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"No Older 'N Seventeen": Defending In Dylan Country

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Cover Page Footnote

Professor of law, Director of Criminal Defense & Prisoner Advocacy Clinic, Co-Director of E. Barrett Prettyman Fellowship Program, Georgetown University Law Center. With thanks to Sophia Heller for excellent research assistance and Jordan Blumenthal for giving me a copy of Walls of Red Wing. This essay is in loving memory of my father-in-law Dr. Albert J. Greenberg, a Minneapolis internist who made house calls until he was nearly 90. He died on September 30, 2010 at 92. Although he didn't always understand criminal defense, he admired it nonetheless. Dinner with him was a highlight of any trip to Dylan Country.

“NO OLDER ‘N SEVENTEEN”: DEFENDING IN DYLAN COUNTRY

*Abbe Smith**

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Oh, the age of the inmates
I remember quite freely:
No younger than twelve
No older ‘n seventeen
Thrown in like bandits
And cast off like criminals
Inside the walls
The walls of Red Wing¹

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1. BOB DYLAN, *Walls of Red Wing*, on THE BOOTLEG SERIES, VOLUMES 1–3 (RARE & UNRELEASED) 1961–1991 (Columbia Records 1991). *Walls of Red Wing* was originally recorded in 1963 for Dylan’s second album, THE FREEWHEELIN’ BOB DYLAN, but never made it on the actual album. It was then supposed to be on his next album, THE TIMES THEY ARE A-CHANGIN’, but met the same fate. The 1963 version was finally released in 1991 on THE BOOTLEG SERIES. The song is about a boys’ “reform school” in Red Wing, Minnesota. See John Bauldie, *Album Liner Notes* 18, THE BOOTLEG SERIES, VOLUMES 1–3 (RARE & UNRELEASED) 1961–1991 (Columbia Records 1991).

INTRODUCTION

I was going to write about Bob Dylan's criminals. I had written an essay about Bruce Springsteen's criminals a few years back,² and believed this was a formula I might fairly easily replicate. But except for his most obvious songs—probably also the best-known ones—Dylan can be inscrutable.³ And, unlike Springsteen, there are no albums in Dylan's extensive oeuvre⁴ that focus on criminal or juvenile offenders.⁵ Did I really want to sift through hundreds of Dylan songs—or worse, read dozens of Dylan biographies⁶ and interviews⁷—to come up with a coherent theory of his philosophy on crime and punishment?⁸

I decided instead to write about an actual experience defending a teenager accused of a serious crime where Bob Dylan grew up—the Minnesota Iron Range. In order to protect the young man's privacy, I will not divulge the actual time period of the case. Likewise, I have

2. See Abbe Smith, *The Dignity and Humanity of Bruce Springsteen's Criminals*, 14 WIDENER L.J. 787 (2005) [hereinafter Smith, *Springsteen's Criminals*].

3. See NICK HORNBY, *A LONG WAY DOWN* 34 (2005) (“‘To live outside the law you must be honest,’ I said. ‘What the fucking hell does that mean?’ said Jess. You know, I’ve never really known what the fuck it means, to tell you the truth. Bob Dylan said it, not me, and I’d always thought it sounded good. But this was the first situation I’d ever been in where I was able to put the idea to the test, and I could see that it didn’t work. We were living outside the law, and we could lie through our teeth anytime we wanted, and I wasn’t sure why we shouldn’t. ‘Nothing,’ I said.”); see also NICK HORNBY, *JULIET, NAKED* 216 (2009) (“Bob Dylan’s for students . . .”).

4. Wikipedia lists thirty-four studio albums, not including THE BOOTLEG SERIES, and scores of compilation and live albums. See *Bob Dylan discography*, WIKIPEDIA, http://en.wikipedia.org/wiki/Bob_Dylan_discography (last visited Aug. 9, 2011).

5. For example, Bruce Springsteen’s album NEBRASKA (Columbia Records 1982) is a public defender classic. See generally Smith, *Springsteen's Criminals*, *supra* note 2, at 807. So is Johnny Cash’s AT FOLSOM PRISON (Columbia Records 1968).

6. For a recent sampling see HIGHWAY 61 REVISITED: BOB DYLAN’S ROAD FROM MINNESOTA TO THE WORLD (Colleen J. Sheehy & Thomas Swiss eds., 2009); GREIL MARCUS, *LIKE A ROLLING STONE: BOB DYLAN AT THE CROSSROADS* (2005); SETH ROGOVOY, *BOB DYLAN: PROPHET, MYSTIC, POET* (2009); LARRY DAVID SMITH, *WRITING DYLAN: THE SONGS OF A LONESOME TRAVELER* (2005) [hereinafter SMITH, *WRITING DYLAN*]; HOWARD SOUNES, *DOWN THE HIGHWAY: THE LIFE OF BOB DYLAN* (2001); SEAN WILENTZ, *BOB DYLAN IN AMERICA* (2010).

7. There are too many of these to list, but see BOB DYLAN: THE ESSENTIAL INTERVIEWS (Jonathan Cott ed., 2006) (selected interviews from 1962 to 2004, by luminaries like Studs Terkel, Nat Hentoff, Nora Ephron, Jann S. Wenner, Mikal Gilmore, Sam Shepard, and Jon Pareles).

8. I did comment on Dylan’s treatment of guilt and innocence in two of his most famous criminal justice songs in the opening panel of this symposium: BOB DYLAN, *The Lonesome Death of Hattie Carroll*, on THE TIMES THEY ARE A-CHANGIN’ (Columbia Records 1964) and BOB DYLAN, *Hurricane*, on DESIRE (Columbia Records 1975).

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altered details about his life and the charges he was facing and changed his name.⁹ I will call him Jamal.

Things did not go well for Jamal. Though a child when he was sent from the juvenile jail outside of Washington, D.C. to a secure treatment facility for serious juvenile offenders in the Iron Range, Jamal was ultimately tried and convicted as an adult and sentenced to many years in prison. He is behind bars as I write, and may well die there. This is as much an elegy as an essay.

I. THE IRON RANGE

From the dirty old mess hall
You march to the brick wall
Too weary to talk
And too tired to sing
Oh, it's all afternoon
You remember your hometown
Inside the walls
The walls of Red Wing
Oh, the gates are cast iron
And the walls are barbed wire
Stay far from the fence
With the 'lectricity sting
And it's keep down your head
And stay in your number

9. The young man gave me permission to write about him so that something good might come of his situation. It feels wrong, however, to write about him in a way that might expose him. See Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1, 48–52 (2000) (discussing the use of client stories, and noting that changing names and facts may not protect a client's identity); Nina W. Tarr, *Clients' and Students' Stories: Avoiding Exploitation and Complying with the Law to Produce Scholarship with Integrity*, 5 CLINICAL L. REV. 271 (1998) (discussing the use of client and student stories in legal scholarship). I have grappled before with the proper bounds of telling stories about real clients. See Abbe Smith, *I Ain't Takin' No Plea: Challenges in Counseling Young People Facing Serious Time*, 60 RUTGERS L. REV. 11, 13 n.7 (2007); Abbe Smith, *Telling Stories and Keeping Secrets*, 8 UDC/DCSL L. REV. 255, 256 (2004) (“[W]hat makes these client stories, and not lawyer stories?”). In the end, I think it is important that these stories be shared. See generally ABBE SMITH, *CASE OF A LIFETIME* (2008) (memoir about the author's efforts to free a wrongly convicted woman who spent nearly thirty years in prison). For a contrary position, see generally Ria A. Tabacco, *Defensible Ethics: A Proposal to Revise the ABA Model Rules for Criminal Defense Lawyer-Authors*, 83 N.Y.U. L. REV. 568 (2008) (arguing that there should be stricter limits on defense lawyers writing nonfiction books about clients).

Inside the walls
The walls of Red Wing¹⁰

The northeast section of Minnesota known as the Iron Range is a bleak and barren place. Everything about it feels harsh: the dusty red earth, the granite boulders, the extreme temperatures.¹¹ The long stretches of road are broken up only by abandoned mine sites and random billboards advertising all-you-can-eat buffets. These sites—now nothing more than massive pits—were once forests, hills, swamps, and lakes.¹² When you come upon the once-thriving towns and cities of Aurora, Buhl, Chisholm, Eveleth, Duluth, and Hibbing, you wonder how residents make a living these days. Things look pretty down-at-the-heels. Nothing seems to have taken the place of the now defunct steel industry, except for a few taconite treatment plants processing the low-grade iron ore that was once considered waste.¹³

There aren't many people on the streets of these towns. School, hospital, and municipal parking lots have plenty of unoccupied spaces. There are some touristy places—the United States Hockey Hall of Fame in Eveleth (featuring the world's largest authentic hockey stick, measuring 107 feet), the Minnesota Museum of Mining in Chisholm, the Wellstone Memorial in Eveleth—and a handful of motels and restaurants, but it is hardly a tourist destination. The only retail shopping center in the area is the Thunderbird Mall in Virginia, Minnesota. Suffice it to say, it is not the Mall of America.

“The Iron Range,” as locals call it, was once a bustling place, full of immigrants and enterprise. The land was rich in natural resources—iron ore in particular. Mining and the industry it spawned drew wagonloads of hard-bitten, hard-working settlers from Finland, Slovenia, Italy, Sweden, Croatia, Serbia, and Norway at the turn of the twentieth century.¹⁴ There were eastern Europeans too—including Jews, who, like Dylan's ancestors, settled mostly in Hibbing (where Dylan grew up) and Eveleth.¹⁵ They came—the Nordics and Slavs, Italians and Jews—in spite of the backbreaking work. Though the winters

10. DYLAN, *Walls of Red Wing*, *supra* note 1.

11. See MARVIN G. LAMPPA, MINNESOTA'S IRON COUNTRY: RICH ORE, RICH LIVES 244 (Paul L. Hayden et al. eds., 2004).

12. Arnold R. Alanen, *Years of Change on the Iron Range*, in MINNESOTA IN A CENTURY OF CHANGE: THE STATE AND ITS PEOPLE SINCE 1900 155, 155 (Clifford E. Clark, Jr. ed., 1989).

13. See LAMPPA, *supra* note 11, at 1, 228–43.

14. Alanen, *supra* note 12, at 155, 170–80.

15. *Id.* at 173.

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were long and hard, the climate was not so different from the Old Country.¹⁶ Removing ore from the frozen earth was laborious but at least there was work to be had.¹⁷

From the turn of the century through the 1940s, the Iron Range was the primary source of iron ore for the entire nation. When production soared, so did the population of the Range. Salaries rose too: during the late 1930s and early 1940s, iron ore miners were among the highest paid blue-collar workers in the country.¹⁸ But when, after supplying high-grade ore to the military through two world wars, the ore was depleted, so was the Range. By the 1950s – when Dylan was a Hibbing schoolboy – the Iron Range was in serious decline.¹⁹

Dylan wrote about the deterioration of his birthplace in *North Country Blues*,²⁰ his 1964 song about the Iron Range. Written in the voice of a miner’s wife, it tells the story of a mining company’s decision to outsource its operations to countries “where the miners work almost for nothing.”²¹ The song captures the depressing feel of the place:

Come gather ‘round friends
And I’ll tell you a tale
Of when the red iron pits ran plenty
But the cardboard filled windows
And old men on the benches
Tell you now that the whole town is empty

In the north end of town
My own children are grown
But I was raised on the other
In the wee hours of youth
My mother took sick
And I was brought up by my brother

The iron ore poured
As the years passed the door
The drag lines an’ the shovels they was a-humming
‘Til one day my brother

16. *Id.* at 170–80.

17. *Id.* at 157–70.

18. *Id.* at 155.

19. Dylan was born in Duluth, Minnesota, on May 24, 1941. SMITH, WRITING DYLAN, *supra* note 6, at 2–3.

20. BOB DYLAN, *North Country Blues*, on THE TIMES THEY ARE A-CHANGIN’ (Columbia Records 1964).

21. *Id.*

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Failed to come home
The same as my father before him
Well a long winter's wait
From the window I watched
My friends they couldn't have been kinder
And my schooling was cut
As I quit in the spring
To marry John Thomas, a miner
Oh the years passed again
And the givin' was good
With the lunch bucket filled every season
What with three babies born
The work was cut down
To a half a day's shift with no reason
Then the shaft was soon shut
And more work was cut
And the fire in the air, it felt frozen
'Til a man come to speak
And he said in one week
That number eleven was closin'
They complained in the East
They are paying too high
They say that your ore ain't worth digging
That it's much cheaper down
In the South American towns
Where the miners work almost for nothing
So the mining gates locked
And the red iron rotted
And the room smelled heavy from drinking
Where the sad, silent song
Made the hour twice as long
As I waited for the sun to go sinking
I lived by the window
As he talked to himself
This silence of tongues it was building
Then one morning's wake
The bed it was bare
And I's left alone with three children
The summer is gone
The ground's turning cold
The stores one by one they're a-foldin'
My children will go

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As soon as they grow
Well, there ain't nothing here now to hold them²²

Other countries now dominate the iron ore industry. Australia, Brazil, India, and China are the top producers.²³ China accounts for almost half of the world's production of crude steel.²⁴ It set a record for importing iron ore in January 2011 due to rising demand for iron and steel products.²⁵

The Iron Range consists of seven counties: Aitkin, Carlton, Cook, Itasca, Koochiching, Lake, and St. Louis, and three great iron ranges: the Vermilion, Cuyuna, and Mesabi.²⁶ When I went to see Jamal, I spent most of my time in St. Louis County, near the Mesabi Range, the largest of the iron ranges.²⁷

Dylan's *North Country Blues* doesn't mention Mesabi explicitly, but the description of “red iron pits” rings true.²⁸ New Jersey native, Bruce Springsteen, refers to Mesabi explicitly in his 1995 song about the demise of another place built on steel, *Youngstown*:

From the Monongahela valley
To the Mesabi iron range
To the coal mines of Appalachia
The story's always the same
Seven hundred tons of metal a day
Now sir you tell me the world's changed
Once I made you rich enough
Rich enough to forget my name²⁹

The most recent popular culture depiction of the Iron Range is the 2005 movie *North Country*³⁰ with Charlize Theron, Frances McDormand, Woody Harrelson, Jeremy Renner, Richard Jenkins, and Sissy

22. *Id.*

23. See *The Iron Ore Market, 2009–2011*, UNCTAD TRUST FUND PROJECT ON IRON ORE INFORMATION (June 2010), available at <http://www.unctad.org/infocomm/Iron/covmar08.htm>.

24. *Id.*

25. See *China Iron Ore Imports Hit Record in Jan*, CHINA DAILY (Feb. 14, 2011 3:24 PM), http://www.chinadaily.com.cn/bizchina/2011-02/14/content_12006080.htm (reporting that China's iron ore imports reached a record 68.97 million tons in January 2011, up nearly twenty percent from the previous month according to data from the General Administration of Customs).

26. LAMPPA, *supra* note 11, at 2–4.

27. See *Mesabi Range*, MININGARTIFACTS.ORG, <http://www.miningartifacts.org/MesabiRange.html> (last visited Aug. 11, 2011).

28. DYLAN, *North Country Blues*, *supra* note 20.

29. BRUCE SPRINGSTEEN, *Youngstown*, on THE GHOST OF TOM JOAD (Columbia Records 1995).

30. NORTH COUNTRY (Warner Bros. Pictures 2005).

Spacek. A fictionalized version of the events surrounding a sexual harassment class-action law suit against a mining company, *Jenson v. Eveleth Taconite Co.*,³¹ the film portrays the brutal work conditions endured by the first women to work at the Eveleth Mines in the 1980s. The Range was a man's world. In many ways, it still is.

The area still has a recognizably Italian, Slavic, and Scandinavian heritage. Hard work remains an abiding value. Big, heavy meals seem to be an abiding value too. Meatballs are a common denominator. Heaping plates of the overcooked orbs of ground beef are served at every restaurant, often with an ethnic twist. The Iron Range is no place for a vegetarian.

A strong northern/midwestern accent is another defining feature, especially among older people. Locals sound like Police Chief Marge Gunderson, the Frances McDormand character in the movie *Fargo*.³² People actually say, "Yah, you betcha," talk in a distinctively Minnesotan singsong, and engage in "Minnesota nice," which is generally understood to be ironic. On *A Prairie Home Companion*, Garrison Keillor makes fun of "Wobegonics," the supposed language of Minnesotans, which includes "no confrontational verbs or statements of strong personal preference . . ."³³

People nod their heads a lot instead of speaking. Maybe it is too cold for speech.

Politically, the Iron Range has traditionally been a Democratic-Farmer-Labor Party stronghold, and the most reliable Democratic voting block in Minnesota aside from the Twin Cities of Minneapolis and St. Paul. In the 2004 presidential election, John Kerry carried the region by a comfortable margin,³⁴ aided by George W. Bush referring to it as the "Iron Ridge" in a campaign appearance.³⁵ Barack Obama did even better than Kerry in 2008, carrying every single county in the

31. 824 F. Supp. 847 (D. Minn. 1993).

32. FARGO (PolyGram Filmed Entertainment and Working Title Films 1996).

33. See A PRAIRIE HOME COMPANION WITH GARRISON KEILLOR, *Wobegonics*, (American Public Media radio broadcast Apr. 19, 1997), available at http://prairiehome.publicradio.org/programs/19970419/97_0419WOBEGONICS.htm.

34. See *Statewide Results for President and Vice-President*, THE OFFICE OF THE MINNESOTA SECRETARY OF STATE, <http://electionresults.sos.state.mn.us/20041102/ElecRslts.asp?M=S&R=ALL&P=A> (last visited Aug. 9, 2011).

35. See Laura Billings, *Living in a Battleground State Could Stall Our Progress*, ST. PAUL PIONEER PRESS, Jul. 20, 2004, at B1; David Stout, *Bush Signs \$386.4 Billion Transportation Bill*, N.Y. TIMES, Aug. 10, 2005, available at <http://www.nytimes.com/2005/08/10/politics/10cnd-bush.html?ei=5090>.

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Range.³⁶ However, in the 2010 election, Republicans scored an upset in the Range—a political newcomer, Chip Cravaack, got elected to the United States Congress, defeating Representative James L. Oberstar, an eighteen-term Democrat and Chairman of the House Transportation Committee.³⁷

Nearly everyone is white in the Iron Range. As I said to Jamal, who had a history of running from every juvenile institution he had ever been sent to, “You’re not gonna get very far if you try to run from there. You’ll be the one black speck in a backdrop of whiteness, especially in winter.” Plus, the frozen landscape of northeastern Minnesota was not exactly Jamal’s natural habitat. He had barely been outside of the District of Columbia when he was sent to the Range.

II. BLACK KID IN A WHITE INSTITUTION

Oh, it’s fare thee well
To the deep hollow dungeon
Farewell to the boardwalk
That takes you to the screen
And farewell to the minutes
They threaten you with it
Inside the walls
The walls of Red Wing
It’s many a guard
That stands around smilin’
Holdin’ his club
Like he was a king
Hopin’ to get you
Behind a wood pilin’
Inside the walls
The walls of Red Wing³⁸

Jamal had just turned fifteen when he was charged with armed robbery and rape. He had been in the juvenile system since he was

36. See *Unofficial Results General*, THE OFFICE OF THE MINNESOTA SECRETARY OF STATE, <http://electionresults.sos.state.mn.us/20081104/countymap.asp> (last visited Aug. 9, 2011).

37. See *Results from Congressional District 08*, THE OFFICE OF THE MINNESOTA SECRETARY OF STATE, <http://electionresults.sos.state.mn.us/20101102/ElecRslts.asp?M=CGS&CD=08> (last visited Aug. 9, 2011); Paul Demko, *Oberstar Drowns in GOP Wave, but Rest of Minnesota Delegation Survives*, THE LEGAL LEDGER (Nov. 3, 2010, 11:44 AM) <http://politicsinminnesota.com/2010/11/oberstar-drowns-in-gop-wave-but-rest-of-mn-delegation-survives/>.

38. DYLAN, *Walls of Red Wing*, *supra* note 1.

ten, but not for anything as serious as these charges. He had sold drugs and stolen cars and boosted stuff from local stores. His school attendance was dismal, and so were his grades. He had been placed in special education classes when he was in the second grade, like he was some kind of “retard.” He did not like being there after that. His “disruptive behavior” got him sent to a disciplinary school and then to a nearby residential treatment program. But he did not last long there. The first chance he got he ran back to his mother’s house.

When juvenile probation and several stays at the juvenile jail did not stop his law-breaking, he was sent to an out-of-state residential program. Maybe there was no place to run to this time—he was down South. Or maybe he had grown up a little. But this time he stayed nine months—long enough to obtain what they called a “diploma.” Jamal was proud of that, even though it was just a photocopied certificate saying he had completed the program. He liked it when everybody stood up and applauded. No one had ever done that for him before.

He had only been home for a couple of weeks when he “caught” the new case.³⁹

The crime was vicious. Jamal was alleged to have grabbed a woman off the street at gunpoint, dragged her behind a vacant house, and raped her repeatedly. The evidence was overwhelming. The woman described Jamal to a “T,” picked out his photograph, and identified him at a lineup. Jamal’s fingerprints, DNA, and sperm were found at the scene. If all that were not enough, he bragged about his exploits on the street and made incriminating statements to the police. At his juvenile court arraignment, the prosecution filed notice that they would seek Jamal’s transfer to adult criminal court for trial.

When a post-graduate fellow and I met him at the juvenile jail just outside of D.C., Jamal did not deny committing the crime. He said he was high on dippers—marijuana dipped in PCP—and did not remember much. He was ashamed of the charge and did not want to talk about the details. He did not understand how he could be tried as an adult when he was only fifteen. “I’m just a kid,” he said. We explained the juvenile transfer statute.⁴⁰ “I’ll take juvenile life,” he said. “They’re not offering juvenile life,” I told him. “I didn’t mean

39. See PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* 132 (2009) (noting that the expression “I caught a case”—popularized through hip-hop culture—reflects the arbitrary nature of criminal justice—a person catches a case in the same way as he or she might catch a cold).

40. See generally D.C. CODE § 16-2307 (2010).

to do it—I ain’t no rapist,” he said. “Maybe not,” I said, “but it won’t be hard for the government to prove the crime.”

Jamal often seemed high when we visited him. He probably was. Drugs were freely available at the jail—the guards easily paid to look the other way. Illegal drugs being bought and sold in a juvenile jail was shameful. But that did not stop it from happening.

A zombie-like Jamal would shuffle out to see us in over-sized bedroom slippers and baggy pajama bottoms, a hoodie pulled low over his forehead. He could be surly and would give us the silent treatment. I did not blame him: we weren’t exactly bringing good news.

The fellow took to Jamal anyway. There was something appealing about him no matter how foul his mood. He was small for his age. There was something tender behind his tough talk. He was weary for one so young—like life had already worn him out.

We had to keep reminding ourselves about the seriousness of the crime. The victim described the perpetrator as cunning and cruel. She believed Jamal was going to kill her. PCP is a dangerous drug. It makes people violent. If convicted in adult court, Jamal was looking at a very long prison sentence, probably thirty years.

The goal was to avoid going to trial on the merits and keep the case in juvenile court. This would not be easy. The government was determined to get an adult conviction. The burden was on us to prove that Jamal was incompetent to proceed to a transfer hearing or trial, or should otherwise not be transferred.⁴¹

We got a lucky break when a court-ordered psychological evaluation raised questions about Jamal’s competency due to cognitive problems.⁴² The mental health professional we retained agreed, citing Jamal’s impaired ability to process language, understand abstract thought, and weigh competing factors in order to make decisions—all of which are essential to meaningfully consulting with counsel. The defense mental health expert also pointed to Jamal’s developmental delay, immaturity, and trauma as impediments to competency.⁴³

41. *See id.* § 16-2307(d)(2)(A) (requiring court to grant the government’s transfer motion if it finds that a transfer “is in the interest of the public welfare and protection of the public security and there are no reasonable prospects for rehabilitation”).

42. *See Dusky v. United States*, 362 U.S. 402, 402 (1960) (holding that in order to be competent to stand trial a defendant must have a “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and a “rational as well as factual understanding of the proceedings against him”).

43. For a small sample of helpful material on juvenile competency see generally Elizabeth Cauffman et al., *Justice for Juveniles: New Perspectives on Adolescents’ Competence and Culpability*, 18 QUINNIPIAC L. REV. 403 (1999); Thomas Grisso,

We got another break when a fair-minded judge was assigned the case. After a lengthy and hotly contested competency hearing, the judge found Jamal incompetent and sent him to a secure juvenile institution in the Minnesota Iron Range. The institution would treat him until his competency was “restored” — through classes and counseling and some special sessions on court proceedings.

Even better was the judge’s willingness to allow Jamal to undergo sex offender treatment. We had argued that this was essential to Jamal’s ability to assist counsel and hence to his competency: because Jamal was so ashamed of the nature of the charges he was unable to talk about them in any meaningful way. The court psychologist and our own expert had experienced the same difficulty and helped persuade the judge.

All of this could assist us in demonstrating that Jamal could be effectively rehabilitated in a juvenile setting.

Despite initial misgivings — Jamal did not see why being found incompetent was a good thing, and he was frightened of being sent to such a strange place — he adapted remarkably well to the institution. In some ways, he thrived. The smaller classes, tutoring, and reward system seemed to work for Jamal. His reading and math improved. His behavior improved so much that staff members described him as a peer leader and a role model. He was opening up to his various counselors.

He did not even seem to mind the cold weather; maybe this was because he was seldom allowed outside. His alleged crimes and record of running away meant he was under very strict supervision. He was allowed to shoot baskets in a fenced-in outdoor area when it was not covered in snow.

He did not care that he was one of only a couple of black kids in the institution. “I don’t think about white and black,” he said. “People here are nice.” I was surprised by this. Jamal grew up in an impoverished, inner-city, exclusively African-American community. Outside of the court system — and the diverse institutional actors as-

Dealing With Juveniles’ Competence to Stand Trial: What We Need to Know, 18 QUINNIPIAC L. REV. 371 (1999); Thomas Grisso, *Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform*, 12 CRIM. JUST. 4 (Fall 1997); David R. Katner, *The Ethical Struggle of Usurping Juvenile Client Autonomy by Raising Competency in Delinquency and Criminal Cases*, 16 S. CAL. INTERDISC. L.J. 293 (2007); David R. Katner, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency Systems*, 32 AM. J.L. & MED. 503 (2006); Laurence Steinberg, *Juveniles on Trial: MacArthur Foundation Study Calls Competence Into Question*, 18 CRIM. JUST. 20 (Fall 2003).

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sociated with court — he did not know any white people. He had never lived among or gone to school with white kids. He had rarely had a white teacher. And yet the overwhelming whiteness of his new home did not bother him at all. After the initial novelty wore off, he did not even notice it.

But Jamal might have been an object of interest to others because of his race, and he might have had some cachet in the institution because of where he was from — the urban inner-city of our nation’s capital. With the exception of a small handful of out-of-state residents, the residents and staff were all from Minnesota, most from the Range. In a youth culture dominated by hip-hop, Jamal was glamorous.⁴⁴ With his braided hair and untied shoes, he looked like the popular music stars of the day. He sounded like them too.

But Jamal preferred the way the locals talked. “Nobody says curse words,” he said. “People act like they respect you and like they respect themselves.” He was trying to talk that way too.

By the time Jamal was 17, he had turned his life around. He was doing well on every front: his academic studies, his treatment, and his relationships with others. He had begun to grapple with some of the problems underlying his crimes. His was the rare success story. Everyone was pleased. Notwithstanding the seriousness of his crime, we were building a record to keep Jamal in the juvenile system.

I visited Jamal twice during this period. After the first visit, the staff received me warmly and treated me like I was one of them. They were happy to talk and to share their thoughts about Jamal’s progress. We were all committed to turning this young man’s life around; we were on the same team.

Though it was never easy getting there — there are no direct flights to the nearest airport, weather-related delays are common, and the climate is either glacial (the very long winter) or scorching and mosquito-infested (the summer) — I enjoyed these visits. Jamal was delighted to see me and whomever else I brought along. Once it was an investigator. Another time it was our mental health expert. We hung out and talked. We went over his progress reports. We played ping-pong.

In the meantime, I got to know the area. I stayed in a motel in the shadow of the Mesabi Range. I woke up in the mornings and looked out at miles of jagged red stone and earth. Sometimes on the way to

44. See generally *SLAM* (Trimark Pictures 1998) (featuring Washington D.C.’s hip-hop scene in telling the story of a young poet’s ordeal in a D.C. jail).

see Jamal, I drove through Chisholm and paid my respects to the Iron Man Statue, built in the 1980s as a tribute to the miners who worked and died on the Mesabi, Cuyuna, and Vermillion Iron Ranges. The statue is almost one-hundred feet high and is made of copper, bronze, and brass over iron and stainless steel. The base is made from Corten steel, a corrosion-resistant and weathering steel, that turns red with exposure.

I sampled local restaurants—mostly family places that were part diner, part cafeteria. Salad was iceberg lettuce and thick dressing. Fish was fried. Vegetables were overcooked. There were big baskets of soft white rolls and butter.

I did not see a single Starbucks.⁴⁵

There is no visible diversity in the upper Midwest. I do not think I saw an Asian person, much less an African-American or a Jew. They stay in the cities, I guess. That is where Dylan's people must be.

There is a fair amount of obesity. Must be all those meatballs and bread baskets. Plus, everyone rides around in huge four-wheel drive vehicles. I do not think I saw a single runner or fast-walker or cross-country skier, even though Minneapolis, only a couple hundred miles away, is the land of the fit. Snowmobiling is popular in the winter. People fish in the summer. Neither is terribly aerobic.

Still, these chubby, northern Minnesotans are cheerful. They go about their business with a can-do attitude.

I was starting to feel cheerful too. Our game plan was working. Jamal was doing everything right. We might beat this thing. We just might save a child's life.⁴⁶

Then, Jamal was accused of raping a young female staff member. The state of Minnesota charged him with first-degree sexual assault and moved to transfer him to adult criminal court.

III. EAST COAST LAWYER IN A NORTHERN MINNESOTA COURTHOUSE

The night aimed shadows
Through the cross bar windows
And the wind punched hard

45. Apparently a Starbucks opened up in Virginia, Minnesota in the past couple of years. *See Store Locations*, STARBUCKS COFFEE CO., <http://www.starbucks.com/store/10357.html> (last visited Aug. 11, 2011).

46. *See generally* ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY IN AMERICA* (1977). My life-saving instincts are probably more Talmudic; it says in the Talmud, if you save one life it's as if you saved the entire world.

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To make the wall-siding sing
It's many a night
I pretended to be a-sleepin'
Inside the walls
The walls of Red Wing
As the rain rattled heavy
On the bunkhouse shingles
And the sounds in the night
They made my ears ring
'Til the keys of the guards
Clicked the tune of the morning
Inside the walls
The walls of Red Wing⁴⁷

I called the institution as soon as I heard the news. I wanted to talk to some of the staff members at the juvenile institution before they were told not to talk—and residents too. But the previously receptive staff were no longer happy to hear from me. Only one returned my call. He had been close to Jamal. He was shaken up. He knew the alleged victim and considered her a friend. She had immediately reported the assault and described it in detail. It happened in a secluded part of the institution. She was escorting Jamal to retrieve a personal belonging. Jamal grabbed her, choked her, threatened to hurt her, and then sexually assaulted her. She tried to get away, but, he was too strong. She had injuries—including bruises on her neck from being choked. The staff member did not think the alleged victim had any reason to lie. She was married and had a small child. She was distraught.

Although I was free to contact whomever I wanted at the institution, he doubted anyone would talk to me.

Meanwhile, Jamal had been moved to the adult jail. They let me talk to him once by phone the morning after he was arrested. He sounded scared and indignant. I cautioned him not to say anything about what happened—this was not exactly a private conversation—but he was bursting with it. He said he had sex with the woman but swore it was consensual. He said the woman had flirted with him, they went up to the third floor together, and she freaked out and cried rape when another staff member came upon them. “I didn’t do this,” he said, “you have to believe me.” “Oh, Jamal,” I said, “it doesn’t matter what I believe.”

47. DYLAN, *Walls of Red Wing*, *supra* note 1.

I suppose it mattered to him. He wanted to know I was in his corner. But I was in his corner whether I believed Jamal or not. I was bound to him as a matter of ethics,⁴⁸ and personal attachment. I did not want to feel attached, but I could not deny it. He was a child in a terrible situation. I was not going to jump ship when the going got rough. Frankly, the going had always been rough.

Still, I could not help but question Jamal's account, even if Jamal genuinely believed it. Was it possible that a young mother was so enthralled with Jamal that she had sex with him, but when caught in the act, did not want to lose her job over it? It seemed unlikely. Yet, it was not the most far-fetched thing I had ever heard. Jamal had his attractions. Plus, why would an institution with sex offenders allow a young female staff member to escort a resident to a secluded place?

Nonetheless, any way you looked at it, a young man already charged with armed robbery and rape was alleged to have had forcible sex again, this time in a treatment facility.

I got on a plane to Minnesota. I would see Jamal at the jail and try to see someone, anyone, at the juvenile institution.

A lawyer in private practice, who also served as the county's half-time public defender, was appointed to represent Jamal. I arranged to meet with him too.

It was my third time in the Range and I was starting to know my way around. It was a holiday weekend. The drive from Minneapolis was nearly free of traffic. But I got a speeding ticket on a stretch of empty road somewhere between Duluth and Hibbing. It was a sunny day and I had been enjoying the drive. It was an expensive ticket. I was not happy about it.

No one would speak to me at the institution. The ticket was a complete waste.

I met the Minnesota lawyer at his home outside of Hibbing. He was gracious. A criminal defender with more than twenty years of trial experience, he also seemed to know what he was talking about. He welcomed my assistance but did not mince words about how bleak the case looked. On top of everything else, the State of Minnesota was struggling with a serious budget shortfall and money for indigent

48. See MODEL RULES OF PROF'L CONDUCT Pmb. [2] (2010) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); see also MODEL RULES OF PROF'L CONDUCT R. 3.1 ("A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may . . . defend the proceeding as to require that every element of the case be established.").

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defense was being slashed. Public defenders had already been laid off. The lawyer had limited funds for investigation and had no means to hire a mental health expert to contest competency or transfer in the Minnesota proceeding.

Moreover, the Minnesota lawyer said that the fact that Jamal was almost eighteen made it hard to argue for such an expense. It was extremely unlikely that, even with a stable of defense experts, a court would agree to keep a repeat rapist who was nearly the age of majority in the juvenile system. He did not like it, but sometimes tough choices have to be made. That kind of money was better spent on a more promising case.

We talked about how I might be helpful. I gave him a list of contacts at the juvenile institution—people who might raise some questions about the complainant’s credibility should the case go to trial, and who might have something good to say about Jamal as part of our effort to keep the case in juvenile court. I agreed to try to find money from a nonprofit juvenile justice organization to pay our current mental health expert to come to Minnesota. Neither one of us wanted to go down without a fight.

Then I went to see Jamal at the St. Louis County Jail in Duluth, the main detention facility for St. Louis County. He had been held in a “lock-up” on the Range—both Hibbing and Virginia have the capacity to hold people for seventy-two hours—but was then transported to Duluth. It was a two-hour drive.

The St. Louis County Jail must have felt downright cozy to Jamal, at least compared to the D.C. jail. It has 197 beds, while the D.C. jail—where Jamal had been held for a time in a special section for younger inmates—sometimes has more than 2000.⁴⁹

I have never had less trouble getting into a correctional facility. No metal detectors, no search, no officious corrections officers. The guards were friendly and helpful. They brought Jamal immediately. I was starting to see the advantages of life on the Range—at least for a criminal lawyer.

Jamal was glad to see me. I was glad to see him too, but with a heavy heart. He never seemed more alone. There would be no sanguine study of progress reports, no cheery chatting about the future, and no ping-pong games. He suddenly seemed old to me.

49. See Robert E. Pierre, *D.C. Judge Pressures City on Jail Population*, WASH. POST, Oct. 6, 2007, at B1.

I told him I had met his Minnesota lawyer, found him able, and urged Jamal to work closely with him. I told him I would do what I could to help, but I was not his lawyer on this case. He was going to have to put his trust in this new lawyer.

I had plenty to do back in D.C. — other cases, clients, students, fellows, and, of course, family responsibilities. I did what I could for Jamal: raised money for the mental health expert to work on the Minnesota case, made sure the Minnesota lawyer had all of Jamal's records, made myself available for consultation. But mostly it was out of my hands.

It being out of my hands was both a bad feeling and a good one. It was bad because I do not like things to be so completely out of my control. This paradox is a familiar one for criminal trial lawyers: we tend to be control freaks and yet so many things are often beyond our control. But it was also freeing. I had done all I could do. Jamal was in someone else's hands. I had to let go.

Maybe Dylan would be philosophical about Jamal's situation. He was caught up in something bigger than himself, something beyond our understanding and power. "[H]ow many years can some people exist/Before they're allowed to be free?"⁵⁰

Yet another post-graduate fellow and I went to the Range for Jamal's competency and transfer hearings. (Over the years, a handful of post-graduate fellows worked with me on Jamal's case.) The hearings, which occurred in the Hibbing courthouse, took several days. Although it was the Minnesota lawyer's show, we were given some responsibilities. We made an airport run to pick up the defense expert. With the help of a law professor at William Mitchell College of Law in St. Paul, we got our hands on materials written by the prosecution expert, prepared the defense expert for the hearing, did what we could to prepare Jamal, and prepared a draft of the cross-examination of the prosecution expert. We took endless notes in court.

We struggled with a feeling of foregone conclusion. What was the point of all this work for a lost cause?⁵¹ What were we doing running

50. BOB DYLAN, *Blowin' in the Wind*, on THE FREEWHEELIN' BOB DYLAN (Columbia Records 1963).

51. See *Talk of the Nation: The Reasons for Trying Cases That Seem Clear-Cut*, NAT'L PUB. RADIO (Feb. 8, 2011), available at <http://www.npr.org/2011/02/08/133595690/the-reasons-for-trying-cases-that-seem-clear-cut> (George Washington law professor, Jonathan Turley, and Director of Virginia Capital Case Clearinghouse, David Bruck, discussing the seemingly futile representation of Jared Loughner for the 2011 shooting of Congresswoman Gabrielle Giffords and others in Tucson).

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to and from the airport, meeting with the Hibbing lawyer, staying up late in my hotel room drafting witness examinations?

No judge — no matter how courageous or enlightened — would rule in Jamal’s favor. His progress would now be used against him. His intellectual and emotional growth while in treatment made the competency decision easy. His disturbing offense while in a juvenile setting made the transfer decision easy. The allegations were a given at this stage; the state did not have to prove the crime beyond a reasonable doubt.⁵² The only argument we could make was that the institution had been cruelly negligent in allowing an untreated and intellectually impaired young sex offender to be alone with a young woman. It was like giving an untreated drug addict a sack of drugs. To use the prevailing therapeutic jargon, Jamal had *relapsed*. This should have been expected — and could have been prevented. What had happened was not a fair test of Jamal’s capacity for rehabilitation. He needed to complete a full course of treatment.

We knew the judge would not buy it.

Jamal’s parents⁵³ decided not to come to these proceedings. It was hard to get to Hibbing, and expensive. They would come for the adult criminal trial. The fellow and I were the only “family” Jamal had there. He seemed to need us to be upbeat. We tried.

The hearing was excruciating. Jamal had to sit quietly at counsel table while a parade of witnesses from the institution — those who had believed in him, who had been his friends — declared that he was competent to be tried in adult criminal court and should be transferred there. They said they had been wrong in thinking Jamal could change; he had betrayed their hope and trust on every possible level.

It was hard to tell what Jamal made of the testimony. Sometimes he seemed angry, sometimes hurt, and sometimes in his own world. Probably, it was too much for him. The people who had been his last, best chance at freedom, at having a life, were saying he was not fit to be among them — probably not ever.⁵⁴

52. See MINN. STAT. ANN. § 260B.125 (West 2011).

53. Jamal’s parents divorced soon after he was born. His father spent most of Jamal’s childhood incarcerated. His mother spent most of it high. The story of Jamal’s dysfunctional family life is beyond the scope of this Essay.

54. For an example of this sort of banishment in a white-collar setting, see Benjamin Weiser, *Judge Explains 150-Year Sentence for Madoff*, N.Y. TIMES, June 28, 2011, <http://www.nytimes.com/2011/06/29/nyregion/judge-denny-chin-recounts-his-thoughts-in-bernard-madoff-sentencing.html?pagewanted=all> (reporting that two years after the Madoff sentencing, Judge Denny Chin remains convinced that Madoff deserved a full sentence).

After the day's proceedings, we hung out at Jimmy's Bar and Restaurant. It was only a short walk from our hotel and one of the best places to eat in Hibbing. A former trolley-car-station-turned-gas-station-turned-eatery, it is the only restaurant in the country devoted to Bob Dylan. (The restaurant name is, of course, a reference to Dylan's real name: Robert Allen Zimmerman.) It is full of Dylan memorabilia and what could only be described as Dylan detritus. The background music is entirely Dylan. The website claims that Dylan's mom "thinks the place is a hoot!"⁵⁵

There is a restaurant gift store that sells Dylan tee-shirts, sweat-shirts, baseball caps, and coffee mugs. They also have key chains with a photo of Dylan's childhood home, framed pictures of a teenaged Bobby Zimmerman, and a DVD documentary called "Tangled Up in Bob." We bought our fair share of stuff there.

So we were with Dylan and he was with us—at least for a moment. We were defenders dining on Dylan. It was a nice escape.

Sadly, there was no escape for Jamal.

He was found competent and transferred to criminal court. Although his local lawyer worked hard—conducting an investigation, filing pretrial motions, contesting everything he could—within a few months, Jamal was convicted of rape and sentenced to twelve years in a Minnesota prison. He would ultimately receive three times that sentence at the conclusion of his rape trial in Washington, D.C.

CONCLUSION: WHAT WOULD DYLAN THINK

Oh, some of us'll end up
In St. Cloud Prison
And some of us'll wind up
To be lawyers and things
And some of us'll stand up
To meet you on your crossroads
From inside the walls
The walls of Red Wing.⁵⁶

I do not know what Dylan would make of Jamal. Dylan's view of justice tends toward the black and white, not gray. People caught up

55. *About Us*, ZIMMY'S RESTAURANT, http://www.zimmys.com/about_us.html (last visited Aug. 9, 2011).

56. DYLAN, *Walls of Red Wing*, *supra* note 1.

in the criminal justice system in Dylan’s songs are either very guilty or very innocent, without much in between.⁵⁷

Yet, Jamal’s story is not really about guilt or innocence. It is not really about the *system*. One could argue that the criminal justice system worked in Jamal’s case because he was well represented, both in D.C. and Minnesota. His case was hard fought. He had his “day in court.”

Jamal’s story is complex and tragic for reasons that are difficult to capture in a song—or essay. I knew Jamal about as well as anyone did for a few years when he was a boy. He let me know him. I let him know me, too. He did some terrible, dreadful things. But there was more to him than his “sheet,” more than a prosecutor’s angry allocution at sentencing. He had a sweetness about him. He always greeted me with a hug. He could be funny; he liked to laugh. He was very forgiving no matter how much people disappointed him—family, friends, lawyers.

Jamal was not born to be a rapist. Something happened to him along the way growing up. Jamal’s crimes are not the product of an evil heart, but the evil conditions of his childhood: physical and sexual abuse, neglect, drug addiction, violence.

Dylan does not write much about the devastating urban poverty and deprivation into which Jamal was born. Maybe Dylan would say of Jamal’s childhood, “When you got nothing, you got nothing to lose.”⁵⁸ Dylan does not write much about the harshness of imprisonment. Maybe Dylan would say of Jamal’s long incarceration, “You’re invisible now, you got no secrets to conceal.”⁵⁹ Guilty or innocent, Jamal is surely in a “living hell.”⁶⁰

57. See, e.g., DYLAN, *The Lonesome Death of Hattie Carroll*, *supra* note 8 (telling the story of the 1963 death of African-American barmaid Hattie Carroll, who died after wealthy, intoxicated William Zanzinger—called “Zanzinger” in the song—struck her in the head with a toy cane). Although there is no evidence that Zanzinger meant to kill Carroll, Dylan is outraged at the convicted man’s unjustly lenient six-month sentence. See *id.*; cf. DYLAN, *Hurricane*, *supra* note 8 (telling the story of the wrongful 1966 murder conviction of Rubin “Hurricane” Carter). Although Carter was no doubt innocent of the crime for which he was convicted, Dylan does not acknowledge Carter’s unsavory criminal history, which is partly why he became a suspect. My point is not that Carter is any less innocent of the murder, but that guilt and innocence are not one-dimensional.

58. BOB DYLAN, *Like a Rolling Stone*, on HIGHWAY 61 REVISITED (Columbia Records 1965).

59. *Id.*

60. DYLAN, *Hurricane*, *supra* note 8.

Minnesota has an inmate locating system on the internet.⁶¹ It features current photographs of Minnesota prisoners, and basic information regarding the crime, sentence, and scheduled release date. You plug in the inmate's name and date of birth — and suddenly a face appears.

The first time I saw Jamal's face on my computer screen I was stunned. I had not seen him in some time. I did not expect to see him on my screen, but there he was. He had aged a lot. He had facial hair and his neck appeared to be covered in tattoos. There was a teardrop tattooed under each eye.

I try not to go on that website. I don't like seeing Jamal like that. I prefer to remember him young and hopeful:

May God bless and keep you always,
May your wishes all come true,
May you always do for others
And let others do for you.
May you build a ladder to the stars
And climb on every rung,
May you stay forever young,
Forever young, forever young,
May you stay forever young.

May you grow up to be righteous,
May you grow up to be true,
May you always know the truth
And see the lights surrounding you.
May you always be courageous,
Stand upright and be strong,
May you stay forever young,
Forever young, forever young,
May you stay forever young.

May your hands always be busy,
May your feet always be swift,
May you have a strong foundation
When the winds of changes shift.
May your heart always be joyful,
May your song always be sung,
May you stay forever young,

61. See STATE OF MINNESOTA DEPARTMENT OF CORRECTIONS OFFENDER LOCATOR, <http://www.doc.state.mn.us/publicviewer/main.asp> (last visited Aug. 9, 2011).

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Forever young, forever young,
May you stay forever young.⁶²

62. BOB DYLAN, *Forever Young*, on PLANET WAVES (Asylum Records 1974).