiggen v. Perkins*, 569 U.S. 383 (2013).

⁸⁴ *Hurricane* lyrics.

⁸⁵ *Carter*, 826 F.2d at 1301.

⁸⁶ *Carter*, 621 F. Supp. at 547–54, *aff'd*, *Carter*, 826 F.2d at 1301.

⁸⁷ See *Watkins v. Miller*, 92 F. Supp. 2d 824, 852 (S.D. Ind. 2000), for a discussion of this aspect of the *Carter* litigation in this case, also finding a *Brady* violation.

- Admitting to a lesser offense to avoid prosecution for a more substantial one:

The law: The trial strategy of admitting to a lesser offense to avoid conviction on a greater charged offense is well known to all criminal lawyers,⁸⁸ a strategy that has been noted by the US Supreme Court.⁸⁹

Dylan's characterization Here, Bello's alleged statement—"I was only robbin' the register, I hope you understand"—falls squarely within this caselaw.⁹⁰

What really happened: One of the major points of contention in the case was Bello's location.⁹¹ And, of course, the dispositive issue at the Third Circuit was whether the state's failure to inform the defense about the polygraph's report on Bello's veracity (or lack of it) was a sufficient *Brady* violation to require affirmance of the grant of habeas corpus. There is little question that Bello was committing *some* crime at the time.⁹²

- Terry stops:

Some authors of books about the Carter trial are equivocal. *See* WICE, *supra* note 43, at 202 ("The defendants may or may not have committed the murders."). The leading criminal justice scholar who has studied the case has no question: "Carter was no doubt innocent of the crime for which he was convicted." Abbe Smith, "No Older'n Seventeen": *Defending in Dylan Country*, 38 *FORD. URB. L.J.* 1471, 1491 n. 57 (2011). *See also, e.g.*, Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety about Innocence Projects*, 13 *U. PA. J. L. & SOC. CHANGE* 315, 316 (2009–2010) (referring to Carter's case as one on which "innocence [was] vindicated"); Erik G. Luna, *Transparent Policing*, 85 *IOWA L. REV.* 1107, 1118 (2000) (discussing "the wrongful conviction of Rubin 'Hurricane' Carter"). Interestingly, the judge who granted Carter's habeas corpus petition—based in large part on prosecutorial misconduct, see *infra* part III—subsequently noted "I . . . concluded that he was probably innocent." H. Lee Sarokin, *Thwarting the Will of the Majority*, 20 *WHITTIER L. REV.* 171, 173 (1998). *See also*, HOWARD SOUNES, *DOWN THE HIGHWAY: THE LIFE OF BOB DYLAN* 288 (2001) ("the essential truth [was] that Carter was in prison for a crime he had not committed"); Sam Shepard, *Night of the Hurricane*, in *STUDIO A: THE BOB DYLAN READER* 122 (Benjamin Hedin, ed., 2004) (Carter was "falsely tried and convicted of murder").

As of 2011, it was estimated that there are approximately 25,000 false convictions (convictions of factually innocent individuals) per year. *See* Leon Friedman, *The Problem of Convicting Innocent Persons: How Often Does It Occur and How Can It Be Prevented?*, 56 *N.Y.L. SCH. L. REV.* 1053, 1056 (2011–12).

⁸⁸ *See, e.g.*, *State v. Basford*, No. 03CA0043-M, 2003 WL 22399713, at ¶11 (Ohio Ct. App. Oct. 22, 2003). *See also, e.g.*, *State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn. Sup. Ct. 1984) (it may "make sense" for a defense attorney to admit defendant's guilt on the less serious of two charges in order to obtain an acquittal on the more serious charge).

⁸⁹ *See* *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (recognizing that an individual may consent to sentencing for a lesser crime even if he is unwilling to admit participating in the acts constituting the crime, so as to avoid a more serious sentence if found guilty of a crime of greater severity).

⁹⁰ *Carter*, 621 F. Supp. at 535. (According to the habeas decision, "Alfred Bello and Arthur Bradley were in the process of breaking into a nearby factory. Bello, who was standing lookout, was either in or outside of the bar (a main point of contention).").

⁹¹ *Id.* at 547 (Later, Bello said in an affidavit that he was "in the bar" at the time of the shootings. (emphasis in original)). The Third Circuit noted this contention: "Bello, who was standing lookout, was either in or outside the bar, and his location at that time is a main point of contention." *Carter*, 826 F.2d at 1301. *See Carter*, 621 F. Supp. at 555 ("Bello's identification must be taken in context with the subsequent changes in his story.").

⁹² *See* WICE, *supra* note 43, at 47 (prosecutor admitted that Bello "rifled" the cash register drawer in the bar).

The law: All agree that the law that has developed around the *Terry* case is complex,⁹³ unclear,⁹⁴ confusing, and inconsistent.⁹⁵ The Supreme Court has tinkered with the doctrine multiple times, up to the present day,⁹⁶ the most significant recent development coming in the case of *Navarette v. California*, that “although a mere ‘hunch’ does not create reasonable suspicion, the level of suspicion the standard requires is ‘considerably less than proof of wrongdoing by a preponderance of the evidence,’ and ‘obviously less’ than is necessary for probable cause.”⁹⁷

Most of the important discussion about *Terry* in recent years has centered on the issue of racial disparities in *Terry* stops. Professor L. Song Richardson is clear: “[T]he *Terry* doctrine facilitates the influence of implicit racial bias and racial anxiety on behaviors and judgments, leading to unjustified racial disparities in police stop and frisk practices.”⁹⁸ Importantly, she concludes that “it is highly unlikely if not impossible for stops and frisks to be conducted in a manner that does not result in unjustified racial disparities,” a practice that “decreases police-public trust and understanding, as well as community views of police legitimacy,” and reinforces “Black individuals’ perceptions that the police are racist and police concerns that they will be negatively stereotyped.”⁹⁹ Consider the conclusion by Professor Michael White and his colleagues: “*Terry* illustrates how the very foundation of the reasonable suspicion standard in American constitutional law masks racially disparate stop-and-frisk practices with the cloak of raceneutrality [*sic*].”¹⁰⁰

Dylan’s characterization: Dylan focuses on the multiple times Carter had been stopped by the police prior to the night in question, stops clearly

⁹³ Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York’s “Related Cases” Rule Shaped Stop-and-Frisk Rulings*, 19 MICH. J. RACE & L. 199, 204 (2014).

⁹⁴ Daniel R. Dinger, *Is There a Seat for Miranda at Terry’s Table?: An Analysis of the Federal Circuit Court Split Over the Need for Miranda Warnings During Coercive Terry Detentions*, 36 WM. MITCHELL L. REV. 1467, 1511 (2010).

⁹⁵ David A. Moran, *Traffic Stops, Littering Tickets, and Police Warnings: The Case for a Fourth Amendment Non-Custodial Arrest Doctrine*, 37 AM. CRIM. L. REV. 1143, 1145 (2000).

⁹⁶ See generally, e.g., *Kansas v. Glover*, 140 S. Ct. 1183 (2020) (when a police deputy had reasonable suspicion to stop vehicle registered to defendant based on commonsense inference that defendant, whose license had been revoked, was likely the driver, the officer pulled him over to the side of the road).

⁹⁷ *Navarette*, 572 U.S. 393 at 397 (2014).

⁹⁸ L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73, 74 (2017).

⁹⁹ *Id.* at 88. On how the rationale of *Terry* has expanded in the half-century since the case was decided, see Jeffrey Fagan, Anthony A. Braga, Rod K. Brunson & April Pattavina, *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 FORDHAM URB. L.J. 539, 553 (2016) (“We show continuity in racial disparities in police contacts from the general *Terry* regime of street stops to the expanded surveillance activities, indicative of the broader expansion of *Terry* doctrine over the past half century.”).

¹⁰⁰ Michael D. White, Henry F. Fradella, Weston J. Morrow & Doug Mellom, *Federal Civil Litigation as an Instrument of Police Reform: A Natural Experiment Exploring the Effects of the Floyd Ruling on Stop-and-Frisk Activities in New York City*, 14 OHIO ST. J. CRIM. L. 9, 25 (2016). See Matthew B. Ross, Jesse J. Kalinowski & Kenneth Barone, *Testing for Disparities in Traffic Stops: Best Practices from the Connecticut Model*, 19 CRIMINOLOGY & PUB. POL’Y 1289 (2020), for a potentially fairer solution.

motivated by racism.¹⁰¹ The valid and reliable post-*Terry* research¹⁰² can leave no question that, in this specific context, the issues of racial bias that plagued us in the 1970s continue to plague us today.¹⁰³

What really happened: The opinion of the district court underscored—time and time again—that the prosecution was premised on “racial revenge.”¹⁰⁴ Although there is no reference to earlier police stops of Carter in either opinion (or in any of the five state court opinions), his oppositional relationship with the police was well known,¹⁰⁵ and is reflected in similar oppositional encounters between police and inner-city residents of Paterson and similar communities in New Jersey.¹⁰⁶

- Accuracy of identifications:

The law: There is no question that judges and lawyers have a limited ability to help a jury discriminate between accurate and inaccurate eyewitness identifications,¹⁰⁷ and the error rate is enhanced in cross-racial

¹⁰¹ *Hurricane* lyrics:

Just like the time before and the time before that
In Paterson that's just the way things go
If you're black you might as well not show up on the street
'Less you wanna draw the heat.

¹⁰² See, e.g., *supra* notes 92–99.

¹⁰³ See, e.g., Sharad Goel, Maya Perelman, Ravi Shroff & David Alan Sklansky, *Combating Police Discrimination in the Age of Big Data*, 20 NEW CRIM. L. REV. 181, 184 (2017); see generally Randall S. Susskind, Race, Reasonable Articulate Suspicion, and Seizure, 31 AM. CRIM. L. REV. 327 (1994); Ronald Weitzer & Steven A. Tuch, *Perceptions of Racial Profiling: Race, Class, and Personal Experience*, 40 CRIMINOLOGY 435 (2002). For the most recent research see Jeffrey Fagan & Amanda Geller, *Profiling and Consent: Stops, Searches, and Seizures after Soto*, 27 VA. J. SOC. POL'Y & L. 16 (2020).

¹⁰⁴ *Carter*, 621 F. Supp. at 546.

¹⁰⁵ See HIRSCH, *supra* note 33, at 24 (as an adolescent and young adult, Carter's “fraseses with the police were common”); see also WICE, *supra* note 43, at 24 (he was apparently “roughed up” by the police for the first time at age eleven).

¹⁰⁶ See Rebekah Spaulding, *In the Wake of Rubin “Hurricane” Carter: The Plight of John Artis*, 2 N.J. STUD.: AN INTERDISC. J. 61, 61 (2016) (“By examining the details surrounding Carter and Artis's wrongful imprisonment, it is clear to see the institutional racism and systematic criminalization of African Americans”); see also Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 275 (1994) (quoting Hubert Williams, formerly Chief of Police of Newark, New Jersey, and subsequently President of the Police Foundation, “Police use of excessive force is a significant problem in this country, particularly in our inner cities”); see Joel Miller, Philip Gounev, Andras L. Pap, Dani Wagman, Anna Balogi & Tihomir Bezlov, *Racism and Police Stops Adapting US and British Debates to Continental Europe*, 5 EUR. J. CRIMINOL. 161, 163 (2008), on *Terry* stops (citing the research reported in John Lamberth, *Driving While Black: A Statistician Proves That Prejudice Still Rules the Road*, WASH. POST (Aug. 16, 1998), <https://www.washingtonpost.com/archive/opinions/1998/08/16/driving-while-black/23ecd90-7317-44b5-ac43-4c9d7b874e3d/>) (“In 1993 . . . African Americans made up 13.5 percent of the turnpike's population and 15 percent of the speeders, yet they made up 35 percent of those stopped”). My special thanks to my friend Glenn Moss for suggesting I add this footnote.

¹⁰⁷ Kristy A. Martire & Richard I. Kemp, *The Impact of Eyewitness Expert Evidence and Judicial Instruction on Juror Ability to Evaluate Eyewitness Testimony*, 33 LAW & HUM. BEHAV. 225, 225 (2009).

identifications.¹⁰⁸ And we know that “analyses of wrongful convictions continue to identify inaccurate eyewitness identification as a leading cause of the conviction of the innocent.”¹⁰⁹

Ironically, the New Jersey Supreme Court has become a national leader in the reform of eyewitness identification testimony admissibility; in *State v. Henderson*,¹¹⁰ addressing estimator variables, such as visibility, age of the viewer, lighting, and system variables, such as lineup procedures and police interaction,¹¹¹ the Court remanded the case to determine whether the test previously used in that state on questions of admissibility of eyewitness-identification evidence remained valid.¹¹²

Dylan’s characterization: This is a core issue in any investigation into whether Carter was factually innocent of the murders in question, and, per Dylan’s lyrics, the witness, Bradley, had said “I’m really not sure.”

What really happened: Bradley eventually did identify Carter, but subsequently recanted that testimony.¹¹³ Per Dylan’s line, quoting the police, “Now you [Bradley] don’t wanta have to go back to jail, be a nice fellow,” Bradley subsequently admitted he lied “to save [himself] [from a lengthy prison sentence].”¹¹⁴

- One-person “show up” identifications:

The law: A “show-up” is the presentation of a single suspect to an eyewitness for possible identification,¹¹⁵ and courts regularly find that such presentations are “suggestive.”¹¹⁶ Notwithstanding this, the Supreme Court rejected a per se rule (requiring total exclusion) in favor of a “totality of the circumstances” approach aimed at balancing three factors: preventing unreliable eyewitness testimony from getting to a jury, deterring the police from

¹⁰⁸ See generally, John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207 (2001); see also WICE, *supra* note 43, at 115 (the male witness (Marins) told police that he “had trouble distinguishing black people because ‘all niggers look alike,’” a statement the prosecutor chose “to bury”).

¹⁰⁹ Lawrence Rosenthal, *Eyewitness Identification and the Problematics of Blackstonian Reform of the Criminal Law*, 110 J. CRIM. L. & CRIMINOLOGY 181, 183 (2020).

¹¹⁰ *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

¹¹¹ *Id.* at 895.

¹¹² *Id.* at 918–19; See Valena Elizabeth Beety, *What the Brain Saw: The Case of Trayvon Martin and the Need for Eyewitness Identification Reform*, 90 DENV. U. L. REV. 331, 345–46 (2012), on *Henderson* in this context. New Jersey has since adopted specific jury instructions for such circumstances. See *State v. Balloutine*, No. A-4894-17T4, 2020 WL 5888140, *3 (N.J. App. Div. October 5, 2020) (“special model jury instructions were adopted in 2012 to guide jurors on these critical concepts for both out-of-court and in-court identifications”).

¹¹³ *Carter*, 826 F.2d at 1302.

¹¹⁴ WICE, *supra* note 43, at 80.

¹¹⁵ *State v. Walters*, 891 A.2d 1003 (Conn. App. 2006).

¹¹⁶ See *People v. Sammons*, 949 N.W.2d 36 (Mich. 2020); see also *Bratcher v. McCray*, 419 F. Supp. 2d 352 (W.D. N.Y. 2006) (pre-trial, out-of-court show-up identification procedure was unduly suggestive where it was conducted 25 minutes after the robbery in relatively close geographic proximity to the crime, where all of the witnesses viewed defendant simultaneously).

conducting unnecessarily suggestive procedures, and the effect on the administration of justice.¹¹⁷

Dylan's characterization:

The witness in the show-up (at the hospital) says to the police, "Wha'd you bring him in here for? He ain't the guy!"¹¹⁸

What happened: "The police took Carter and Artis to the station and then to the hospital where the two survivors failed to identify them."¹¹⁹ The male survivor, William Marins, had been shot in the temple and the bullet exited near his eye which was an "open, serrated cut."¹²⁰

- Suggestive questioning by the police appealing to racial prejudice:

The law: Ironically, we know that, because potential exists for private parties to inject suspect descriptions with their racial biases, incentives must exist to fortify the police's responsibility to screen information gathered from witnesses.¹²¹ Courts have invalidated police actions based on suspect descriptions relying on race because they have found the descriptions to be insufficient to yield valid and reliable identifications.¹²² At the time of the crime in question, no more than two percent of law enforcement had received formal training on how to interact with civilians.¹²³

Dylan's characterization:

Per Dylan's lyrics, the investigating police officer specifically appealed to what he hoped was the witness's racialism.¹²⁴

¹¹⁷ *Manson v. Brathwaite*, 432 U.S. 98, 112–13 (1977).

¹¹⁸ *Hurricane* lyrics.

¹¹⁹ *Carter*, 826 F.2d at 1301. The physical descriptions given at the hospital by witnesses of the assailants differed wildly from what Carter and John Artis, his co-defendant, looked like. *See also Carter*, 621 F. Supp. at 555–56 (The men were described as being "about six feet, slim build, light complexion and a pencil line mustache." Petitioner Carter, at the time, was described as five foot seven inches, 160 pounds, very dark complexion, well-built, with a prominent goatee.").

¹²⁰ HIRSCH, *supra* note 33, at 34. This is probably quasi-poetic license for "one dyin' eye." At least one music critic states that the witness was "blinded in one eye." IAN BELL, *TIME OUT OF MIND: THE LIVES OF BOB DYLAN* 75 (2013).

¹²¹ Priyamvada Sinha, *Police Use of Race in Suspect Descriptions: Constitutional Considerations*, 31 N.Y.U. REV. L. & SOC. CHANGE 131, 174 (2006); *see also*, Fredrik H. Leinfelt, *Descriptive Eyewitness Testimony: The Influence of Emotionality, Racial Identification, Question Style, and Selective Perception*, 29 CRIM. JUST. REV. 317 (2004) (on racial identification in police questioning).

¹²² Sinha, *supra* note 121, at 135 (discussing, *inter alia*, *Washington v. Lambert*, 98 F.3d 1181, 1183–84 (9th Cir. 1996); *Brown v. United States*, 590 A.2d 1008 (D.C. 1991); and *People v. Robinson*, 507 N.Y.S.2d 268 (App. Div. 1986)).

¹²³ R. Edward Geiselman & Ronald P. Fisher, *Ten Years of Cognitive Interviewing*, in *INTERSECTIONS IN BASIC AND APPLIED MEMORY RES.* 291, 291 (David G. Payne & Frederick G. Conrad eds., 1997).

¹²⁴ "And the cops are puttin' the screws to [Bradley], lookin' for somebody to blame. . . / You think you'd like to play ball with the law? . . . / Think it might-a been that fighter that you saw runnin' that night? . . . / Don't forget that you are white." *Hurricane* lyrics.

Consider also, in the context of racial bias, that at one point, the male witness (Marins) told police that he had difficulty distinguishing black people. WICE, *supra* note 43, at 115.

See Sinha, *supra* note 121, at 151, on how a "police department's response may be linked to public or political pressures, which in turn could be influenced by race." The language in Dylan's lyrics—"don't forget that you are white" (the police officer speaking to Arthur Dexter Bradley)—is the polar opposite of

What really happened:

There can be no question that Bello and Bradley knew that if they “played ball with the law,” they would likely receive reduced prison sentences (or none at all).¹²⁵

- Implications of police focusing on one suspect and then shaping all evidence to conform with this a priori idea:

The law: Ironically, one of the lead cases on, the “tunnel vision” phenomenon¹²⁶—“when both police and prosecutors focus only on one suspect or defendant while ‘building a case’ for prosecution”¹²⁷—comes from Passaic County in New Jersey, where Carter was initially prosecuted. In *State v. Kelley*,¹²⁸ the appellate court affirmed a trial court decision that granted defendants a new trial based on the revelation of relevant DNA evidence. There, a former police detective who had been qualified as an expert in interrogation techniques, testified that “‘tunnel vision,’ i.e., being so convinced of a suspect’s guilt that contrary information was disregarded, could play a ‘very powerful’ role,” and that “officers who are so focused on what they think is important can have a selective memory as to what a suspect actually said.”¹²⁹

This is abetted by what is known as “belief perseverance”—, “the tendency to adhere to theories even when new information wholly discredits the

what black parents have told their children for decades. *See generally* Andrea L. Dottolo & Abigail Stewart, “Don’t Ever Forget Now, You’re a Black Man in America”: *Intersections of Race, Class and Gender in Encounters with the Police*, 59 SEX ROLES 350 (2008).

¹²⁵ *See Carter*, 354 A. 2d at 633:

As to Bradley, it was disclosed for the first time at the new trial hearing that, prior to his having given the police a written statement identifying Carter, Lt. DeSimone [the lead prosecutorial detective] had not only promised Bradley protection but also represented that he would inform every prosecutor’s office in the State where there were pending charges against Bradley of his having testified as a State’s witness in a triple homicide case. The purpose of this, DeSimone said, was to have the information included in the presentence report for consideration by the sentencing judge. DeSimone also revealed that the assistant prosecutor who tried the case was aware of these promises

Ominously, DeSimone was viewed by his bosses in the prosecutor’s office as “their own Javert.” HIRSCH, *supra* note 33, at 35. Javert, of course, was the policeman who was a central character in *Les Misérables*.

¹²⁶ Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 307–08 (2006).

¹²⁷ Sarah Anne Mourer, *Believe It or Not: Mitigating the Negative Effects Personal Belief and Bias Have on the Criminal Justice System*, 43 HOFSTRA L. REV. 1087, 1111 (2015) (Exculpatory evidence may be ignored, and other possible culprits may not be investigated or considered. This is true even when the prosecution is directly presented with other plausible suspects or with exculpatory evidence.).

¹²⁸ *State v. Kelley*, No. A-1266-17T3, 2018 WL 1247248 (N.J. App. Div. Mar. 12, 2018).

¹²⁹ *Id.* at *14. *See also* *State v. Robinson*, No. M2019-00451-CCA-R3-CD, 2020 WL 4718125, *14 (Tenn. Ct. Crim. App. Jan. 15, 2020) (reversing a conviction and remanding for a new trial. There, defense counsel argued “it was fundamentally unfair to deny the Defendant the opportunity to present proof of the State’s ‘single narrow-minded tunnel vision’ of the Defendant’s guilt regardless of how the evidence had changed over time, [and that] ‘[O]ur argument might be that no facts would have made a difference, that they were always determined to prosecute [the Defendant] for . . . first degree murder, and they’re going to shift their theory no matter what to try to prosecute him for that—that offense.’”).

theory's evidentiary basis.¹³⁰ "Belief perseverance," is one of the heuristics¹³¹ that "distort our abilities to consider information rationally" and "contaminate [legal] practice."¹³² As noted in this context by Professors Findley and Scott, lead actors in the criminal justice system will "focus on a suspect, select and filter the evidence that will 'build a case' for conviction, while ignoring or suppressing evidence that points away from guilt."¹³³

Dylan's characterization: Dylan's lyrics—"We want to put his ass in stir/
We want to pin this triple murder on him"—clearly reflect this "tunnel vision."

What really happened: This was precisely what was going on in the Passaic County prosecutor's office at this time.¹³⁴ It is no surprise that "advocates shape and reshape evidence to fit their strategies and theories of the case."¹³⁵ The decision of the Passaic County prosecutor to focus solely on Carter and Artis fits perfectly into this schema.

- Conditions of pre-trial confinement:

The law: Although it is clear that "pretrial detention may serve legitimate regulatory purposes,"¹³⁶ the question to be resolved is whether the conditions of confinement in the jail are always compatible with those purposes.¹³⁷ And the Court has clarified that "pretrial detainees (unlike convicted prisoners)

¹³⁰ Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1599 (2006). This goes beyond lay witness testimony, and also pervades expert testimony. See Mandy Locke & Joseph Neff, *Part 3: Witness for the Prosecution: Lab loyal to law enforcement*, NEWS & OBSERVER (Aug. 11, 2010), <http://www.newsobserver.com/news/special-reports/agents-secrets/article17704160.html> (describing the North Carolina Bureau of Investigation as "often forc[ing] analysts to become advocates, in lock step with police and prosecutors, shaping evidence needed to deliver a conviction"). See *Mills v. Barnard*, 869 F.3d 473, 482 (6th Cir. 2017) (citing the Locke & Neff article with approval).

¹³¹ See Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39, 57 n.115 (1992) (heuristics are "simplifying cognitive devices that frequently lead to distorted and systematically erroneous decisions through ignoring or misusing rationally useful information").

¹³² Michael L. Perlin & Heather Ellis Cucolo, "Tolling for the Aching Ones Whose Wounds Cannot Be Nursed": *The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law*, 20 J. GENDER, RACE & JUST. 431, 433 (2017) (quoting, in part, Michael L. Perlin, "Wisdom Is Thrown into Jail": *Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness*, 17 MICH. ST. U.J. MED. & L. 343, 365 n.127 (2013)).

¹³³ Findley & Scott, *supra* note 126, at 292 (citing Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002)). "Tunnel vision is a . . . 'compendium of common heuristics and logical fallacies[.]'" *Id.*

¹³⁴ See generally, HIRSCH, *supra* note 33; WICE, *supra* note 43.

¹³⁵ William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. & LEE L. REV. 329, 376 (1995).

¹³⁶ Schall v. Martin, 467 U.S. 253, 268 (1984).

¹³⁷ Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963).

cannot be punished at all,”¹³⁸ though the reality is that pretrial detainees commonly face harsher conditions of confinement than convicted individuals.¹³⁹

Dylan’s characterization: Dylan stressed, “But then they took him to the jailhouse/Where they try to turn a man into a mouse.”¹⁴⁰ He does not elaborate on this, but there can be little question that he was referring to conditions commonplace in New Jersey jails at this time.¹⁴¹

What really happened: Reported litigation in New Jersey on “deplorable” jail conditions dates back to at least 1961,¹⁴² and such litigation involved the Passaic County Jail as recently as 2011.¹⁴³

- Judicial bias:

The law: The United States Supreme Court has recognized “a litigant’s due process right to a fair trial before an unbiased judge.”¹⁴⁴ This lack of bias—a “cardinal principle of justice”—is an “indispensable feature of democracy.”¹⁴⁵ This has been an essential principle in the criminal justice system for nearly a century,¹⁴⁶ and convictions have been reversed where there is such an appearance of bias.¹⁴⁷ Strikingly, such claims of bias are not subject to review under the “harmless error” doctrine.¹⁴⁸

¹³⁸ *Kingsley v. Hendrickson*, 576 U.S. 389, 400 (2015).

¹³⁹ *See, e.g.*, Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1684–88 (2003).

¹⁴⁰ Hurricane lyrics.

¹⁴¹ The “man into a mouse” line is also cited in a law review article by another professor who spoke at the symposium where I first presented Perlin, *Tangled*, *supra* note 1. *See* Laurie Serafino, *Life Cycles of American Legal History Through Bob Dylan’s Eyes*, 38 FORDHAM URB. L.J. 1431, 1431–32 (2011), for a discussion on this line as an example of Dylan’s perspective on how “America passes through cycles of change that correlate to patterns of discrimination and revolution.”

¹⁴² *See In re Presentment by Camden County Grand Jury*, 169 A.2d 465, 474–75 (N.J. 1961).

¹⁴³ *See State v. Traylor*, No. 08-07-1035, 2011 WL 6089343, *1 (N.J. App. Div. Dec. 8, 2011). In one case, *United States v. Sutton*, No. 07-426, 2007 WL 3170128 (D.N.J. Oct. 25, 2007), a district court granted a variance below the federal sentencing guideline range based on conditions in the Passaic County Jail.

¹⁴⁴ *Citizens United v. Fed’l Election Comm.*, 130 U.S. 876, 910 (2010).

¹⁴⁵ Elizabeth B. Wydra, *The Fourteenth Amendment’s Due Process Clause and Caperton: Placing the Federalism Debate in Historical Context*, 60 SYRACUSE L. REV. 239, 241 (2010).

¹⁴⁶ *See, e.g.*, *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

¹⁴⁷ *See, e.g.*, *People v. Mentzer*, No. 17CA2237, 2020 WL 3088837, ¶ 14 (Colo. Ct. App. June 11, 2020) (“Given the appearance of bias resulting from the judge’s supervisory role over the attorney who filed the charges against Mentzer at the time the charges were filed, we must reverse the judgment and remand for a new trial.”).

¹⁴⁸ *See, e.g.*, *Franklin v. McCaughtry*, 398 F.3d 955, 956 (7th Cir. 2005) (judicial bias is a due process violation not subject to harmless error analysis); *United States v. Edward J.*, 224 F. 3d 1216, 1223 (10th Cir. 2000) (judicial bias part of “limited class of fundamental constitutional errors” not subject to harmless error analysis.).

Dylan's characterization: In his characterization of the trial judge—"The judge made Rubin's witnesses drunkards from the slums"¹⁴⁹—Dylan depicts a biased judge.¹⁵⁰

What really happened: In Carter's habeas petition, he sought relief on the grounds that "the petition[er]'s due process rights were violated by the trial judge's bias."¹⁵¹ But this issue was not discussed in the Court's opinion,¹⁵² although the issue of potential *juror* bias was discussed directly in the trial court's conclusions:

It would be naive not to recognize that some prejudice, bias and fear lurks in all of us. But to permit a conviction to be urged based upon such factors or to permit a conviction to stand having utilized such factors diminishes our fundamental constitutional rights.¹⁵³

- Racial composition of juries:

It is now (and has been since 1986) axiomatic that it is a *prima facie* violation of the Equal Protection Clause for the state to remove jurors who are of the defendant's race.¹⁵⁴ Dylan's reference to the "all-white jury" was partially poetic license: in Carter's first trial, there was one juror of color (a West Indian) selected, but he did not deliberate; in his second, there were two African-Americans.¹⁵⁵

On the other hand, there have been successful *Batson* challenges in cases involving juries with an African-American defendant and just one African-American juror.¹⁵⁶ Nonetheless, there remain significant differences between

¹⁴⁹ *Hurricane* lyrics.

¹⁵⁰ Case law tells us that the privilege of trial judge to comment on the credibility of witnesses has its inherent limitations, and that that discretion is not arbitrary and uncontrolled. *See, e.g., United States v. Carlos*, 478 F.2d 377 (9th Cir. 1973).

¹⁵¹ *Carter*, 621 F. Supp. at 537. The trial judge was described by one author as "short-tempered," WICE, *supra* note 43, at 45, and by another as frequently "interv[en]ing when Carter's lawyer was 'pressing witnesses,'" HIRSCH, *supra* note 33, at 46. The interesting "back story" here is that Carter's lawyer, Raymond Brown, known universally as New Jersey's greatest criminal defense lawyer at the time, and the judge, Samuel Larner, once represented co-defendants in an international espionage conspiracy trial. *Id.* at 45.

¹⁵² Interestingly, potential *prosecutorial* bias was. *See id.* at 547 ("An appeal to racial prejudice and bias must be deplored in any jury trial and certainly where charges of murder are involved. For the state to contend that an accused has the motive to commit murder solely because of his membership in a racial group is an argument which should never be permitted to sway a jury or provide the basis of a conviction.").

¹⁵³ *Id.* at 560.

¹⁵⁴ *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). Subsequently, the Court extended this rule to permit a white defendant to have standing to object to the removal of black venirepersons from his jury. *Holland v. Illinois*, 494 U.S. 474 (1990).

¹⁵⁵ HIRSCH, *supra* note 33, at 46, 143. As is customary in New Jersey trials, 14 jurors are selected and then, at the time that deliberations begin, two are excluded by lot. In the first case, the one non-white juror was one of the two excluded. WICE, *supra* note 43, at 46.

¹⁵⁶ *See, e.g., State v. Myers*, 761 So. 2d 498, 499 (La. 2000) (reversing on the ground that the trial court erred in failing to address the defendant's *Batson* challenges to the State's peremptory striking of six of seven African-American venirepersons).

all-white juries and juries with at least a single minority member,¹⁵⁷ as the research shows that “[e]mpirical evidence suggests that [single-race juries] do a worse job than racially diverse juries.”¹⁵⁸ Although a person of color *had been* selected as one of the 14 jurors in Carter’s first trial, that juror was not among those who eventually deliberated.¹⁵⁹

- Prosecutorial use of known-to-be-false testimony:

The law: It is clear—and had been clear for years at the time of Carter’s trial—that if the state knows that offered testimony is false and does not correct such false testimony, that is reversible error.¹⁶⁰ As one of the leading scholars in this area of the law has noted, “The corrupting impact of false testimony on the justice system is profound and corrosive.”¹⁶¹ This point has been repeated many times by New Jersey courts,¹⁶² dating back to the time before Carter’s trial.¹⁶³ Importantly, evidence is material for *Brady* purposes “if there is a reasonable probability that, had the evidence been disclosed, the would have been different.”¹⁶⁴

Dylan’s characterization: Dylan here is crystal clear: “The crime was murder one, guess who testified?/ Bello and Bradley and they both baldly lied.”¹⁶⁵

What really happened: As discussed extensively above,¹⁶⁶ the district court, and then the Third Circuit, premised their decisions (granting the writ of habeas corpus and then affirming that grant) on *Brady* violations by failing to disclose the results of a lie detector test given to Bello, the State’s only

¹⁵⁷ See, e.g., Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 40–41 (2014) (citing Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 608 (2006); Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704 (1995) (“All-white juries are not problematic just because they are symbolically disturbing. . . In a study comparing racially mixed mock juries and all-white mock juries, researchers found that racially mixed juries tended to deliberate longer and discuss more information, made fewer factual errors, and were less resistant to discussions of race than all-white juries.”).

¹⁵⁸ *Id.* at 40.

¹⁵⁹ It has never been suggested that this was the result of manipulation or other illegal processes.

¹⁶⁰ *Napue v. Illinois*, 360 U.S. 264, 271–72 (1959); *Brady v. Maryland*, 373 U.S. 83, 90–91 (1963). See generally, Anne Bowen Poulin, *Convictions Based on Lies: Defining Due Process Protection*, 116 PENN ST. L. REV. 331 (2012).

¹⁶¹ *Id.* at 333.

¹⁶² See, e.g., *State v. Engel*, 592 A.2d 572, 598 (N.J. App. Div. 1991) (“where the prosecution knowingly uses perjured testimony, the Court has held that the conviction will be set aside if there is a ‘reasonable likelihood that the false testimony could have affected the judgment of the jury.’” (citing *United States v. Agurs*, 427 U.S. 97, 103 (1976)).

¹⁶³ See, e.g., *State v. Cahill*, 311 A.2d 760, 763 (N.J. Super. Ct., Law Div. 1973) (“use of perjured testimony by the State, whether willful or merely negligent, deprives the defendant of a fair trial.”).

¹⁶⁴ *State v. Marshall*, 690 A.2d 1, 33 (N.J. 1997) (quoting, in part, *United States v. Bagley*, 473 U.S. 667, 682 (1985) (Blackmun, J., plurality opinion)).

¹⁶⁵ *Hurricane* lyrics.

¹⁶⁶ See Part III.

“eyewitness.”¹⁶⁷ In affirming the decision below, as previously noted, the Third Circuit concluded:

[T]hat Bello’s testimony was critical to the prosecution’s case. His credibility was a crucial issue for the jury. From this, it must necessarily follow that there is a “reasonable probability” that the “result of the [trial] would have been different” had the prosecution properly disclosed to Carter Harrelson’s [the polygrapher’s] oral reports, *see Bagley*, 473 U.S. at 682, 105 S.Ct. at 3384, because Bello’s believability was all important. Accordingly, we hold that the district court did not err in concluding that the reports were “material” under *Brady*.¹⁶⁸

- Prejudicial publicity:

The law: For over a half-century, it has been black-letter law that the failure of a judge to protect a defendant from inherently prejudicial publicity that “saturated” a community deprived the defendant of a fair trial consistent with due process.¹⁶⁹

Dylan’s characterization: Here, Dylan clearly pointed an accusatory finger at the press: “The newspapers, they all went along for the ride.”¹⁷⁰

What really happened: One of the leading books about the case makes clear that the local press “evinced a clear anti-Carter slant,” reflecting the history of racial tensions in Paterson.¹⁷¹ One story—a month before the trial—told of Carter’s juvenile record¹⁷² and described the defendant as a man “obsessed with guns and violence.”¹⁷³ Subsequently, the same book discusses how the pervasive pretrial publicity—there there were at least 672 articles published in Paterson newspapers at the time of the first trial, including four editorials “that seemed to presuppose guilt”¹⁷⁴—led to the transfer of the retrial of the state case to nearby Hudson County.¹⁷⁵

- Prison conditions:

The law: Conditions of confinement will constitute cruel and unusual punishment if they result in “unquestioned and serious deprivation of basic human needs.”¹⁷⁶ Most courts employ the “totality of circumstances” test in

¹⁶⁷ *Carter*, 621 F. Supp. at 537.

¹⁶⁸ *Carter*, 826 F.2d at 1309.

¹⁶⁹ *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966). Subsequently, the New Jersey Supreme Court described the “torrent of publicity that creates a carnival-like setting in which ‘the trial atmosphere is so corrupted by publicity that prejudice may be presumed.’” *State v. Harris*, 716 A. 2d 458, 469 (N.J. 1998) (quoting, in part, *State v. Biegenwald*, 524 A. 2d 130, 140 (N.J. 1987)).

¹⁷⁰ *Hurricane* lyrics.

¹⁷¹ *WICE*, *supra* note 43, at 59.

¹⁷² Under New Jersey statute, such records are strictly confidential, and with specific exceptions set out in the statute, “shall be strictly safeguarded from public inspection.” *See* N.J. STAT. ANN. § 2A:4A–60(a).

¹⁷³ *WICE*, *supra* note 43, at 59.

¹⁷⁴ *Id.* at 108.

¹⁷⁵ *Id.* at 108–09.

¹⁷⁶ *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

their analysis of such issues,¹⁷⁷ a position endorsed by federal courts in cases from New Jersey.¹⁷⁸

At least one case has found that the acceptable minimum cell size depends on basic standards of decency to which the state adheres to in its prison conditions, the duration of time an inmate must spend inside a cell, and the opportunities and conditions outside a cell that provide an inmate with relief from discomfort of in-cell confinement.¹⁷⁹ Not insignificantly, *that* case found conditions involving a 35-foot cell to constitute cruel and unusual punishment.¹⁸⁰

Dylan's characterization: According to Dylan, "Rubin sits like Buddha in a ten-foot cell."

What really happened: Even acknowledging the poetic license in Dylan's line (his cell was actually 35 square feet, as in the *Crain* case) it should be noted that his cell was, nevertheless, inhumanely small.¹⁸¹ A *New York Times* story from 1989 describes cells in Trenton State Prison as being "the size of closet, with one window, a bed, a sink and a stopped-up toilet."¹⁸² Importantly, the American Corrections Association standards stipulate that the smallest acceptable cell is one that is 80 square feet.¹⁸³

In his autobiography, Carter did describe the prison as an "obsolete hole of depravity and death."¹⁸⁴ Conditions in New Jersey prisons (and jails) were so onerous at that time that the state had created a special Office of Inmate Advocacy within the Office of the Public Defender to "represent the interests of inmates in such disputes and litigation, as will, in the discretion of the Public Defender, best advance the interests of inmates as a class on an issue of general application to them, and may act as representative of inmates with any principal department or other instrumentality of State, county or local government."¹⁸⁵

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¹⁷⁷ See, e.g., cases listed in Russell W. Gray, *Wilson v. Seiter: Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U. L. REV. 1339, 1340-41 n. 9 (1992). For the classic criminological perspective, see MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (Cambridge U. Press ed., 1999).

¹⁷⁸ *Inmates v. Di Buono*, 713 F.2d 984, 999 (3d Cir. 1983).

¹⁷⁹ *Crain v. Bordenkircher*, 342 S.E.2d 422, 447 (W. Va. Sup. Ct. App. 1986).

¹⁸⁰ *Id.*

¹⁸¹ CHAITON & SWINTON, *supra* note 65, at 60 (quoting a TORONTO GLOBE AND MAIL (Dec. 20, 1977) article).

¹⁸² Anthony Depalma, *About New Jersey*, N.Y. TIMES (Nov. 26, 1989), <https://www.nytimes.com/1989/11/26/nyregion/about-new-jersey.html>.

¹⁸³ Standards Comm. Meeting Minutes, American Correctional Association Winter Conference (Jan. 10, 2012), https://www.aca.org/aca_prod_imis/docs/Standards%20and%20Accreditation/sac_January_2012.pdf.

¹⁸⁴ WICE, *supra* note 43, at 68 (quoting RUBIN CARTER, *THE SIXTEENTH ROUND: FROM NUMBER 1 CONTENDER TO NUMBER 45472309* (1974)).

¹⁸⁵ NEW JERSEY DEP'T OF THE PUBLIC ADVOCATE, OFFICE OF INMATE ADVOCACY, <https://dspace.njstatelib.org/xmlui/handle/10929/55547/> (quoting Chap. 27, Laws of New Jersey, (1974)).

In short, Dylan's lyrics are fairly close to what was found in both the habeas petition hearing and repeated in the Third Circuit's opinion. There is no definitive answer to the question of actual innocence, but, on virtually every other major legal issue, the lyrics are close to—in some cases, virtually identical to—reality.

V. THERAPEUTIC JURISPRUDENCE¹⁸⁶

Briefly, therapeutic jurisprudence recognizes that, as a therapeutic agent, the law can have therapeutic or anti-therapeutic consequences,¹⁸⁷ asking whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.¹⁸⁸ It “look[s] at law as it actually impacts people's lives” and supports “an ethic of care,”¹⁸⁹ attempting “to bring about healing and wellness,” and valuing psychological health.¹⁹⁰

One of its lodestars is a commitment to dignity.¹⁹¹ I believe that attorneys “must embrace the principles and tenets of therapeutic jurisprudence as a means of best ensuring the dignity of [persons before the court.]”¹⁹² This

¹⁸⁶ See Perlin, *Death Planes*, *supra* note 1, at 325. See also Michael L. Perlin, “I’ve Got My Mind Made Up”: How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 81, 93–95 (2018) [hereinafter Perlin, *Mind Made Up*]; Michael L. Perlin & Alison J. Lynch, “In the Wasteland of Your Mind”: Criminology, Scientific Discoveries and the Criminal Process, 4 VA. J. CRIM. L. 304, 357 (2016), for fuller expositions.

¹⁸⁷ Michael L. Perlin, “His Brain Has Been Mismanaged with Great Skill”: How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?, 42 AKRON L. REV. 885, 912 (2009).

¹⁸⁸ Michael L. Perlin, “And My Best Friend, My Doctor, Won’t Even Say What It Is I’ve Got”: The Role and Significance of Counsel in Right to Refuse Treatment Cases, 42 SAN DIEGO L. REV. 735, 751 (2005); see also David Wexler, *Therapeutic Jurisprudence: Restructuring Mental Disability Law*, 10 N.Y.L. SCH. J. HUM. RTS. 759 (1993).

¹⁸⁹ Perlin, *Mind Made Up*, *supra* note 186, at 94 (citing Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–07 (2006)).

¹⁹⁰ Perlin, *Mind Made Up*, *supra* note 186, at 94 (citing Bruce Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, in INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVE ON CIVIL COMMITMENT 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003)).

¹⁹¹ See Michael L. Perlin, “Striking for the Guardians and Protectors of the Mind”: The Convention on the Rights of Persons with Disabilities and the Future of Guardianship Law, 117 PENN ST. L. REV. 1159, 1186 (2013); Heather Ellis Cucolo & Michael L. Perlin, *Promoting Dignity and Preventing Shame and Humiliation by Improving the Quality and Education of Attorneys in Sexually Violent Predator (SVP) Civil Commitment Cases*, 28 FLA. J. L. & PUB. POL’Y 291 (2017); Michael L. Perlin, “Have You Seen Dignity?”: The Story of the Development of Therapeutic Jurisprudence, 27 N.Z.U. L. REV. 1135 (2017) [hereinafter Perlin, *Have You Seen Dignity*], for a discussion on the relationship between dignity and therapeutic jurisprudence in general.

¹⁹² Michael L. Perlin & Naomi M. Weinstein, “Said I, ‘But You Have No Choice’”: Why a Lawyer Must Ethically Honor a Client’s Decision About Mental Health Treatment Even if It Is Not What S/he Would Have Chosen, 15 CARDOZO PUB. L. POL’Y & ETHICS J. 73, 115 (2016–17).

focus will also diminish the likelihood that shame and humiliation will permeate the legal proceedings.¹⁹³

It is difficult to conjure up a case in recent New Jersey legal history that paid less attention to these principles than the trial of Rubin Carter.¹⁹⁴ The state solicited perjured testimony from its two star witnesses—Bello and Bradley.¹⁹⁵ It fanned the flames of racism prior to the trial, at the trial, and after the trial.¹⁹⁶ Detectives in the prosecutor's office forged documents allegedly pointing to the defendants' guilt.¹⁹⁷ There was no dignity—of any sort—in Carter's trials, not an iota of effort to increase healing and wellness, and no effort to establish an ethic of care. This was a lost opportunity; had the treatment of the defendant been radically different, some genuine healing might have taken place. Also, if therapeutic jurisprudence principles were invoked and accepted, it would have been such an opportunity to bring healing to a community as torn asunder as was Paterson;¹⁹⁸ this opportunity was irrevocably lost.

Although a few of the issues faced by the courts in this case raise issues that have been the subject, in other contexts, of therapeutic jurisprudence scholarship,¹⁹⁹ most have (somewhat surprisingly, to me) not been considered yet in this context.²⁰⁰ This lack of attention is perplexing and

¹⁹³ Michael L. Perlin & Alison J. Lynch, "She's Nobody's Child/The Law Can't Touch Her at All": *Seeking to Bring Dignity to Legal Proceedings Involving Juveniles*, 56 FAM. CT. REV. 79, 88–89 (2018).

¹⁹⁴ It should also be stressed that the conditions of confinement—both pre-trial and in the prison system—were also violative of the principles of therapeutic jurisprudence. See, e.g., Astrid Birgden & Michael L. Perlin, "Tolling for the Luckless, the Abandoned and Forsaken": *Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 231 (2008); Astrid Birgden & Michael L. Perlin, "Where the Home in the Valley Meets the Damp Dirty Prison": *A Human Rights Perspective on Therapeutic Jurisprudence and the Role of Forensic Psychologists in Correctional Settings*, 14 AGGRESSION & VIOLENT BEHAV. 256 (2009).

¹⁹⁵ HIRSCH, *supra* note 33, at 110.

¹⁹⁶ See *Carter*, 621 F. Supp. at 534 ("Petitioner's convictions were predicated upon an appeal to racism rather than reason").

¹⁹⁷ HIRSCH, *supra* note 33, at 235.

¹⁹⁸ See, e.g., Mike Kelly, *Revisiting the Hurricane Carter Murder Case: Son Resurrects His Detective Father's Memoir*, NORTHJERSEY.COM (June 17, 2019), <https://www.northjersey.com/story/news/columnists/mike-kelly/2019/06/17/revisiting-hurricane-carter-murder-case-53-years-later-memoir/1411490001/> ("In 1966, Paterson—and, indeed, America—was fractured by racial discord.").

¹⁹⁹ See generally, *supra* note 193; see also, Michael D. Pepson, *Therapeutic Jurisprudence in Philosophical Perspective*, 2 J. L. PHIL. & CULTURE 239, 258 (2008) (on actual innocence); see generally Michael L. Perlin, "Merchants and Thieves, Hungry for Power": *Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 WASH. & LEE L. REV. 1501 (2016) (on judicial bias); see also Colleen M. Berryessa, *Judicial Stereotyping Associated with Genetic Essentialist Biases Toward Mental Disorders and Potential Negative Effects on Sentencing*, 53 LAW & SOC'Y REV. 202 (2019) (on judicial bias).

²⁰⁰ Of course, therapeutic jurisprudence did not exist as a theoretical concept at the time of the Carter trial. David B. Wexler, *Therapeutic Jurisprudence Forum: The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REV. JUR. U.P.R. 691, 693 (1999); see generally Michael L. Perlin, "Changing of the Guards": *David Wexler, Therapeutic Jurisprudence, and the Transformation of Legal Scholarship*, 63 INT'L J. L. & PSYCHIATRY 3 (2019) (discussing the creation of therapeutic jurisprudence in the late 1980s). It has been clear, however, since at least the early 1990s, that therapeutic jurisprudence was meant to re-energize criminal law and procedure, then seen as "hungry for new approaches." David

troublesome, and I hope will be remedied in the near future as others who focus on criminal procedure in their writings incorporate therapeutic justice principles into their work.²⁰¹ Writing recently about Dylan's songs about war and international affairs, focusing primarily (but not exclusively) on *Masters of War*, I concluded that his lyrics reflected "the essence of musical therapeutic jurisprudence."²⁰² In very different ways, so does *Hurricane*.²⁰³

CONCLUSION

When I wrote my first Dylan law review article, I concluded by noting that I used his lyrics and titles in my article titles "as a reflection of a near-total consonance between Bob's jurisprudential and political values and the

B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 282 (1993). It was not until 2008 that the Supreme Court "first implicit[ly] endorse[d] the important principles of therapeutic jurisprudence in a criminal procedure context." Michael L. Perlin & Naomi Weinstein, "Friend to the Martyr, a Friend to the Woman of Shame": *Thinking About the Law, Shame and Humiliation*, 24 S. CAL. REV. L. & SOC. JUST. 1, 17 n. 87 (2014) (discussing *Indiana v. Edwards*, 554 U.S. 164 (2008) (on competency to self-represent in a criminal case)).

²⁰¹ See Lori Carroll, *Restoring the Weak and the Victimized*, 1 INT'L J. THERAPEUTIC JURIS. 119, 141 (2016), on how "the amazing benefits of therapeutic jurisprudence and all its healing elements may be complete disconnected from the adversarial system's criminal procedures." See GINGER LERNER-WREN, THERAPEUTIC JURISPRUDENCE: THE HIDDEN POWER OF HUMANIZING JUSTICE, A COURT OF REFUGE: STORIES FROM THE BENCH OF AMERICA'S FIRST MENTAL HEALTH COURT (July 8, 2018), <https://court-of-refuge.medium.com/problem-solving-courts-therapeutic-jurisprudence-bbf73fb32a6> (Judge Lerner-Wren created the first mental health problem-solving court in the U.S.); see also Perlin, *Have You Seen Dignity*, *supra* note 191, at 1149.

²⁰² Perlin, *Death Planes*, *supra* note 1, at 328.

²⁰³ I am hoping that this article may inspire others to "get" the dynamic ways that therapeutic jurisprudence develops as our knowledge of substantive areas of law and society grows and may encourage them to apply therapeutic justice concepts to what is still uncharted territory. For an aggregate of many of the other areas of law in which scholars and practitioners have employed therapeutic jurisprudence in all its manifestations, civil and criminal, public and private, domestic and international, see PERLIN & CUCOLO, *supra* note 65, § 2-6, at 2-46 to 2-65 (listing articles). By way of examples, and for a flavor of the range of therapeutic justice topics, see, e.g., Shelley Kierstead, *Therapeutic Jurisprudence, Professionalism, and "Spikes" for Lawyers*, 30 ST. THOMAS L. REV. 42 (2017) (legal writing); David C. Yamada, *Employment Law as if People Mattered: Bringing Therapeutic Jurisprudence into the Workplace*, 11 FLA. COASTAL L. REV. 257 (2010) (employment law); Barbara Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775 (1997) (family law); Kathy L. Cerminara, *Therapeutic Jurisprudence's Future in Health Law: Bringing the Patient Back into the Picture*, 63 INT'L J. L. & PSYCHIATRY 56 (2019) (health care law); David B. Wexler, *Relapse Prevention Planning Principles for Criminal Law Practice*, 5 PSYCHOL., PUB. POL'Y & L. 1028 (1999) (substantive criminal law); Michael L. Perlin & Heather Ellis Cucolo, *See This Empty Cage Now Corrode: The International Human Rights Implications of Sexually Violent Predator Laws*, 23 NEW CRIM. L. REV. 388 (2020) (sex offender law and international human rights/comparative law).

As my friend and colleague Henry Dlugacz has noted, in this specific context, "Powerful advocacy is sometimes needed to force the [criminal justice] system to see the powerless/black/supposed criminal as a human being and that this a prerequisite for any meaningful [therapeutic jurisprudence] approach." (Personal communication, Jan. 11, 2021, on file with author).

values I seek to assert in my writings.”²⁰⁴ Nine years later, I continue to do that, as that consonance continues.²⁰⁵

Dylan never went to law school, and presumably never took a course in criminal procedure. And there is no evidence that his lyric sheet was ever vetted by any criminal procedure professor. But still, there is such connectivity between the saga he tells in the song and what criminal procedure professors teach every semester. I frequently tell people that I don’t believe in coincidence, so. . .

When I first heard *Hurricane*, I was practicing law in New Jersey, no longer as a Public Defender, but as the state Mental Health Advocate (and my caseload certainly included many who had been involved/immersed in the state criminal justice system, and as noted above, many who were institutionalized in the Vroom Building). Of course, I had known about the Carter case for many years. Nothing in Dylan’s lyrics—about the pervasive racism in the Paterson police department and on the part of some individuals in the Passaic County Prosecutor’s Office, and the fundamental unfairness of the trial and the entire judicial process in Passaic County at that time—surprised me at all. I was so relieved when I first read Judge Sarokin’s decision, and then the Third Circuit’s substantial affirmance. They gave me hope that, maybe, per Dylan’s line in *Hattie Carroll*, someday the courts would truly be “on the level.” I have been a member of the bar for over 50 years, and I am still hoping.

²⁰⁴ Perlin, *Tangled*, *supra* note 1, at 1430.

²⁰⁵ As a random example, here are the titles of three articles of mine most recently published: Michael L. Perlin & Heather Ellis Cucolo, “*Something’s Happening Here/But You Don’t Know What It Is*”: How Jurors (Mis)Construe Autism in the Criminal Trial Process, 82 U. PITT. L. REV. 585 (2021) (about *Ballad of a Thin Man*); Michael L. Perlin, Talia Roitberg Harmon & Sarah Wetzel, “*Man Is Opposed to Fair Play*”: An Empirical Analysis of How the Fifth Circuit Has Failed to Take Seriously *Atkins v. Virginia*, 11 WAKE FOREST J.L. & POL’Y 451 (2021) (about *Political World*); Michael L. Perlin & Alison J. Lynch, “*Some Mother’s Child Has Gone Astray*”: Neuroscientific Approaches to a Therapeutic Jurisprudence Model of Juvenile Sentencing, 59 FAM. CT. REV. 478 (2021) (about *Dark Eyes*). Not coincidentally, all of these articles deal, to some extent, with racial bias issues in the criminal justice process.