

# Lex|Brevis

May 2017

WESTERN NEW ENGLAND UNIVERSITY SCHOOL OF LAW



# FROM THE EDITOR'S DESK



**AMARA RIDLEY**  
LEX BREVIS Editor-in-Chief  
2015-2017

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*“Ambition is the path  
to success.  
Persistence is the  
vehicle you drive in.”*

—Bill Bradley

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## Parting Ways

These last two years have been a whirlwind of an experience heading Lex Brevis. I had no idea what I was getting myself into when we first started but I wouldn't trade a minute. I can only hope that you, our readers, have appreciated this voyage as much as I have and the rest of Lex Brevis has enjoyed the ride. Working with this team of editors and writers has been more rewarding than I can adequately express and sharing what our students and alumni are doing and have done has been a joy. Thank you specifically to my team of editors; Alex, Renee, Claudia, Arshan and Lilya. Lex is a team effort and I wouldn't have it any other way. It has not always been easy but it has always been worth the ride.

I have full faith in our new editorial board and want to congratulate the students who ran for positions. Those who were elected and those who were not. I hope everyone finds a seat at Lex Brevis in some capacity and I cannot wait to see what next year's staff has in store for us readers.

I also have much faith in our newly elected incoming Editor-in-Chief, Kerri Ann Manning. Kerri, I hope Lex brings you as much pride and gratification as it has brought me. It is inspiring to not only get to publish works from our students but also to be a part of engaging with our alum, faculty and student body.

Like my Dad taught me growing up, it is not what you have, but what you do with what you have. As always, I hope you enjoy this month's issue.

With Warm Regards,

**Amara Ridley**  
Editor-in-Chief, 2015-2017

# Lex Brevis

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We, at Lex Brevis, are always looking for ways to improve. We would love feedback to better serve our law school community. Enjoy the issue.

Email us at [LexBrevis@gmail.com](mailto:LexBrevis@gmail.com)

## EDITOR'S NOTE



Kerri Ann Manning  
Editor-in-Chief  
Lex Brevis, 2017/2018

**T**hank you for electing me as the new Editor-in-Chief of Lex Brevis! My name is Kerri Ann Manning and I am grateful for the opportunity to partake in such a pivotal role. I look forward to working and learning with the Lex Brevis staff while building upon the exceptional work that has been done in previous years.

As we develop our specific goals for the upcoming year, I often find myself drawing from one of the core principles taught by my previous employer—"inclusion makes us stronger." I believe strongly in diversity of perspectives and experiences. It is the only way the human condition can truly improve—inclusivity and understanding of all outlooks. It is with this principle in mind that we hope to facilitate ardent discourse while providing a medium for fellow students to express themselves—irrespective of how popular or unpopular they feel their view is.

Two of the goals for Lex Brevis next year will be better engagement with the student body and more collaboration with the broader legal community.

With Warm Regards,  
Kerri Ann

# Absolutely Innocent

## The Shabaka Shakur Story



by **Joevonne Brace**  
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**10,037**. “I was conscious of racism in the criminal justice system, but I was innocent. I guess believed that the system would work, because I was innocent.” The jury returned with a guilty verdict, for a double homicide and Shabaka Shakur received a sentence of two twenty-to-life terms with an aggregate of forty years. Wrongfully convicted, he served 27 years and 6 months in prison for crimes that he did not commit. In this featured report, we will venture inside the legal and personal journey of a man who fought the system and won.

Unfortunately, there are many defendants who are

wrongfully convicted that accept their mistaken fate. But not Shabaka Shakur, he is an anomaly. I had the honor of sitting with Mr. Shakur for an in-depth interview. I saw a stoic businessman of distinction, intelligence, strength, patience and humility. It was his relentless pursuit and perseverance that rewarded him his day in court and ultimately his freedom.

On January 12, 1988 he was arrested and charged with double homicide. January 12, 2011 his mother passed while he was incarcerated for a crime he did not commit. He could not attend his mother’s funeral, to honor and pay his last respects. What an inexplicable horror,



that can never be repaid to Mr. Shakur.

## THE CASE:

AT approximately 8:00 p.m., January 11, 1988, Mr. Shakur left Gates Ave in the Bushwick area of Brooklyn after a meeting with the two decedents. The first victim will be referred to as “S” and the

second will be referred to as “F.” “S” was a drug dealer who was interested in purchasing a car. He had access to cash and could afford the asking price of the car. “F” who was a friend of “S” decided to interrupt and insert himself in their conversation. “F” disagreed with the price. He boisterously expressed that the price of the car was too expensive versus its worth. Mr. Shakur responded telling “F” to “mind your business, it has nothing to do with you, I am dealing with him.” “S” explained to Mr. Shakur that he would give him some of the money and to return to him this weekend for the remainder. Mr. Shakur made it clear that he would not give him the car until the monies were paid in full.

“It was never an argument, and I left both men alive on Gates Avenue” Mr. Shakur stated.

He then ventured to Queens to Lanette Jones’ residence with Lisa White, where a big card party was underway. He spent the night at Ms. Jones’ and proceeded to work the following morning. Tuesday morning on January 12, 1988, at his place of employment his boss called him into the office. He was detained by the police, brought down to the Brooklyn precinct to be questioned and this was his last day of freedom.

Detective Mahony questioned Mr. Shakur about his whereabouts. Mr. Shakur stated “Queens” and provided Lisa White and Lanette Jones’ to verify his location. According to the police reports, the murders occurred approximately 10:30 p.m. and remember he left Gates Avenue around 8:00 p.m.

A second Detective Louis Scarcella confronted Mr. Shakur during the interrogation process. Unbeknownst to Mr. Shakur, his life would be disrupted. Scarcella began cursing and arguing with Mr. Shakur. Scarcella yelled

“I know you did it, you’re a murderer and you’re part of the drug dealing.” Mr. Shakur told Scarcella, “get away from me, I do not want to talk to you.” Scarcella exited the room. There was no other exchange, communication or conversation between Shakur and Scarcella. Shortly thereafter, Mr. Shakur was ordered to participate in a line up, formally arrested and charged with double homicide. Detective Scarcella falsified a report and stated Mr. Shakur confessed. Incorrect. Mr. Shakur never confessed to the crime. He told his attorney he “did not confess,” he stated “I was in Queens” and “had witnesses” to prove his whereabouts. The brother of one of the deceased told the police that “I think I know who did this” and “the only person who had something to do with this was” and he named Mr. Shakur.

During his arraignment Mr. Shakur repeatedly stated he “did not confess anything to Scarcella.” Later we learned that Mr. Shakur was one of the many innocent men and women who endured the heinous “rogue” tactics and actions of Detective Scarcella.

## THE CATALYST:

Detective Louis Scarcella, is a retired New York City police officer that is responsible for 50 or more questionable convictions, to date. The convictions that are under review are the results of Scarcella’s deplorable, dishonest and inhumane interrogation and procedural methods. He would use the same witness, who was a known crack addict, for several cases, savagely beating defendants into false confessions, using false threats, false evidence and sleep deprivation. He used The Reid interrogation tactic which is a nine step interrogation method that confuses a de-



defendant into a false confession by a bait and switch or bait and bash method. The procedure basically involves three stages meant to break down a suspect's defenses and rebuild him as a confessor. Here are the main four ideas of The Reid interrogation method:

Step 1 – Direct Confrontation.

Step 2 – Try to shift the blame away from the suspect to some other person or set of circumstances that prompted the suspect to commit the crime. That is, develop themes containing reasons that will justify or excuse the crime.

Step 3 – Try to discourage the suspect from denying his guilt.

Step 4 – At this point, the accused will often give a reason why he or she did not or could not commit the crime. A Reid Interrogation teeters on violation of the 5th Amendment's "protection against compelled self-incrimination, is implicit in the Miranda rights statement, which protects the "right to remain silent." Although the method is subject to confirmation bias (likely to reinforce inaccurate beliefs or assumptions), this interrogation procedure is not illegal. Scarcella has paid, coerced and threatened witnesses into false testimony. The latest defendant to have his wrongful conviction overturned was Sundhe Moses who spent 18 years behind bars for a murder he did not commit. Scarcella beat him, choked him, blew cigar smoke in

his face, forced him to strip naked and threw a chair at Moses in order to elicit a confession to the murder of a 4-year old Brooklyn girl. Other exonerees who were convicted due to Scarcella's fabrications including Shakur and Moses are, David Ranta, Derrick Hamilton, Rosean Hargrave, John Bunn, Vanessa Gathers, Darryl Austin and Alvena Jennette. Because of the statute of limitations, no criminal charges have been filed against Scarcella.

## THE TRIAL:

The defense counsel was ill prepared. Mr. Shakur said "I took the subway, and I went to Queens" but the lawyer did not investigate and obtain the security tapes from the subways. The two ladies, Ms. Jones and Ms. White, both testified regarding Mr. Shakur's whereabouts. He was present at the card party on the night of January 11th. He filed a motion for a new lawyer and the judge denied his request. He filed a second motion to have the lawyer dismissed and explained to the court, that the attorney had not done any work on his case. The judge told him that he and his lawyer should resolve the issues.



Now the trial was underway and still his lawyer was unprepared. However, the prosecution had worthless evidence that consisted of lies. They had the statement of one of the victim's brothers who later fabricated another version of events. He claimed he witnessed "Mr. Shakur shoot his brother twice in the back." The testimony was problematic because the medical examiner's report documented that the victim was shot in the chest one time. The prosecution's evidence regarding the alleged weapon was a gun found in a trash can near the scene. There were no finger prints or palm prints on the gun and it was not linked to Mr. Shakur. Essentially this means there was no evidence that the weapon found in the trash can was used by Mr. Shakur. The defense counsel should have argued that the gun did not have his palm nor finger prints.

Based on the fabricated testimony of the victim's brother; the misconduct of this detective; and the stray gun in the trash can with no finger or palm prints—the prosecution failed to prove a sufficient nexus between the murders and Mr. Shakur. The elements of murder such as intent, malice aforethought, were not met so the prosecution did not prove their case beyond a reasonable doubt against him. If his defense counsel fought zealously, he could have moved for a directed verdict because a reasonable jury would not issue a guilty verdict.

The nucleus of the injustice was the testimony of lies from Detective Scarcella. He swore under oath that Mr. Shakur confessed to the murders. He also claimed that Mr. Shakur stated "Man, you know I just got out. I spoke

to the cops before on another case, and all it got me was jail. You know what happened. You have it all. They were going to kill me. They deserved to die." Mr. Shakur never made that statement. Scarcella had no physical reports or documentation typed, written, or recorded with these statements or any statements made by Mr. Shakur. Scarcella did admit that he had no notes of the interrogation—only a report that he said he typed up after speaking with Shakur.

This typed up report was not a confession and again, Mr. Shakur never confessed. Defense counsel failed to raise pertinent objections and the testimony of lies was admitted into evidence. The detective "had no documents or reports" of this confession or statement, because the confession did not exist. It is highly likely that a detective will follow the proper protocol for a voluntary confession from a suspect. Because of the gravity of a murder offense; the officer will either have it witnessed by another detective, well documented and recorded.

It never occurred to the court that Mr. Shakur was actually innocent.

**"It never occurred to the court that Mr. Shakur was actually innocent."**

## THE FACTORS:

The court allowed Detective Scarcella's false testimony with no supporting documentation into evidence. The unprepared defense counsel failed to make the objections during the trial. It is inferred that Scarcella's statement was enough to convict him, because there

was no other evidence linking him to the murders. The jury deliberated for 2 and half days. On February 15, 1989 the jury returned with the guilty verdict. He was devastated.

Procedural Process and Learning the Law: “If I continued to present my case to the court, I knew it would end up in front of a judge that would take time and read my brief.” He said “I did not trust anyone my defense.” So, Mr. Shakur taught himself the law and attended every law course that Cornell Law School conducted. He sat for law classes, for 5-6 years in Auburn Correctional Facility. He developed and maintained a relationship with the Professors and the law students from Cornell Law School’s C.P.E.P, College Prison Education Program. The law classes “showed me the principles behind the law, what led to the decisions in cases, and the thought process, the landmark cases opened my mind up to what I needed and how to fight my case. I didn’t file my motions by repeating the law, I started to include the principles of the law.”

Learning the reasoning behind the laws elevated his legal abilities and allowed him to hone in on his legal writing skills.

The first 13 motions were all denied although the law was in his favor. In his first direct appeal in 1991, he argued the Rosario Rule. This rule means that by law, the prosecutor must provide defense counsel with statements that relate to a witness' testimony at trial. Examples of Rosario Material include: a signed statement by a witness, District Attorney paperwork that contains or summarizes a witness' statement, and a police officer's notes and paperwork. Detective Scarcella provided testimony of a confession that did not exist. His false testimony was allowed into evidence without documentation (because there was no confession or statement made) and Mr. Shakur’s counsel raised no objection. Under the Rosario Rule this was a per’se reversible error but the courts re-

**“The law classes “showed me the principles behind the law, what led to the decisions in cases, and the thought process, the landmark cases opened my mind up to what I needed and how to fight my case. I didn’t file my motions by repeating the law, I started to include the principles of the law.”**

fused to reverse his charges. He persisted. What was interesting is that some of the responses from the reviewing courts agreed that Mr. Shakur had a valid argument, yet denied his motion.

His next option was a Writ of Error Coram Nobis Rule N.Y.C.P.L § 440.10 Section 440.10 (1)(b) of the N.Y.C.P.L. is a partial codification of the writ of error coram nobis, an ancient English common law doctrine that the New York Court of Appeals revisited in 1943. This motion allows you to inform the trial court of facts that cannot be raised on appeal because they were not in the trial record, since facts presented for the first time on appeal cannot be considered by an appellate court. A motion under § 440.10 is not an appeal and is not a substitute for it. A motion under § 440.10 to vacate a criminal judgment can be filed while still incarcerated or even after serving the convictions. The District Attorney’s memorandum to Mr. Shakur, was legally incorrect, contradicting and circular. The first response was “his counsel was not ineffective” and “his appeal should not be raised on an Error Coram Nobis, it should be raised on direct appeal or Rule N.Y.C.P.L §



440.10.” He filed another brief. The District Attorney’s office replied that he has “to file his motion under Error Coram Nobis.”

The Rule N.Y.C.P.L § 440.10 allows appellants to raise numerous grounds for vacating a conviction or set their sentences aside. The defendant can prove the following, including but not limited to: 1. The court did not have jurisdiction of the action or of the person of the defendant; or 2. The judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor; or 3. Material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false; or 4. Material evidence adduced by the people at a trial resulting in the judgment was procured in violation of the defendant’s rights under the constitution of this state or of the United States.

## JUDICIAL INTERVENTION:

The Court of Appeals under Justice Judith Kaye started a wrongful conviction task force panel to identify the constitutional deficiencies. The goal was to evaluate our public defense system, and the failure of lawmakers to compel the state to repair what is clearly a broken and unjust system. This panel conducted research and composed a six prong analysis of the root cause of wrongful convictions.

- Eyewitness Misidentification
- Unvalidated Forensic Science
- False Confessions
- Cooperating Witness aka “Snitch”
- Police and Prosecutorial Misconduct
- Poor Defense Lawyering

## THE FOURTEENTH MOTION:

Using Justice Judith Kaye’s six prong analytical framework in his last motion pursuant to a Rule § 440.10, Mr. Shakur met four out of the six prongs. His case highlighted the procedural and substantive errors that fit the parameters that Justice Kaye established. The false confession, police and prosecutorial misconduct, along with the poor defense lawyering and invalidated forensics, were the direct causes for his guilty verdict. The key component of his final brief was his claim-Innocence. He was told by attorneys that, he “couldn’t file a claim arguing you are “innocent.” There is no case with an actual innocent claim on record, and he wouldn’t win pursuant to a Rule 440.10. “Mr. Shakur said “That’s the problem, if there is no claim, then there is a problem. I asked them, are you saying “there is nothing that can address the claim of innocence then there is a problem with the law.” This brief was denied.

Immediately, Shabaka Shakur adopted a new strategy. He included Justice Kaye’s analysis and at that time a new Supreme Court decision from the Troy Davis Case. Davis’ claim and plea to the court was he is innocent. The case went before the Supreme Court and the court’s reasoning was if the defendant has a legitimate claim of actual innocence, he’s entitled to a hearing, the state cannot just execute him. Mr. Shakur’s argument was, if a defendant has a valid claim of actual innocent, a hearing must be granted-based on the new ruling in the Davis case. Troy Davis was a death row defendant who was convicted and sentenced to death in Georgia for the killing of a security guard. “My strategy was to re-



quest a hearing, not release, not a vacate conviction, not an appeal bail, nor setting my sentence aside just a hearing.” He continued “I knew that once I was granted a hearing, I would be a free man.”

## **INNOCENT TO ABSOLUTELY INNOCENT:**

Mr. Shakur began a grass roots legal initiative anticipating the court’s decision. Working constantly in the law library, Mr. Shakur, along with his friend and now business partner, Derrick Hamilton were active and very instrumental in assisting others with their cases. “We have actually helped some guys get released.” They started non-profit legal organization called “Absolutely Innocent.” The team includes Derrick Hamilton who has also

been successful on his own and other exoneration cases; Danny Rincon who is sentenced to and is serving 158 year prison bid; Richard Rosario who is now exonerated from serving a 25 to life prison sentence; and Nelson Cruz. Mr. Shakur had other inmates contact their families and direct the participants to picket in front of city hall. “The first rally was approximately 30 people, and the second rally was an estimate of 150 people.” It started with a newspaper clipping to news cameras, the crowds became larger. There were t-shirts, posters and flyers were printed and distributed. “And we got the attention of many influential people in the legal community” and the grassroots legal initiative gained more exposure. The rallies attracted the attention of Lonny Soury. Soury is an advocate against false confessions as well as a highly respected media expert with experience in high profile and complex criminal cases. Lonny Soury, contacted a wider media platform to cover the rallies of Absolute Innocent. While Shabaka Shakur organized rallies from the administrative segregation unit (solitary confinement) for filing grievances against the officers- the court made a decision and granted him a hearing. He just dismantled a wall with his bare hands. Mr. Shakur contacted civil rights and post-conviction expert attorney Ron Kuby. Ron Kuby contacted Lonny Soury to validate their efforts. Soury told Kuby “they are creating a movement from the jail, they are innocent and are not sitting idle.” After reviewing the interviews, news footage, pictures, and articles Mr. Kuby agreed to represent Mr. Shakur. Mr. Shakur asked Ron for one favor, “a job when I am released.” Kuby replied “you win, I got you.” Later in 2014, Defense attorney Ron Kuby presented evidence that Scarcella had fabricated the confession at a

series of hearings on Shakur's motion for a new trial.

## TEN-THOUSAND THIRTY SEVEN:

On June 2, 2015, New York Supreme Court Justice Desmond Green granted the motion for a new trial and vacated Shakur's conviction. Green ruled that there was "a reasonable probability that the alleged confession of (Shakur) was indeed fabricated." The judge said that Scarcella's version of obtaining the confession was "particularly troubling and causes serious doubts." The judge also said he believed the testimony of the Shakur's alibi witnesses.

On June 4, 2015, the charges against Mr. Shakur were dismissed at the request of Brooklyn District Attorney Kenneth Thompson, who said, "our ability to retry has been compromised by a number of factors, including the death of the main eyewitness. Therefore, I have decided not to prolong Mr. Shakur's incarceration with a lengthy appeal or retrial and will consent to his release" after spending 10,037 days wrongfully incarcerated.

Today Shabaka Shakur and Derrick Hamilton are owners of a highly successful restaurant-bar called The Brownstowne, located in Brooklyn, New York's DUMBO area. The cuisine is exquisite. They serve dishes such as The Rasta Pasta, Coconut Chicken, Crab Cakes made with real crab meat, as well as other high quality entrees.

Mr. Shakur's story has been featured nationally in documentaries, and numerous articles

and interviews. His mission is to expand his brand, continue to crusade, advocate and help with legal assistance to the wrongfully convicted via his initiative, Absolutely Innocent. His story has many undertones. And from a legal perspective it displays the horrors and abuse of the criminal justice system. The many casualties of the defunct criminal justice systems are many District Attorneys and Judges are reluctant to reverse convictions. Court officers, and officials are not held accountable for their errors. If all participants in the criminal justice system would approach their duties with greater integrity, rather than a blind push for a prosecutorial win, stories such as Mr. Shakur's and many others would be few.

Shabaka Shakur is owed so much more than an apology, because compensation does not and cannot replace the huge part of his life that was stolen.

Who: Kedar Ismail, 3L  
What: Trial Lawyers Summit  
Where: Miami, FL  
When: February 3-7, 2017

by **KEDAR ISMAIL**  
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### **Why would you recommend students go to professional development opportunities like this?**

Vision is important. It sounds cliché but if you can see it in your mind and with the right amount of work you can bring it to fruition. This is an opportunity to get a glance into the profession from attorneys that handle the leading cases. As a law student, it really makes you feel like you are placing yourself in a position to learn and ultimately get ahead of the pack.

### **What was the format of the conference?**

The conference consisted of three full days of marketing and skills workshops from 6:30 a.m. to 4:30 p.m. with topics ranging from *voire dire*, marketing, trial techniques, the list goes on... After classes, there were a variety of parties and events to choose from; Villa parties, formal lunches (Joe Montana, keynote speaker), events at surrounding lounges and establishments.

### **What was your biggest take-away from the experience?**

Visualizing myself in the position I want to be in. Just being there made me feel like I was putting something in the tank and speeding up my learn



Kedar with Attorney F. Lee Bailey

ing process. I really paid attention to the advice that winning attorneys were giving. Stuff you won't get in law school you know?

### **How did you find out about this Trial Lawyers Summit?**

Actually, this was my second time attending the conference. Last year while attending University of Miami law school, they shot us an email recommending all aspiring trial lawyers to attend. I figured I might as well use the opportunity for a chance to network and go to the beach.

### **What kind of connections did you make?**

By the grace of God, I met some really cool people that took an interest in my situation. I made sure I networked. Especially the Attorneys that spoke at the workshops or ones I knew were heavy in the game. That afforded me new contacts I could call should I need some advice for a

case, or in town and want to observe a trial. Who knows maybe 2nd seat. Networking opened the doors to mentoring opportunities. These opportunities for mentorship allow me a wide range of contacts for situations I will be facing as a trial attorney. It's important to surround yourself with tried and experienced professionals that are successful at what they do. It can give you a window into how you want to craft your style. You can do it alone but not as effectively.

**What was your favorite thing about the conference?**

You mean besides the location? It was a great opportunity to learn and grow outside of law school. Law school only prepares you for so much. You have to get the practical side on your

own.

**Who is the most interesting person you met?**

F. Lee Bailey by far. I got a chance to kick it with the legend for a few. Super nice guy but I wouldn't advise thinking he lost a step. Serious dude. Good stories. I asked about the Mark Furman question. I had to.

**Was there anything that surprised you?**

How hot it can get in February!!! No, but really, how willing leading attorneys were to offer advice and possible opportunities just by being in the mix. It was really welcoming from a student's point of view.

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# Professor Matthew Charity



by **Marketia Wright**  
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**Education:**

A.B., Princeton University, J.D.,  
Columbia Law School

**Courses Taught:**

Contracts, Federal Criminal Law,  
Human Rights, International  
Criminal Law, International Law,  
Sales

**What's your favorite thing about the law? Least favorite?**

**Favorite:** You're on a team trying to come up with a better answer. It's really about cooperative competition (or competitive cooperation) at its core, as long as we're focused on issues and not on ad hominem attacks. In addition, there are thousands of people you're working with over millennia (in reading old writings or building on old laws) to make things better.

**Least favorite:** It is sometimes played as a zero-sum game – an I win, you lose scenario. That approach, typically, diminishes returns for those involved.

**Did you always want to go to law school? If not, what made you want to go to law school?**

I wanted to be involved in shaping policy to make things better, probably from about age 9. I had no idea law school was a way to do that. If anything, a number of the movies and television shows I watched indicated law was primarily a way to make money. I was fortunate to go to a magnet school that offered a semester of criminal law and a semester of civil (non-criminal) law when I was in sixth grade. I was captivated by the opportunity to impact rights, and to be in the room where, by

marshalling evidence, I could protect a person's ability to express themselves without undue societal pressure (or unnecessary societal harm). I also became familiar with a number of Supreme Court cases. At some point in high school, I also came across my mother's LSAT prep book. She had considered law school, but had decided to continue with teaching, and studied educational administration (in which she worked) and religion (she did coursework in an Education for Ministry program, and earned a masters in theology after her retirement). I liked the logic and games of the LSAT, and spent some weekend afternoons doing a few LSAT prep tests.

**What did you enjoy most about law school? Least?**

I enjoyed the service – working in a clinic on prisoner and family rights, preparing middle school students for mock trial. I also really enjoyed seeing how I came to answers differently with legal training than someone – even with expertise – might arrive at their answer. I took a course in preventive diplomacy – half law and public policy students, and half people from U.N. missions. It drove home for me the notion that I was approaching problems with a different expectation for solutions.

**If you had to do it all again, would you?**

Absolutely. I'd be the first to acknowledge that it's not the only way to serve our communities, but it's one way that allows me to expand fair treatment for people. That, in itself, is invaluable. I also think we have to decide what to do with the fact that, as we get older, we are the de facto role models for those around us (in our extended family, local community, religious community, etc.). Now, that doesn't mean people know what we do; but we set an example of how we think, and what opportunities we see for others (and, occasionally, are recognized for the things we do as attorneys). I know I have cousins who made choices to go into law because they knew it was a possibility for them, and they spoke with me about law school applications and possible career paths. In addition to getting to work in a field that is

incredibly important, I also see a ripple effect to some communities around me, and hope that the effect is even greater than I can perceive.

**As a law professor, you are now where your professors used to be, what is one thing that is done in law schools now, that you wish was done when you were in law school?**

I am where I am – as the saying goes, you can't step into the same river twice (the flow has made it into a different river). Law school today is different, because there are more people who see law as broader than two competing theories. According to Justice Breyer, Justice Scalia told a story on constitutional originalism – a camper wakes up to see his friend putting on sneakers while a bear is approaching their campsite. The camper waking up says, "why are you putting on sneakers? You can't outrun a bear!" The friend putting on sneakers says, "I don't have to outrun the bear, I just have to outrun you!" presumably leaving his friend to be mauled by the bear. The idea as expressed by Justice Scalia was that constitutional originalism wasn't necessarily a great tool for constitutional analysis, but it did put Justice Scalia in a better position to have an answer than Justice Breyer's less concretized methodology. I follow Justice Scalia on this – that we're looking for the better analysis—but recognize that the complexity of different analyses does not make them less valuable than originalism. We do, though, need a framework by which we recognize different methodologies. I know a number of professors who now take this broader approach, and, I hope, we're getting farther ahead of the bear (in terms of legal comprehensibility).

**What made you transition from practicing to teaching?**

I like looking at the bigger picture, and taking others along with me. In theory, that's what law does – it's a long conversation moving toward a better answer, or set of answers, on how we should deal with each other. Practice was often transactional – helping a client navigate the conversation that they wish they didn't have to

have, but usually with an eye to getting out of the conversation as quickly, and cheaply, as possible. The research side of law teaching lets us consider what the conversation should be based around, and might make it easier for those who have to engage in it, even if they don't want to.

As for teaching, it's an opportunity to both engage in the conversation, and to see (and shape) how those entering it engage in it. People are coming from different backgrounds and experiences, and I think we learn when we listen to those voices. Helping others express themselves as they engage in the practice of law will enrich the conversation.

It also didn't hurt that the relative flexibility in hours allowed me to see my children growing up. There's a certain inflexibility – I have to be available for classes and students during the semester, and can't put things off for a week and take a vacation or visit family during the semester. My kids also see my prepping for class, in the evenings, and are used to being surrounded by books and papers – that exposure to the professional life of an adult is, perhaps, not such a bad thing. They may not agree, though, when I respond to being interrupted for the sixth time in a 20 minute period...

### **What was your first legal job?**

#### *Prior to Law School:*

Most of my internships were policy-related, but certainly law-related, as well. I was a constituent affairs intern with the Manhattan Borough President's Office, a communications intern with the White House Office of the National AIDS Policy Coordinator, and an intern with the French Senate under the sponsorship of the French Senator for French citizens living overseas. I also did a semester-long externship with the New Jersey State Attorney General's Office Environmental Enforcement Division, and looked at wetlands protection and purported takings as an undergraduate.

#### *During Law School:*

My first legal internship was with the Trial Observation and Information Project. I was sponsored by Human Rights Watch to observe a genocide trial under Ethiopian criminal law. I revised reports written by Ethiopian law students, interviewed defense counsel, and conferred with the project manager on rule of law questions.

I spent the next year doing a clinic, representing incarcerated clients seeking visitation or otherwise trying to maintain a connection with their child. That was both rewarding, and frustrating, but gave me some practice experience prior to law school graduation.

#### *After Law School:*

I worked for a law firm in lower Manhattan, focusing on commercial litigation – defending claims of reinsurance fraud (undercapitalization), seeking reinstatement or a fair buyout for a partner in a tax firm forced out while undergoing cancer treatment, and a number of other matters.

### **Do you find yourself critiquing legal shows about their "realness" factor?**

I've generally stopped watching shows where there's an expectation a lawyer is giving legal advice. They tend to be about cheap tricks – memorization (Suits), or silly relationships with clients (The Good Wife) – and don't even get me started with the illegal actions of law professors (How to Get Away with Murder). There was a time when I might have yelled to the TV: "Rule 11 sanctions! Disbarment!" Alas, as characters failed to heed my warnings, I opted to stop giving them notice of their horrible behavior. Some programs that are a bit more real to me: "Tokyo Trials," "Au Service de la France (A Very Secret Service)" (which is meant to be quite exaggerated).



**Tell us something we would never be able to guess about you? What is your guilty pleasure?**

Donuts. And chocolate. And French Fries. I also love media (music (I listen to music on average 6 hours a day, and had a brother who was, for a time, a music producer), film (much less frequent), theater (far too infrequent), but have a strong aversion to anything with a laugh-track). While I was a student, I was a member of the Dramatists Guild of America, and, as an undergrad, did coursework each year in art criticism (dramaturgy, art/architecture criticism, philosophy on the construction of rights). When I went to law school, I assumed I'd also get a masters – either in theology, public policy, or fine arts (playwriting). I, sadly, discovered that most firms did not have much of an interest in hiring a playwright.

**When you're not helping to shape legal minds of the future, what do you enjoy doing in your spare time?**

I enjoy reading about legal issues, watching programs about legal issues. I spent five years coaching recreational and travel soccer prior to my son joining a high school team.

**Tell us about your favorite vacation?**

Biking down Route 5 in Charles City, Virginia, the bright sunlight making the green shadows on heavy leaves appear a deep blue, a taste of fermentation in the air, perhaps the decomposition of tadpoles in a streambed that dried too quickly. I push through air that pulls and drapes, heavy with the weight of water that refuses to coalesce into a storm – knowing that I can travel freely, almost silent but for the whirring of the wheel and the clanking of pressure on the gears and chain as I pump my feet on an uphill climb. Thinking that, if I go too far, I will spot my cousin's gas station, or my uncle's funeral home, and stop for a sip of water and conversation. Knowing that the roads are clear of midday traffic – people in factories and

offices aren't free to come home, and those at home have too much sense to take themselves out in 95 degree heat. When I'm under the leaves, coasting in the sudden darkness after a long stretch of too-bright light, I feel that nature herself has whispered that relief is not given, but shared freely. I was 16 or 17 at the time.

**What is something you've always wanted to do, but have yet to do it?**

Just about everything. I'm curious, but risk averse.

**What is one food that you would eat everyday if you could?**

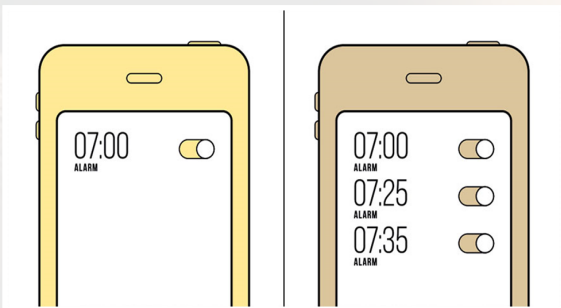
No such food. I appreciate the need for diversity of experience, and my hunger for different foods reflects that.

# Which Type Are You?

## Professor Charity:

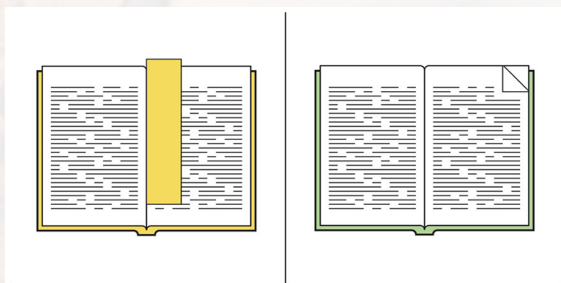
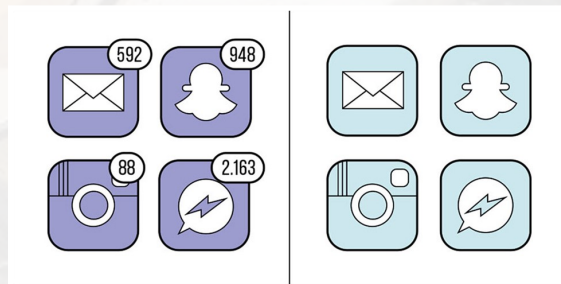
**Set one alarm or multiple to wake up on time? If multiple alarms, how many times do you hit the snooze button?**

One alarm, no snooze. That said, I may need to give myself 20 minutes just to fully wake up.



**On your phone are there a million notifications or no notifications?**

Depends on the app. There are probably hundreds of thousands of emails I don't read (and I thank app developers for sorting emails), so those numbers are large. I don't allow most apps to give me notifications, as it strains my concentration to see that there's something I could/should be looking at – usually on an app I don't particularly need. So, it runs the full range.



**When reading do you use a Bookmark or fold the page?**

I love books. If I'm reading a book, I use a bookmark, and would be horrified at the idea of damaging the printed word. If I'm reading a paper, all bets are off.

**You are on a deserted island, what 3 things do you want with you?**

Perhaps a method to get off the deserted island? Food, potable water? If you're asking, what would you be happy with if you had few possessions; clothes that protect and comfort me, something to engage my mind, and family and friends to create a sense of community that would help define my soul.

# HAMPDEN COUNTY BAR ASSOCIATION NEWS:

## Law Day:

On **May 1, 2017**, Honorable Matthew J. Shea and the Mock Trial Team from Pioneer Valley School of Performing Arts will participate in a Law Day Event. The Event will be hosted by the Hampden County Bar Association President-Elect Wm. Travaun Bailey, Esquire with the help and support of the master of ceremonies, Judge Shea. The Event will be held from 9:00 a.m. – 11:00 a.m. in Hampden County District Court, Courtroom Number 2, 50 State Street, Springfield, Massachusetts.

Around May 1 of each year, the Hampden County Bar Association hosts Law Day activities. This year's Law Day theme, "The 14th Amendment: Transforming American Democracy," will explore the many ways that the fourteenth amendment has reshaped American law and society. Through its Citizenship, Due Process and Equal Protection clauses, this transformative amendment advanced the rights of all Americans.

The Event will include a presentation by the Mock Trial Team from Pioneer Valley School of Performing Arts and the presentation of the prestigious Honorable John M. Greaney Award to Attorney Jeffrey S. Morneau and Ms. Jaime E. Morrow, Hampden County Legal Clinic Program Coordinator.

### About Law Day

Law Day is an annual event, which was originally conceived in 1957 when American Bar Association President Charles Rhynes envisioned a special national day to mark our commitment to the rule of law. The following year, President Dwight D. Eisenhower established the first Law Day. Law Day was made official in 1961 when Congress issued a joint resolution designating May 1 as the official date for celebrating Law Day.

## Free Shred Day:

The Hampden County Bar Association in conjunction with ProShred will be hosting a free community shred day event on **Friday, May 12, 2017** from 11:00 a.m.-2:00 p.m. This event is free and open to all. We ask those attending to donate a non-perishable food item for the local food pantry. This event is held at the Century Shopping Center, 219 Memorial Avenue, West Springfield.

## HCBA Annual Golf Outing:

The Hampden County Bar Association will be holding our annual golf tournament on **Thursday, May 18, 2017** at the Ranch Golf Club in Southwick, MA. This event is held rain or shine. The cost for HCBA members is \$130 and non-members is \$150. The fee includes lunch, greens' fee, dinner and prizes. Please contact the HCBA office at (413) 732-4660 for more information and to register.

## HCBA Annual Dinner & Vendor Show:

The Hampden County Bar Association will be holding our Annual Dinner & Vendor Show on **Thursday, June 15, 2017** at the Sheraton in Springfield, MA. The vendor show and cocktail reception begins at 5:00, with dinner following immediately after. This event and dinner is FREE for all HCBA members, reservations are required. Please contact the HCBA office at (413) 732-4660 for more information and to register.

## Scholarship Deadlines:

John F. Moriarty Scholarship – Available to any individual from Hampden County attending or planning to attend an accredited law school. **Deadline: May 26, 2017**

Colonel Archer B. Battista Veterans Scholarship – Available to any Veteran attending or planning to attend an accredited law school in New England. **Deadline: May 15, 2017**

## HCBA Membership:

**A reminder that HCBA membership is free to all law students.** A student membership includes: All membership emails which include information on events, seminars, local legal news as well as access to the Hall of Justice amenities: copier, computers, fax, wireless. Free HCBA seminars (typically held at the Hampden County Hall of Justice), as well as various member benefits discounts such as: LexisNexis subscriptions, American Bar Association website purchases, Silk's Auto Service, and ES-QSites123.com. Please contact the HCBA office for an application or visit our website [www.hcbar.org](http://www.hcbar.org).

# The Doctrine of Unintended Consequences and the Law



by **CHRIS MUTCHLER**  
LEX BREVIS Staff Writer

Christopher.Mutchler@wne.edu

A anecdote exists<sup>1</sup> that during the time of British rule of Colonial India, the British government expressed concern over the number of venomous cobra snakes in Delhi. In an attempt to solve the problem, the British government offered citizens of Delhi a bounty on cobras: in exchange for each dead cobra offered, citizens were provided a cash reward.

At first, the plan worked precisely as intended. Many of the problematic snakes were killed for the reward, and the number of venomous cobras was effectively reduced. Eventually, however, citizens of Delhi began to take advantage of British generosity. Seeing a new market and potential for economic gain, Delhians began breeding cobras solely for the purpose of generating income from the bounty.

When this was realized, the bounty was immediately scrapped, leaving breeders with an abundance of valueless snakes. In response, the breeders—having little concern for the intent of the law, as evidenced by their previous abuses—released those snakes that had not yet been “bought” by the government into the wild. The net result of the bounty? A drastic increase in the number of snakes. The attempted solution made the problem even worse.

Results of this sort are predicted by the sociological doctrine of unintended consequences. The doctrine—introduced by philosopher John Locke<sup>2</sup> and expanded upon by economist Adam Smith<sup>3,4</sup>—states simply that where purposeful action is undertaken, there is a potential for the consequenc-

es of that action to be other than intended<sup>5</sup>. Generally, unintended consequences may be avoided via thorough analysis of a problem and account for all related complications.

Issues that stem from complex systems—such as large scale governance—are rarely so easily reduced. For instance, with regards to the regulation of marijuana, it would be hard to argue that fields such as economics, philosophy, biology, sociology, psychology, and chemistry are unimportant to efficacious reform, though their teachings are generally disregarded in that context. Though inefficient, any effective and lasting solution must rely thus on complex inquiry.

Many times, attempt is made to incorporate relevant fields through introduction of empirical evidence in the form of studies. This method is unreliable. It can be proven that most claimed research findings are false.<sup>6</sup> This is due in part to bias—subconscious or otherwise—throughout the entirety of a study, including during interpretation.<sup>7</sup> Ask a slightly different question of a set of results, and those same results can provide a drastically different answer. Highlight poetically a particularly convincing point and those unfamiliar with the field may disregard contrary evidence. Convolute an argument with emotion and those who oppose risk being labeled a bad person.

Determination as to merit must thus be made on considerations other than such subjectively gleaned and disparately defended determinations as “likelihood of success.” One important consideration is the extent to which a solution seeks to

intrude upon individual liberties. Traditional ethical inquiry looks predominately at the principles of beneficence, non-maleficence, and autonomy, but beneficence and non-maleficence being too subjective to warrant consideration, determination must thus logically turn on the principle of autonomy.

The presence of law—by its very nature—limits individual freedoms. The public consents to forego these freedoms in exchange for the benefit gleaned by the structured removal of certain behaviors from society. Conversely, the absence of law imposes no such limits, and offers no such structured benefit. It may thus be analytically concluded that the absence of law impinges less upon the principle of autonomy than does the presence of law. Having established that neither approach is demonstrably more likely than the other to effectively eliminate any issue, ethical analysis thus favors minimalism.

Everyone has their own opinion as to the “best” course of action on any given issue. As opinion is based on personal experience, everyone also has a different understanding of what exactly each issue is, and of what effect each solution will actually have. The solution is neither that proposed by modern day liberals nor that by modern day conservatives. Rather, it is far less abrasive to opposing views: simple acknowledgment.

Acknowledgment of the fact that, when provided with enough detail, everyone disagrees with everyone else about almost every political issue; acknowledgment that these disagreements stem from differences in individual life experience, and are not only acceptable but necessary in society; acknowledgment that no one opinion is supreme to every other, or to any other; acknowledgment that law comes at the cost of individual freedom; acknowledgment that one’s own actions affect more than oneself, and more than the immediate future; acknowledgment that life is uncertain, and that no one can guarantee the results of their actions. “There are no facts; only interpretations.” Mindful of our own imperfection and wary of the impossibility of a future absolute, we must legislate for successive generations.

## REFERENCES

<sup>1</sup>See, e.g., Siebert, Horst (2001). *Der Kobra-Effekt. Wie man Irrwege der Wirtschaftspolitik vermeidet*. Munich: Deutsche Verlags-Anstalt. ISBN 3-421-05562-9.

<sup>2</sup>See John Locke, *Some Considerations of the Consequences of the Lowering of Interest and the Raising the Value of Money*.

<sup>3</sup>Smith, Adam. "The Theory of Moral Sentiments". p. 93.

<sup>4</sup>Merton, Robert K. "The Unanticipated Consequences of Purposive Social Action". *American Sociological Review*. 1 (6): 895.

<sup>5</sup>Merton, Robert K. "The Unanticipated Consequences of Purposive Social Action." *American Sociological Review*, vol. 1, no. 6, 1936, pp. 894, 895. [www.jstor.org/stable/2084615](http://www.jstor.org/stable/2084615). ("Rigorously speaking, the consequences of purposive action are limited to those elements in the resulting situation which are exclusively the outcome of the action.... Concretely, however, the consequences result from the interplay of the action and the objective situation, the conditions of action.").

<sup>6</sup>Ioannidis JPA. *Why Most Published Research Findings Are False*. *PLoS Medicine*. 2005;2(8):e124. doi:10.1371/journal.pmed.0020124.

<sup>7</sup>Id.

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Your name: Terry Nagel

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Where do you work: CPCS Appeals Unit

What kind of work you do/area of law you practice in: Criminal Appeals

**What is the most fulfilling part of your work?**

Mentoring young trial lawyers, and pitching in on the occasional “all hands on deck” emergencies, like the Annie Dookahn scandal, or the flood of cases after the Melendez-Diaz decision in SCOTUS.

**During law school, what kind of work did you do that helped enhance your skills?**

The Prisoners Legal Clinic.

**What was the most difficult aspect in school and how did you overcome that obstacle/experience?**

It had been nine years since I had been in an academic setting, and it took a little while to adjust. Also, I started in the evening division, and I overcame that obstacle by quitting my job and transferring to days. That made sleep an option.

**Are there any specific programs, committees, clubs that you suggest current students to join?**

I think the clinical programs provide important balance, offsetting the often obscurantist drift of the Socratic method.

**How can students benefit from meeting other attorneys and others within the legal profession?**

I probably should have tried for Law Review. Believe it or not, I had no idea it was important. I did one internship, with a housing project, and that was a good way to get a feel for how a law office functions, and to see some actual practicing lawyers.

**What is something you did or advice you were given that has helped you now?**

Moot Court was useful.

**Was there a class or area of law you studied that has proven particularly helpful now?**

Civil Procedure. I think that’s where I really learned to analyze a case or a rule.

**What class(es) if you recall, helped you the most on the Bar exam?**

I don’t remember using anything I learned in class on the bar exam, but I assume I must have. I just crammed for it using one of the commercial services. I only took the Massachusetts State and Federal exams.

**What was your favorite part of attending Western New England University School of Law?**

I met some great people among the students, and some professors I still count as friends, some of whom have consulted with me on complex matters.

**How did the skills you learned in law school transition into the legal profession?**

Abruptly.

**What surprised you most about Practicing?**

The degree of racism and personal & political influence brought to bear in the criminal justice system.

**What have you enjoyed most in being an attorney?**

Arguing in the state and federal appellate system, and trying murder cases.

**What advice would you give current students to prepare them for practice?**

If you want to litigate, watch as many trials as you can. If you have a chance to work of an established trial lawyer, grab it.



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The mission of Lex Brevis is to serve the Western New England University School of Law student body and law school community as a student-run media outlet and an informative periodical. Containing articles of a more academic nature as well as those for entertainment, Lex Brevis aims to publish a variety of pieces in each issue and provide a place for members of the Western New England University School of Law community to have their voices heard. Lex Brevis strongly encourage participation from guest writers.

Lex Brevis strongly encourages collaboration and feedback from law school alumni and others in the legal profession in an effort to further educate and prepare soon to be attorneys.

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